REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. 13 OF 2015

Supreme Court Advocates-on-Record -
Association and another ... Petitioner(s)

versus

Union of India ... Respondent(s)

With

WRIT PETITION (C) NO. 14 OF 2015
WRIT PETITION (C) NO. 18 OF 2015
WRIT PETITION (C) NO. 23 OF 2015
WRIT PETITION (C) NO. 24 OF 2015
WRIT PETITION (C) NO. 70 OF 2015
WRIT PETITION (C) NO. 83 OF 2015
WRIT PETITION (C) NO. 108 OF 2015
WRIT PETITION (C) NO. 124 OF 2015
WRIT PETITION (C) NO. 209 OF 2015
WRIT PETITION (C) NO. 309 OF 2015
WRIT PETITION (C) NO. 310 OF 2015
WRIT PETITION (C) NO. 323 OF 2015
WRIT PETITION (C) NO. 341 OF 2015
TRANSFER PETITION(C) NO. 391 OF 2015
TRANSFER PETITION (C) NO. 971 OF 2015

J U D G M E N T

Jagdish Singh Khehar, J.

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THE RECUSAL ORDER

Signature Not Verified
Digitally signed by
Parveen Kumar Chawla
Date: 2015.10.16
13:01:55 IST
Reason:

1. In this Court one gets used to writing common orders, for orders are written either on behalf of the Bench, or on behalf of the Court. Mostly, dissents are written in the first person. Even though, this is not an order in the nature of a dissent, yet it needs to be written in the first person. While endorsing the opinion expressed by J. Chelameswar, J., adjudicating upon the prayer for my recusal, from hearing the matters in hand, reasons for my continuation on the Bench, also need to be expressed by me. Not for advocating any principle of law, but for laying down certain principles of conduct.

2. This order is in the nature of a prelude – a precursor, to the determination of the main controversy. It has been necessitated, for deciding an objection, about the present composition of the Bench. As already noted above, J. Chelameswar, J. has rendered the decision on the objection. The events which followed the order of J. Chelameswar, J., are also of some significance. In my considered view, they too need to be narrated, for only then, the entire matter can be considered to have been fully expressed, as it ought to be. I also need to record reasons, why my continuation on the reconstituted Bench, was the only course open to me. And therefore, my side of its understanding, dealing with the perception, of the other side of the Bench.

3(i) A three-Judge Bench was originally constituted for hearing these matters. The Bench comprised of Anil R. Dave, J. Chelameswar and Madan B. Lokur, JJ.. At that juncture, Anil R. Dave, J. was a part of the 1+2 collegium, as also, the 1+4 collegium. The above combination heard

the matter, on its first listing on 11.3.2015. Notice returnable for 17.3.2015 was issued on the first date of hearing. Simultaneously, hearing in Y. Krishnan v. Union of India and others, Writ Petition (MD) No.69 of 2015, pending before the High Court of Madras (at its Madurai Bench), wherein the same issues were being considered as the ones raised in the bunch of cases in hand, was stayed till further orders.

(ii) On the following date, i.e., 17.3.2015 Mr. Fali S. Nariman, Senior Advocate, in Supreme Court Advocates-on-Record Association v. Union of India (Writ Petition (C) No.13 of 2015), Mr. Anil B. Divan, Senior Advocate, in Bar Association of India v. Union of India (Writ Petition (C) No.108 of 2015), Mr. Prashant Bhushan, Advocate, in Centre for Public Interest Litigation v. Union of India (Writ Petition (C) No.83 of 2015) and Mr. Santosh Paul, Advocate, in Change India v. Union of India (Writ Petition (C) No.70 of 2015), representing the petitioners were heard. Mr. Mukul Rohatgi, Attorney General for India, advanced submissions in response. The matter was shown as part-heard, and posted for further hearing on 18.3.2015.

(iii) The proceedings recorded by this Court on 18.3.2015 reveal, that Mr. Santosh Paul, (in Writ Petition (C) No.70 of 2015) was heard again on 18.3.2015, whereupon, Mr. Mukul Rohatgi and Mr. Ranjit Kumar, Solicitor General of India, also made their submissions. Thereafter, Mr. Dushyant A. Dave, Senior Advocate – and the President of Supreme Court Bar Association, addressed the Bench, as an intervener.

Whereafter, the Court rose for the day. On 18.3.2015, the matter was adjourned for hearing to the following day, i.e., for 19.3.2015.

(iv) The order passed on 19.3.2015 reveals, that submissions were advanced on that date, by Mr. Dushyant A. Dave, Mr. Mukul Rohatgi, Mr. T.R. Andhyarujina, Senior Advocate, and Mr. Mathews J. Nedumpara. When Mr. Fali S. Nariman was still addressing the Bench, the Court rose for the day, by recording *inter alia,* "The matters remained Part-heard." Further hearing in the cases, was deferred to 24.3.2015.

(v) On 24.3.2015, Mr. Fali S. Nariman and Mr. Anil B. Divan, were again heard. Additionally, Mr. Mukul Rohatgi concluded his submissions. On the conclusion of hearing, judgment was reserved. On 24.3.2015, a separate order was also passed in Writ Petition (C) No.124 of 2015 (Mathews J. Nedumpara v. Supreme Court of India, through Secretary General and others). It read as under:

"The application filed by Mr. Mathews J. Nedumpara to argue in person before the Court is rejected. The name of Mr. Robin Mazumdar, AOR, who was earlier appearing for him, be shown in the Cause List."

(vi) On 7.4.2015, the following order came to be passed by the three-Judge Bench presided by Anil R. Dave, J.:

"1. In this group of petitions, validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014 (hereinafter referred to as `the Act') has been challenged. The challenge is on the ground that by virtue of the aforestated amendment and enactment of the Act, basic structure of the Constitution of India has been altered and therefore, they should be set aside.

2. We have heard the learned counsel appearing for the parties and the parties appearing in-person at length.

3. It has been mainly submitted for the petitioners that all these petitions should be referred to a Bench of Five Judges as per the provisions of

Article 145(3) of the Constitution of India for the reason that substantial questions of law with regard to interpretation of the Constitution of India are involved in these petitions. It has been further submitted that till all these petitions are finally disposed of, by way of an interim relief it should be directed that the Act should not be brought into force and the present system with regard to appointment of Judges should be continued.

4. Sum and substance of the submissions of the counsel opposing the petition is that all these petitions are premature for the reason that the Act has not come into force till today and till the Act comes into force, cause of action can not be said to have arisen. In the circumstances, according to the learned counsel, the petitions should be rejected.

5. The learned counsel as well as parties in-person have relied upon several judgments to substantiate their cases.

6. Looking at the facts of the case, we are of the view that these petitions involve substantial questions of law as to the interpretation of the Constitution of India and therefore, we direct the Registry to place all the matters of this group before Hon'ble the Chief Justice of India so that they can be placed before a larger Bench for its consideration.

7. As we are not deciding the cases on merits, we do not think it appropriate to discuss the submissions made by the learned counsel and the parties in-person.

8. It would be open to the petitioners to make a prayer for interim relief before the larger bench as we do not think it appropriate to grant any interim relief at this stage."

4. During the hearing of the cases, Anil R. Dave, J. did not participate in any collegium proceedings.

5. Based on the order passed by the three-Judge Bench on 7.4.2015, Hon'ble the Chief Justice of India, constituted a five-Judge Bench, comprising of Anil R. Dave, Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ.

6. On 13.4.2015 the Constitution (Ninety-ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014, were notified in the Gazette of India (Extraordinary). Both the above enactments, were brought into force with effect from 13.4.2015. Accordingly, on 13.4.2015 Anil R. Dave, J. became an *ex officio* Member

of the National Judicial Appointments Commission, on account of being the second senior most Judge after the Chief Justice of India, under the mandate of Article 124A (1)(b).

7. When the matter came up for hearing for the first time, before the five-Judge Bench on 15.4.2015, it passed the following order:

"List the matters before a Bench of which one of us (Anil R. Dave, J.) is not a member."

It is, therefore, that Hon'ble the Chief Justice of India, reconstituted the Bench with myself, J. Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ., to hear this group of cases.

8. When the reconstituted Bench commenced hearing on 21.4.2015, Mr. Fali S. Nariman made a prayer for my recusal from the Bench, which was seconded by Mr. Mathews J. Nedumpara (petitioner-in-person in Writ Petition (C) No.124 of 2015), the latter advanced submissions, even though he had been barred from doing so, by an earlier order dated 24.3.2015 (extracted above). For me, to preside over the Bench seemed to be imprudent, when some of the stakeholders desired otherwise. Strong views were however expressed by quite a few learned counsel, who opposed the prayer. It was submitted, that a prayer for recusal had earlier been made, with reference to Anil R. Dave, J. It was pointed out, that the above prayer had resulted in his having exercised the option to step aside (– on 15.4.2015). Some learned counsel went to the extent of asserting, that the recusal of Anil R. Dave, J. was not only unfair, but was also motivated. It was also suggested, that the Bench should be

reconstituted, by requesting Anil R. Dave, J. to preside over the Bench. The above sequence of facts reveals, that the recusal by Anil R. Dave, J. was not at his own, but in deference to a similar prayer made to him. Logically, if he had heard these cases when he was the presiding Judge of the three-Judge Bench, he would have heard it, when the Bench strength was increased, wherein, he was still the presiding Judge.

9(i) Mr. Fali S. Nariman strongly refuted the impression sought to be created, that he had ever required Anil R. Dave, J. to recuse. In order to support his assertion, he pointed out, that he had made the following request in writing on 15.4.2015:

> "The provisions of the Constitution (Ninety-Ninth Amendment) Act, 2014 and of the National Judicial Appointments Commission Act, 2014 have been brought into force from April 13, 2015. As a consequence, the Presiding Judge on this Bench, the Hon'ble Mr. Justice Anil R. Dave, has now become (not out of choice but by force of Statute) a member *ex officio* of the National Judicial Appointments Commission, whose constitutional validity has been challenged.
> It is respectfully submitted that it would be appropriate if it is declared at the outset – by an order of this Hon'ble Court – that the Presiding Judge on this Bench will take no part whatever in the proceedings of the National Judicial Appointments Commission."

Learned senior counsel pointed out, that he had merely requested the then presiding Judge (Anil R. Dave, J.) not to take any part in the proceedings of the National Judicial Appointments Commission, during the hearing of these matters. He asserted, that he had never asked Anil R. Dave, J. not to hear the matters pending before the Bench.

(ii) The submission made in writing by Mr. Mathews J. Nedumpara for the recusal of Anil R. Dave, J. was in the following words:

"….. VI. Though Hon'ble Shri Justice Anil R. Dave, who heads the Three-Judge Bench in the instant case, is a Judge revered and respected by the legal fraternity and the public at large, a Judge of the highest integrity, ability and impartiality, still the doctrine of *nemo iudex in sua causa* or *nemo debet esse judex in propria causa* – no one can be judge in his own cause – would require His Lordship to recuse himself even at this stage since in the eye of the 120 billion ordinary citizens of this country, the instant case is all about a law whereunder the exclusive power of appointment invested in the Judges case is taken away and is invested in the fair body which could lead to displeasure of the Judges and, therefore, the Supreme Court itself deciding a case involving the power of appointment of Judges of the Supreme Court will not evince public credibility. The question then arises is as to who could decide it. The doctrine of necessity leaves no other option then the Supreme Court itself deciding the question. But in that case, it could be by Judges who are not part of the collegium as of today or, if an NJAC is to be constituted today, could be a member thereof. With utmost respect, Hon'ble Shri Justice Dave is a member of the collegium; His Lordship will be a member of the NJAC if it is constituted today. Therefore, there is a manifest conflict of interest.

VII. Referendum. In Australia, a Constitutional Amendment was brought in, limiting the retirement age of Judges to 70 years. Instead of the Judges deciding the correctness of the said decision, the validity of the amendment was left to be decided by a referendum, and 80% of the population supported the amendment. Therefore, the only body who could decide whether the NJAC as envisaged is acceptable or not is the people of this country upon a referendum.

VIII. The judgment in *Judges-2*, which made the rewriting of the Constitution, is void ab initio. The said case was decided without notice to the pubic at large. Only the views of the government and Advocates on record and a few others were heard. In the instant case, the public at large ought to be afforded an opportunity to be heard; at least the major political parties, and the case should be referred to Constitutional Bench. The constitutionality of the Acts ought to be decided, brushing aside the feeble, nay, apologetical plea of the learned Attorney General that the Acts have been brought into force and their validity cannot be challenged, and failing to come forward and state in candid terms that the Acts are the will of the people, spoken through their elected representatives and that too without any division, unanimous. The plea of the Advocates on Record Association that the notification bringing into force the said Acts be stayed be rejected forthwith; so too its demand that the collegium system, which has ceased to be in existence, be allowed to be continued and appointments to the august office of Judges of High Courts and Supreme Court on its recommendation, for to do so would mean that Judges of the High Courts who are currently Chief Justices because they were appointed at a young age in preference over others will be appointed as Judges of the Supreme Court and if that is allowed to happen, it may

lead to a situation where the Supreme Court tomorrow will literally be packed with sons and sons-in-law of former Judges. There are at least three Chief Justices of High Courts who are sons of former Judges of the Supreme Court. The Petitioner is no privy to any confidential information, not even gossips. Still he believes that if the implementation of the NJAC is stayed, three sons of former Judges of the Supreme Court could be appointed as Judges of the Supreme Court. The Petitioner has absolutely nothing personal against any of those Judges; the issue is not at all about any individual. The Petitioner readily concedes, and it is a pleasure to do so, that few of them are highly competent and richly deserving to be appointed.

IX. Equality before law and equal protection of law in the matter of public employment. The office of the Judge of the High Court and Supreme Court, though high constitutional office, is still in the realm of public employment, to which every person eligible ought to be given an opportunity to occupy, he being selected on a transparent, just, fair and non-arbitrary system. The Petitioner reiterates that he could be least deserving to be appointed when considered along with others of more meritorious than him, but the fact that since he satisfies all the basic eligibility criteria prescribed under Articles 124A, as amended, and 217, he is entitled to seek a declaration at the hands of this Hon'ble Court that an open selection be made by advertisement of vacancies or such other appropriate mechanism.

X. Judicial review versus democracy. Judicial review is only to prevent unjust laws to be enacted and the rights of the minorities, whatever colour they could be in terms of religion, race, views they hold, by a legislation which enjoys brutal majority and an of the executive which is tyrannical. It is no way intended to substitute the voice of the people by the voice of the high judiciary.

XI. Article 124A, as amended, is deficient only in one respect. The collegium contemplated thereunder is still fully loaded in favour of the high judiciary. Three out of the six members are Judges. In that sense it is failing to meet to be just and democratic. But the Parliament has in its wisdom enacted so and if there is a complaint, the forum is to generate public opinion and seek greater democracy. The Petitioner is currently not interested in that; he is happy with the Acts as enacted and the principal relief which he seeks in the instant petition is the immediate coming into force of the said Acts by appropriate notification and a mandamus to that effect at the hands of this Hon'ble Court."

10. When my recusal from the reconstituted Bench was sought on 21.4.2015, I had expressed unequivocally, that I had no desire to hear the matters. Yet, keeping in view the reasons expressed in writing by Mr. Fali S. Nariman, with reference to Anil R. Dave, J. I had disclosed in open

Court, that I had already sent a communication to Hon'ble the Chief Justice of India, that I would not participate in the proceedings of the 1+4 collegium (of which I was, a member), till the disposal of these matters. Yet, the objection was pressed. It needs to be recorded that Anil R. Dave, J. was a member of the 1+2 collegium, as well as, the 1+4 collegium from the day the hearing in these matters commenced. Surprisingly, on that account, his recusal was never sought, and he had continued to hear the matters, when he was so placed (from 11.3.2015 to 7.4.2015). But for my being a member of the 1+4 collegium, a prayer had been made for my recusal.

11. It was, and still is, my personal view, which I do not wish to thrust either on Mr. Fali S. Nariman, or on Mr. Mathews J. Nedumpara, that Anil R. Dave, J. was amongst the most suited, to preside over the reconstituted Bench. As noticed above, he was a part of the 1+2 collegium, as also, the 1+4 collegium, under the 'collegium system'; he would continue to discharge the same responsibilities, as an *ex officio* Member of the National Judicial Appointments Commission, in the 'Commission system', under the constitutional amendment enforced with effect from 13.4.2015. Therefore, irrespective of the system which would survive the adjudicatory process, Anil R. Dave, J. would participate in the selection, appointment and transfer of Judges of the higher judiciary. He would, therefore, not be affected by the determination of the present controversy, one way or the other.

12. The prayer for my recusal from the Bench was pressed by Mr. Fali S. Nariman, Senior Advocate, in writing, as under:

"8. In the present case the Presiding Judge, (the Hon'ble Mr. Justice J.S. Khehar) by reason of judgments reported in the Second Judges case Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441, (reaffirmed by unanimously by a Bench of 9 Judges in the Third Judges case Special Reference No.1 of 1998, Re. (1998 7 SCC 739), is at present a member of the Collegium of five Hon'ble Judges which recommends judicial appointments to the Higher Judiciary, which will now come under the ambit of the National Judicial Appointments Commission set up under the aegis of the Constitution (Ninety-ninth Amendment) Act, 2014 read with National Judicial Appointments Commission Act No.40 of 2014 – if valid; but the constitutional validity of these enactments has been directly challenged in these proceedings.
The position of the Presiding Judge on this Bench hearing these cases of constitutional challenge is not consistent with (and apparently conflicts with) his position as a member of the 'collegium'; and is likely to be seen as such; always bearing in mind that if the Constitution Amendment and the statute pertaining thereto are held constitutionally valid and are upheld, the present presiding Judge would no longer be part of the Collegium – the Collegium it must be acknowledged exercises significant constitutional power.
9. In other words would it be inappropriate for the Hon'ble Presiding Judge to continue to sit on a Bench that adjudicates whether the Collegium system, (as it is in place for the past two decades and is stated (in the writ petitions) to be a part of the basic structure of the Constitution), should continue or not continue. The impression in peoples mind would be that it is inappropriate if not unfair if a sitting member of a Collegium sits in judgment over a scheme that seeks to replace it. This is apart from a consideration as to whether or not the judgment is (or is not) ultimately declared invalid or void: whether in the first instance or by Review or in a Curative Petition."

The above prayer for my recusal was supported by Mr. Mathews J. Nedumpara, petitioner-in-person, in writing, as under:

".....Hon'ble Shri Justice J.S. Khehar, the presiding Judge, a Judge whom the Petitioner holds in high esteem and respect, a Judge known for his uprightness, impartiality and erudition, the Petitioner is afraid to say, ought not to preside over the Constitution Bench deciding the constitutional validity or otherwise of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 ("the said Acts", for short). His Lordship will be a member of the collegium if this Hon'ble Court were to hold that the said

Acts are unconstitutional or to stay the operation of the said Acts, for, if the operation of the Acts is stayed, it is likely to be construed that the collegium system continues to be in force by virtue of such stay order. Though Hon'ble Shri Justice J.S. Khehar is not a member of the National Judicial Appointments Commission, for, if the NJAC is to be constituted today, it will be consisting of the Hon'ble Chief Justice of India and two seniormost Judges of this Hon'ble Court. With the retirement of Hon'ble Shri H.L. Dattu, Chief Justice of India, His Lordship Hon'ble Shri Justice J.S. Khehar will become a member of the collegium. Therefore, an ordinary man, nay, an informed onlooker, an expression found acceptance at the hands of this Hon'ble Court on the question of judicial recusal, will consider that justice would not have been done if a Bench of this Hon'ble Court headed by Hon'ble Shri Justice J.S. Khehar were to hear the above case. For a not so informed onlooker, the layman, the *aam aadmi,* this Hon'ble Court hearing the Writ Petitions challenging the aforesaid Acts is nothing but a fox being on the jury at a goose's trial. The Petitioner believes that the Noble heart of his Lordships Justice Khehar could unwittingly be influenced by the nonconscious, subconscious, unconscious bias, his Lordships having been placed himself in a position of conflict of interest.

3. This Hon'ble Court itself hearing the case involving the power of appointment of Judges between the collegium and the Government, nay, the executive, will not evince any public confidence, except the designated senior lawyers who seem to be supporting the collegium system. The collegium system does not have any confidence in the ordinary lawyers who are often unfairly treated nor the ordinary litigants, the *Daridra Narayanas*, to borrow an expression from legendary Justice Krishna Iyer, who considered that the higher judiciary, and the Supreme Court in particular, is beyond the reach of the ordinary man. An ordinary lawyer finds it difficult to get even an entry into the Supreme Court premises. This is the stark reality, though many prefer to pretend not to notice it. Therefore, the Petitioner with utmost respect, while literally worshipping the majesty of this Hon'ble Court, so too the Hon'ble presiding Judge of this Hon'ble Court, in all humility, with an apology, if the Petitioner has erred in making this plea, seeks recusal by Hon'ble Shri Justice J.S. Khehar from hearing the above case."

13. As a Judge presiding over the reconstituted Bench, I found myself in an awkward predicament. I had no personal desire to participate in the hearing of these matters. I was a part of the Bench, because of my nomination to it, by Hon'ble the Chief Justice of India. My recusal from the Bench at the asking of Mr. Fali S. Nariman, whom I hold in great

esteem, did not need a second thought. It is not as if the prayer made by Mr. Mathews J. Nedumpara, was inconsequential.

14. But then, this was the second occasion when proceedings in a matter would have been deferred, just because, Hon'ble the Chief Justice of India, in the first instance, had nominated Anil R. Dave, J. on the Bench, and thereafter, had substituted him by nominating me to the Bench. It was therefore felt, that reasons ought to be recorded, after hearing learned counsel, at least for the guidance of Hon'ble the Chief Justice of India, so that His Lordship may not make another nomination to the Bench, which may be similarly objected to. This, coupled with the submissions advanced by Mr. Mukul Rohatgi, Mr. Harish N. Salve and Mr. K.K. Venugopal, that parameters should be laid down, led to a hearing, on the issue of recusal.

15. On the basis of the submissions advanced by the learned counsel, the Bench examined the prayer, whether I should remain on the reconstituted Bench, despite my being a member of the 1+4 collegium. The Bench, unanimously concluded, that there was no conflict of interest, and no other justifiable reason in law, for me to recuse from the hearing of these matters. On 22.4.2015, the Bench passed the following short order, which was pronounced by J. Chelameswar, J.:

"A preliminary objection, whether Justice Jagdish Singh Khehar should preside over this Bench, by virtue of his being the fourth senior most Judge of this Court, also happens to be a member of the collegium, was raised by the petitioners. Elaborate submissions were made by the learned counsel for the petitioners and the respondents. After hearing all the learned counsel, we are of the unanimous opinion that we do not see

any reason in law requiring Justice Jagdish Singh Khehar to recuse himself from hearing the matter. Reasons will follow."

16. After the order was pronounced, I disclosed to my colleagues on the Bench, that I was still undecided whether I should remain on the Bench, for I was toying with the idea of recusal, because a prayer to that effect, had been made in the face of the Court. My colleagues on the Bench, would have nothing of it. They were unequivocal in their protestation.

17. Despite the factual position noticed above, I wish to record, that it is not their persuasion or exhortation, which made me take a final call on the matter. The decision to remain a member of the reconstituted Bench was mine, and mine alone. The choice that I made, was not of the heart, but that of the head. The choice was made by posing two questions to myself. Firstly, whether a Judge hearing a matter should recuse, even though the prayer for recusal is found to be unjustified and unwarranted? Secondly, whether I would stand true to the oath of my office, if I recused from hearing the matters?

18. The reason that was pointed out against me, for seeking my recusal was, that I was a part of the 1+4 collegium. But that, should have been a disqualification for Anil R. Dave, J. as well. When he commenced hearing of the matters, and till 7.4.2015, he suffered the same alleged disqualification. Yet, the objection raised against me, was not raised against him. When confronted, Mr. Fali S. Nariman vociferously contested, that he had not sought the recusal of Anil R. Dave, J.. He supported his assertion with proof. One wonders, why did he not seek

the recusal of Anil R. Dave, J.? There is no doubt about the fact, that I have been a member of the 1+4 collegium, and it is likely that I would also shortly become a Member of the NJAC, if the present challenge raised by the petitioners was not to succeed. I would therefore remain a part of the selection procedure, irrespective of the process which prevails. That however is the position with reference to four of us (on the instant five-Judge Bench). Besides me, my colleagues on the Bench – J. Chelameswar, Madan B. Lokur and Kurian Joseph, JJ. would in due course be a part of the collegium (if the writ-petitioners before this Court were to succeed), or alternatively, would be a part of the NJAC (if the writ-petitioners were to fail). In such eventuality, the averment of conflict of interest, ought to have been raised not only against me, but also against my three colleagues. But, that was not the manner in which the issue has been canvassed. In my considered view, the prayer for my recusal is not well founded. If I were to accede to the prayer for my recusal, I would be initiating a wrong practice, and laying down a wrong precedent. A Judge may recuse at his own, from a case entrusted to him by the Chief Justice. That would be a matter of his own choosing. But recusal at the asking of a litigating party, unless justified, must never to be acceded to. For that would give the impression, of the Judge had been scared out of the case, just by the force of the objection. A Judge before he assumes his office, takes an oath to discharge his duties without fear or favour. He would breach his oath of office, if he accepts a prayer for recusal, unless justified. It is my duty to discharge my responsibility with

absolute earnestness and sincerity. It is my duty to abide by my oath of office, to uphold the Constitution and the laws. My decision to continue to be a part of the Bench, flows from the oath which I took, at the time of my elevation to this Court.

.....J.
(Jagdish Singh Khehar)

New Delhi;
October 16, 2015.

THE REFERENCE ORDER

I. THE CHALLENGE:

1. The question which has arisen for consideration, in the present set of cases, pertains to the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 (hereinafter referred to as, the Constitution (99th Amendment) Act), as also, that of the National Judicial Appointments Commission Act, 2014 (hereinafter referred to as, the NJAC Act).

2. During the course of hearing on the merits of the controversy, which pertains to the selection and appointment of Judges to the higher judiciary (i.e., Chief Justices and Judges of the High Courts and the Supreme Court), and the transfer of Chief Justices and Judges of one High Court to another, it emerged that learned counsel for the respondents, were *inter alia* relying on the judgment rendered in S.P. Gupta v. Union of India[1], (hereinafter referred to as, the First Judges case); whereas, the learned counsel for the petitioners were *inter alia* relying on the judgment in Supreme Court Advocates-on-Record Association v. Union of India[2] (hereinafter referred to as, the Second Judges case), and the judgment in Re: Special Reference No.1 of 1998[3], (hereinafter referred to as, the Third Judges case).

3. *Per se,* the stance adopted by learned counsel for the respondents in placing reliance on the judgment in the First Judges case, was not

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[1] 1981 (Supp) SCC 87
[2] (1993) 4 SCC 441
[3] (1998) 7 SCC 739

open to them. This, for the simple reason, that the judgment rendered in the First Judges case, had been overruled by a larger Bench, in the Second Judges case. And furthermore, the exposition of law declared in the Second Judges case, was reaffirmed by the Third Judges case.

4. Visualizing, that the position adopted by the respondents, was not legally permissible, the Attorney General, the Solicitor General, and other learned counsel representing the respondents, adopted the only course open to them, namely, to seek reconsideration of the decisions rendered by this Court in the Second and Third Judges cases. For the above objective it was asserted, that various vital aspects of the matter, had not been brought to the notice of this Court, when the controversy raised in the Second Judges case was canvassed. It was contended that, had the controversy raised in the Second Judges case, been examined in the right perspective, this Court would not have recorded the conclusions expressed therein, by the majority. It was submitted, that till the respondents were not permitted to air their submissions, with reference to the unacceptability of the judgments rendered in the Second and Third Judges cases, it would not be in the fitness of matters, for this Court to dispose of the present controversy, by placing reliance on the said judgments.

5. Keeping in mind the importance and the sensitivity of the controversy being debated, as also, the vehemence with which learned counsel representing the respondents, pressed for a re-examination of

the judgments rendered by this Court, in the Second and Third Judges cases, we permitted them, to detail the basis of their assertions.

6. Before embarking on the issue, namely, whether the judgments rendered by this Court in the Second and Third Judges cases, needed to be revisited, we propose first of all, to determine whether or not it would be justified for us, in the peculiar facts and circumstances of this case, keeping in view the technical parameters laid down by this Court, to undertake the task. In case, we conclude negatively, and hold that the prayer seeking a review of the two judgments was not justified, that would render a quietus to the matter. However, even if the proposition canvassed at the behest of the respondents is not accepted, we would still examine the submissions canvassed at their behest, as in a matter of such extreme importance and sensitivity, it may not be proper to reject a prayer for review, on a mere technicality. We shall then endeavour to determine, whether the submissions canvassed at the hands of the respondents, demonstrate clear and compelling reasons, for a review of the conclusions recorded in the Second and Third Judges cases. We shall also venture to examine, whether the respondents have been able to *prima facie* show, that the earlier judgments could be seen as manifestly incorrect. For such preliminary adjudication, we are satisfied, that the present bench-strength satisfies the postulated requirement, expressed in the proviso under Article 145(3).

7. Consequent upon the above examination, if the judgments rendered in the Second and Third Judges cases, are shown to *prima facie* require a

re-look, we would then delve on the merits of the main controversy, without permitting the petitioners to place reliance on either of the aforesaid two judgments.

8. In case, we do not accept the submissions advanced at the hands of the petitioners on merits, with reference to the main controversy, that too in a sense would conclude the matter, as the earlier regime governed by the Second and Third Judges cases, would become a historical event, of the past, as the new scheme contemplated under the impugned Constitution (99th Amendment) Act, along with the NJAC Act, would replace the earlier dispensation. In the above eventuality, the question of re-examination of the Second and Third Judges cases would be only academic, and therefore uncalled for.

9. However, if we accept the submissions advanced at the hands of the learned counsel for the petitioners, resulting in the revival of the earlier process, and simultaneously conclude in favour of the respondents, that the Second and Third Judges cases need a re-look, we would be obliged to refer this matter to a nine-Judge Bench (or even, to a larger Bench), for re-examining the judgments rendered in the Second and Third Judges cases.

II. THE BACKGROUND TO THE CHALLENGE:

10. Judges to the Supreme Court of India and High Courts of States, are appointed under Articles 124 and 217 respectively. Additional Judges and acting Judges for High Courts are appointed under Articles 224 and 224A. The transfer of High Court Judges and Chief Justices, of one High

Court to another, is made under Article 222. For the controversy in hand, it is essential to extract the original Articles 124 and 217, hereunder:

"124. Establishment and constitution of Supreme Court. (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:
Provided further that—
(a) a Judge may, by writing under his hand addressed to the President, resign his office;
(b) a Judge may be removed from his office in the manner provided in clause (4).
(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.
(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—
(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
(b) has been for at least ten years an advocate of a High Court or of two or more such courts in succession; or
(c) is, in the opinion of the President, a distinguished jurist.
Explanation I.—In this clause "High Court" means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.
Explanation II.—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district Judge after he became an advocate shall be included.
(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) 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 under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India."

"217. Appointment and conditions of the office of a Judge of a High Court.— (1) 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:

Provided that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such courts in succession;

Explanation.— For the purposes of this clause —

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.
(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final."

11. The true effect and intent of the provisions of the Constitution, and all other legislative enactments made by the Parliament, and the State legislatures, are understood in the manner they are interpreted and declared by the Supreme Court, under Article 141. The manner in which Articles 124 and 217 were interpreted by this Court, emerges principally from three-Constitution Bench judgments of this Court, which are now under pointed consideration. The first judgment was rendered, by a seven-Judge Bench, by a majority of 4:3, in the First Judges case on 30.12.1981. The correctness of the First Judges case was doubted by a three-Judge Bench in Subhash Sharma v. Union of India[4], which opined that the majority view, in the First Judges case, should be considered by a larger Bench. The Chief Justice of India constituted a nine-Judge Bench, to examine two questions. Firstly, whether the opinion of the Chief Justice of India in regard to the appointment of Judges to the Supreme Court and to the High Courts, as well as, transfer of Chief Justices and Judges of High Courts, was entitled to primacy? And secondly, whether the fixation of the judge-strength in High Courts, was

[4] 1991 Supp (1) SCC 574

justiciable? By a majority of 7:2, a nine-Judge Bench of this Court, in the Second Judges case, overruled the judgment in the First Judges case. The instant judgment was rendered on 6.10.1993. Consequent upon doubts having arisen with the Union of India, about the interpretation of the Second Judges case, the President of India, in exercise of his power under Article 143, referred nine questions to the Supreme Court, for its opinion. A nine-Judge Bench answered the reference unanimously, on 28.10.1998.

12. After the judgment of this Court in the Second Judges case was rendered in 1993, and the advisory opinion of this Court was tendered to the President of India in 1998, the term "consultation" in Articles 124(2) and 217(1), relating to appointment (as well as, transfer) of Judges of the higher judiciary, commenced to be interpreted as vesting primacy in the matter, with the judiciary. This according to the respondents, had resulted in the term "consultation" being understood as "concurrence" (in matters governed by Articles 124, 217 and 222). The Union of India, then framed a Memorandum of Procedure on 30.6.1999, for the appointment of Judges and Chief Justices to the High Courts and the Supreme Court, in consonance with the above two judgments. And appointments came to be made thereafter, in consonance with the Memorandum of Procedure.

13. As per the position expressed before us, a feeling came to be entertained, that a Commission for selection and appointment, as also for transfer, of Judges of the higher judiciary should be constituted,

which would replace the prevailing procedure, for appointment of Judges and Chief Justices of the High Courts and the Supreme Court of India, contemplated under Articles 124(2) and 217(1). It was felt, that the proposed Commission should be broad based. In that, the Commission should comprise of members of the judiciary, the executive and eminent/important persons from public life. In the above manner, it was proposed to introduce transparency in the selection process.

14. To achieve the purported objective, Articles 124 and 217 were *inter alia* amended, and Articles 124A, 124B and 124C were inserted in the Constitution, through the Constitution (99th Amendment) Act, by following the procedure contemplated under Article 368(2), more particularly, the proviso thereunder. The amendment, received the assent of the President on 31.12.2014. It was however given effect to, with effect from 13.4.2015 (consequent upon its notification in the Gazette of India (Extraordinary) Part II, Section 1). Simultaneously therewith, the Parliament enacted the NJAC Act, which also received the assent of the President on 31.12.2014. The same was also brought into force, with effect from 13.4.2015 (by its notification in the Gazette of India (Extraordinary) Part II, Section 1). The above constitutional amendment and the legislative enactment, are subject matter of challenge through a bunch of petitions, which are collectively being heard by us. In order to effectively understand the true purport of the challenge raised by the petitioners, and the nuances of the legal and constitutional issues involved, it is imperative to have a bird's eye view of the First Judges

case, upon which reliance has been placed by the learned counsel for the respondents, in their attempt to seek a review of the Second and Third Judges cases.

The First Judges case - 1981 Supp SCC 87.

15. The Union Law Minister addressed a letter dated 18.3.1981 to the Governor of Punjab and to Chief Ministers of all other States. The addressees were *inter alia* informed, that "…one third of the Judges of High Court, should as far as possible be from outside the State in which the High Court is situated…". Through the above letter, the addressees were requested to "…(a) obtain from all additional Judges working in the High Courts… their consent to be appointed as permanent Judges in any other High Court in the country…" The above noted letter required, that the concerned appointees "…be required to name three High Courts, in order of preference, to which they would prefer to be appointed as permanent Judges; and (b) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts…". The Union Law Minister, in the above letter clarified, that furnishing of their consent or indication of their preference, would not imply any commitment, at the behest of the Government, to accommodate them in accordance with their preferences. In response, quite a few additional Judges, gave their consent to be appointed outside their parent State.

(i) Iqbal Chagla (and the other petitioners) felt, that the letter dated 18.3.1981 was a direct attack on the "independence of the judiciary", and an uninhibited assault on a vital/basic feature of the Constitution. A series of Advocates' Associations in Bombay passed resolutions, condemning the letter dated 18.3.1981, as being subversive of "judicial independence". They demanded the withdrawal of the letter. Since that was not done, a writ petition was filed by the above Associations in the Bombay High Court, challenging the letter dated 18.3.1981. An interim order was passed by the High Court, restraining the Union Law Minister and the Government from implementing the letter dated 18.3.1981. A Letters Patent Appeal preferred against the above interim order, came to be dismissed by a Division Bench of the High Court. The above interim order, was assailed before this Court. While the matter was pending before this Court, the Union Law Minister and the Government of India, filed a transfer petition under Article 139A. The transfer petition was allowed, and the writ petition filed in the Bombay High Court, was transferred to the Supreme Court.

(ii) A second petition was filed by V.M. Tarkunde, in the High Court of Delhi. It raised a challenge to the constitutional validity of the letter dated 18.3.1981. One additional ground was raised with reference to the three additional Judges of the Delhi High Court, namely, O.N. Vohra, S.N. Kumar and S.B. Wad, JJ., whose term was expiring on 6.3.1981. Rather than being appointed for a further term of two years, their appointment was extended for three months, from 7.3.1981. These short

term appointments were assailed, as being unjustified under Article 224, besides being subversive of the "independence of the judiciary". This writ petition was also transferred for hearing to the Supreme Court. So far as the circular letter dated 18.3.1981 is concerned, the Supreme Court, on an oral prayer made by the petitioner, directed that any additional Judge who did not wish to respond to the circular letter may not do so, and that, he would neither be refused extension nor permanent appointment, on the ground that he had not sent a reply to the letter dated 18.3.1981. Thereafter, the appointment of S.B. Wad, J., was continued, as an additional Judge for a period of one year from 7.6.1981, but O.N. Vohra and S.N. Kumar, JJ., were not continued beyond 7.6.1981.

(iii & iv). A third writ petition, was filed by J.L. Kalra and others, who were practicing Advocates, in the Delhi High Court. And a fourth writ petition was filed by S.P. Gupta, a practicing Advocate, of the Allahabad High Court. The third and fourth writ petitions were for substantially the same reliefs, as the earlier two petitions.

(v) A fifth writ petition, was filed by Lily Thomas. She challenged a transfer order dated 19.1.1981, whereby the Chief Justice of the High Court of Madras was transferred as the Chief Justice of the High Court of Kerala. The above order had been passed by the President, under Article 222(1), after consultation with the Chief Justice of India. Likewise, the transfer of the Chief Justice of the High Court of Patna to the Madras High Court was challenged by asserting, that the power of transfer under Article 222(1) was limited to Judges of the High Courts, and did not

extend to Chief Justices. Alternatively, it was contended, that transfers could only be made with the consent of the concerned Judge, and only in public interest, and after full and effective consultation with the Chief Justice of India.

(vi & vii) A sixth writ petition was filed by A. Rajappa, principally challenging the order dated 19.1.1981, whereby some Chief Justices had been transferred. One additional submission was raised in this petition, namely, that the transfer of the Chief Justices had been made without the prior consultation of the Governors of the concerned States, and further, that the said transfers were not in public interest, and therefore, violated the procedural requirements contained in Article 217(1). The seventh writ petition was filed by P. Subramanian, on the same grounds, as the petition filed by A. Rajappa.

(viii) An eighth writ petition was filed by D.N. Pandey and Thakur Ramapati Sinha, practicing Advocates, of the Patna High Court. In this petition, Justice K.B.N. Singh, the Chief Justice of the Patna High Court was impleaded as respondent no.3. On a prayer made by respondent no.3, he was transposed as petitioner no.3. As petitioner no.3, Justice K.B.N. Singh filed a detailed affidavit asserting, that his transfer had been made as a matter of punishment, and further, that it had been made on irrelevant and on insufficient grounds, and not in public interest. And further that, it was not preceded by a full and effective consultation with the Chief Justice of India.

It is therefore apparent, that the above mentioned petitions related to two different sets of cases. Firstly, the issue pertaining to the initial appointment of Judges, and the extension of the term of appointment of additional Judges, on the expiry of their original term. And secondly, the transfer of Judges and Chief Justices from one High Court to another.

16. The opinions recorded in the First Judges case, insofar as they are relevant to the present controversy, are being summarized herein:

P.N. Bhagwati, J. (as he then was):

(i) On the subject of independence of the judiciary, it was opined, that "…The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the entire Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective…The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive, and therefore, it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution. "…It was felt, that the concept of "independence of the judiciary" was not limited only to the independence from executive pressure or influence, but it was a much wider concept, which took

within its sweep, independence from many other pressures and prejudices. It had many dimensions, namely, fearlessness of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. It was held, that the principle of "independence of the judiciary" had to be kept in mind, while interpreting the provisions of the Constitution (paragraph 27).

(ii). On the subject of appointment of High Court Judges, it was opined, that just like Supreme Court Judges, who are appointed under Article 124 by the President (which in effect and substance meant the Central Government), likewise, the power of appointment of High Court Judges under Article 217, was to be exercised by the Central Government. Such power, it was held, was exercisable only "…after consultation with the Chief Justice of India, the Governor of the State, and, the Chief Justice of the High Court…" It was concluded, that it was clear on a plain reading of the above two Articles, that the Chief Justice of India, the Chief Justice of the High Court, and such other Judges of the High Court and of the Supreme Court (as the Central Government may deem necessary to consult), were constitutional functionaries, having a consultative role, and the power of appointments rested solely and exclusively in the decision of the Central Government. It was pointed out, that the above power was not an unfettered power, in the sense, that the Central Government could not act arbitrarily, without consulting the constitutional functionaries specified in the two Articles. The Central Government was to act, only after consulting the constitutional

functionaries, and that, the consultation had to be full and effective (paragraph 29).

(iii). On the question of the meaning of the term "consultation" expressed in Article 124(2) and Article 217(1), it was held, that this question was no longer *res integra*, as the issue stood concluded by the decision of the Supreme Court in Union of India v. Sankalchand Himatlal Sheth[5], wherein its meaning was determined with reference to Article 222(1). But, since it was the common ground between the parties, that the term "consultation" used in Article 222(1) had the same meaning, which it had in Articles 124(2) and 217(1), it was held that, "…therefore, it follows that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system…" It was further concluded, that the above observation in the Sankalchand Himatlal Sheth case[5] would apply with equal force to determine the scope and meaning of the term "consultation" within the meaning of Articles 124(2) and 217(1). Each of the constitutional functionaries, required to be consulted under these two Articles, must have for his consideration, full and identical facts bearing upon

[5] (1977) 4 SCC 193

appointment or non-appointment of the person concerned, and the opinion of each of them taken on identical material, must be considered by the Central Government, before it takes a decision, whether or not to appoint the person concerned as a Judge. It was open to the Central Government to take its own decision, in regard to the appointment or non-appointment of a Judge to a High Court or the Supreme Court, after taking into account and giving due weight to, the opinions expressed. It was also observed, that the only ground on which such a decision could be assailed was, that the action was based on *mala fides* or irrelevant considerations. In case of a difference of opinion amongst the constitutional functionaries, who were to be consulted, it was felt, that it was for the Central Government to decide, whose opinion should be accepted. The contention raised on behalf of the petitioners, that in the consultative process, primacy should be that of the Chief Justice of India, since he was the head of the Indian judiciary and *pater familias* of the judicial fraternity, was rejected for the reason, that each of the constitutional functionaries was entitled to equal weightage. With reference to appointment of Judges of the Supreme Court, it was held, that the Chief Justice of India was required to be consulted, but the Central Government was not bound to act in accordance with the opinion of the Chief Justice of India, even though, his opinion was entitled to great weight. It was therefore held, that the ultimate power of appointment, rested with the Central Government (paragraph 30).

(iv). On the issue of appointment of Judges of the Supreme Court, it was concluded, that consultation with the Chief Justice of India was a mandatory requirement. But while making an appointment, consultation could extend to such other Judges of the Supreme Court, and of the High Courts, as the Central Government may deem necessary. In response to the submission, where only the Chief Justice of India was consulted (i.e., when consultation did not extend to other Judges of the Supreme Court, or of the High Courts), whether the opinion tendered by the Chief Justice of India should be treated as binding, it was opined, that there was bound to be consultation, with one or more of the Judges of the Supreme Court and of the High Courts, before exercising the power of appointment conferred under Article 124(2). It was felt, that consultation with the Chief Justice of India alone, with reference to the appointment of Judges to the Supreme Court, was not a very satisfactory mode of appointment, because wisdom and experience demanded, that no power should rest in a single individual howsoever high and great he may be, and howsoever honest and well-meaning. It was suggested, that it would be more appropriate if a collegium would make the recommendations to the President, with regard to appointments to the higher judiciary, and the recommending authority should be more broad based. If the collegium was comprised of persons who had knowledge of persons, who may be fit for appointment to the Bench, and possessed the qualities required for such appointment, it would go a long way towards securing the right kind of Judges, who would be truly independent (paragraph 31).

(v) It was held, that the appointment of an additional Judge, must be made by following the procedure postulated in Article 217(1). Accordingly, when the term of an additional Judge expired, and he ceased to be a Judge, his reappointment could only be made by once again adopting the procedure set out in Article 217(1). The contention, that an additional Judge must automatically and without any further consideration be appointed as an additional Judge for a further term, or, as a permanent Judge, was rejected (paragraphs 38 to 44).

(vi) On the question of validity of the letter of the Union Law Minister dated 18.3.1981, it was opined, that the same did not violate any legal or constitutional provision. It was felt, that the advance consent sought to be obtained through the letter dated 18.3.1981, from additional Judges or Judges prior to their permanent appointment, would have no meaning, so far as the Chief Justice of India was concerned, because irrespective of the fact, whether the additional Judge had given his consent or not, the Chief Justice of India would have to consider, whether it would be in public interest to allow the additional Judge to be appointed as a permanent Judge in another High Court (paragraph 54).

(vii) After having determined the merits of the individual claim raised by S.N. Kumar, J., (who was discontinued by the Central Government, while he was holding the position of additional Judge), it was concluded, that it would be proper if the Union of India could find a way, to place the letter dated 7.5.1981 addressed by the Chief Justice of Delhi High Court to the Law Minister, before the Chief Justice of India, and elicit his opinion with

reference to that letter. And thereupon consider, whether S.N. Kumar, J., should be reappointed as additional Judge.

(viii) With reference to K.B.N. Singh, CJ., it was opined that there was a clear abdication by the Central Government of its constitutional functions, and therefore, his transfer from the Patna High Court to the Madras High Court was held as unconstitutional and void.

A.C. Gupta, J.:

(i). On the subject of the "independence of the judiciary", it was opined, that the same did not mean freedom of Judges to act arbitrarily. It only meant, that Judges must be free, while discharging their judicial functions. In order to maintain "independence of the judiciary", it was felt, that Judges had to be protected against interference, direct or indirect. It was concluded, that the constitutional provisions should not be construed in a manner, that would tend to undermine the concept of "independence of the judiciary" (paragraph 119).

(ii) On the question, whether, on the expiry of the term of office of an additional Judge of a High Court, it was permissible to drop him by not giving him another term, though the volume of work, pending in the High Court, required the services of another Judge? It was opined, that the tenure of an additional Judge, was only dependent on the arrears of work, or the temporary increase in the business of a High Court. And since an additional Judge was not on probation, his performance could not be considered to determine, whether he was fit for appointment as a permanent Judge. Therefore, it was concluded, that if the volume of

work pending in the High Court justified the appointment of an additional Judge, there could be no reason, why the concerned additional Judge should not be appointed for another term. The submission that the two years' period mentioned in Article 224, depicted the upper limit of the tenure, and that the President was competent to appoint an additional Judge, for any shorter period, was rejected. Since the fitness of a Judge, had been considered at the time of his initial appointment, therefore, while determining whether he should be reappointed, under Article 217(1), it was opined, that the scope of inquiry was limited, to whether the volume of work pending in the High Court, necessitated his continuation.

(iii). Referring to the opinion expressed by the Chief Justice of the High Court, in connection with S.N. Kumar, J., it was opined, that when allegations were levelled against a Judge with respect to the discharge of his duties, the only reasonable course open, which would not undermine the "independence of the judiciary" was, to proceed with an inquiry into the allegations and remove the Judge, if the allegations were found to be true (in accordance with the procedure laid down under Article 124(4) and (5) read with Article 218). It was felt that, dropping an additional Judge, at the end of his initial term of office, on the ground that there were allegations against him, without properly ascertaining the truth of the allegations, was destructive of the "independence of the judiciary" (paragraph 123).

(iv). With reference to the non-continuation of S.N. Kumar, J., an additional Judge of the Delhi High Court, it was observed, that the letter of the Chief Justice of the Delhi High Court dated 7.5.1981, addressed to the Law Minister, was not disclosed to the Chief Justice of India. As the relevant material was withheld from the Chief Justice of India, it was concluded, that there was no full and effective "consultation", as contemplated by Article 217(1). And therefore, the decision not to extend the term of office of S.N. Kumar, J., as additional Judge of the Delhi High Court, though the volume of pending work in the High Court required the services of an additional Judge, was invalid.

(v). On the question, whether the opinion of the Chief Justice of India would have primacy, in case of a difference of opinion between the Chief Justice of a High Court and the Chief Justice of India, the view expressed was, that the President should accept the opinion of the Chief Justice of India, unless such opinion suffered from any obvious infirmity. And that, the President could not act as an umpire, and choose between the two opinions (paragraph 134).

(vi). Referring to the judgment in the Sankalchand Himatlal Sheth case[5], wherein it was concluded, that mass transfers were not contemplated under Article 222(1), it was opined, that the President could transfer a Judge from one High Court to another, only after consultation with the Chief Justice of India. And that, the Chief Justice of India must consider in each case, whether the proposed transfer was in public interest (paragraph 138).

(vii). With reference to the transfer of K.B.N. Singh, CJ., from the Patna High Court to the Madras High Court, it was opined, that even if the above transfer had been made for administrative reasons, and in public interest, it was likely to cause some injury to the transferee, and it would only be fair to consider the possibility of transferring him, where he would face least difficulties, namely, where the language difficulty would not be acute.

S. Murtaza Fazal Ali, J.:

(i) On the issue, whether the transfer of a High Court Judge under Article 222 required the consent of the Judge proposed to be transferred, it was opined, that a non-consensual transfer, would not amount to punishment, nor would it involve any stigma. It was accordingly concluded, that a transfer made after complying with Article 222, would not mar or erode the "independence of the judiciary" (paragraph 345).

(ii). With reference to appointing Chief Justices of High Courts from outside the State, and for having 1/3rd Judges in every High Court from outside the State, it was expressed, that Article 222 conferred an express power with the President, to transfer a Judge (which includes, Chief Justice) from one State to another. In determining as to how this power had to be exercised, it was felt, that the President undoubtedly possessed an implied power to lay down the norms, the principles, the conditions and the circumstances, under which the said power was to be exercised. A declaration by the President regarding the nature and terms of the policy (which virtually meant a declaration by the Council of Ministers)

was quite sufficient, and absolutely legal and constitutional (paragraph 410).

(iii). On the subject of validity of the letter of the Union Law Minister dated 18.3.1981, it was held, that the same did not in any way tarnish the image of Judges, or mar the "independence of the judiciary" (paragraph 433).

(iv). On the question of appointment of additional Judges, and the interpretation of Article 217, the opinion expressed by P.N. Bhagwati and E.S. Venkataramiah, JJ. were adopted (paragraph 434).

(v). Insofar as the interpretation of Article 224 was concerned, the opinion of P.N. Bhagwati and D.A. Desai, JJ. were accepted, (paragraph 537). And accordingly, their conclusion about the continuation of S.N. Kumar, J., as an additional Judge, after the expiry of his term of appointment, was endorsed.

(vi). On analyzing the decision rendered in the Sankalchand Himatlal Sheth case[5], *inter alia,* the following necessary concomitants of an effective consultation between the President and the Chief Justice of India were drawn. That the consultation, must be full and effective, and must precede the actual transfer of the Judge. If consultation with the Chief Justice of India had not taken place, before transferring a Judge, it was held, that the transfer would be unconstitutional. All relevant data and necessary facts, must be provided to the Chief Justice of India, so that, he could arrive at a proper conclusion. Only after the above process was fully complied with, the consultation would be considered full and

effective. It was felt, that the Chief Justice of India owed a duty, both to the President and to the Judge proposed to be transferred, to consider every relevant fact, before tendering his opinion to the President. Before giving his opinion the Chief Justice of India, could informally ascertain from the Judge, if there was any personal difficulty, or any humanitarian ground, on which his transfer should not be made. And only after having done so, the Chief Justice of India, could forward his opinion to the President. Applying the above facets of the consultation process, with respect to the validity of the order dated 19.1.1981, by which K.B.N. Singh, CJ., was transferred, it was held, that the consultation process contemplated under Article 222, had been breached, rendering the order passed by the President invalid (paragraph 589).

V.D. Tulzapurkar, J.:

(i). Insofar as the question of "independence of the judiciary" is concerned, it was asserted that all the Judges, who had expressed their opinions in the matter, had emphasized, that the framers of the Constitution had taken the utmost pains, to secure the "independence of the Judges" of the higher judiciary. To support the above contention, several provisions of the Constitution were referred to. It was also pointed out, that the Attorney General representing the Union of India, had not dispute the above proposition (paragraph 639).

(ii). With reference to additional Judges recruited under Article 224(1), from the fraternity of practicing Advocates, it was pointed out, that an undertaking was taken from them at the time of their initial

appointment, that if and when a permanent judgeship of that Court was offered to them, they would not decline the same. And additionally, the Chief Justice of the Bombay High Court would require them to furnish a further undertaking, that if they decline to accept such permanent judgeship (though offered), or if they resigned from the office of the additional judgeship, they would not practice before the Bombay High Court, or any court or tribunal subordinate to it. Based on the aforesaid undertakings, the contention advanced was, that a legitimate expectancy, and an enforceable right to continue in office, came to be conferred on the additional Judges recruited from the Bar. It was felt, that it was impossible to construe Article 224(1), as conferring upon the appointing authority, any absolute power or discretion in the matter of appointment of additional Judges to a High Court (paragraphs 622 and 624).

(iii) All submissions made on behalf of the respondents, that granting extension to an additional Judge, or making him a permanent Judge was akin to a fresh appointment, were rejected. It was concluded, that extension to an additional Judge, or making him permanent, did not require re-determination of his suitability under Article 217(1) (paragraph 628).

(iv). While dealing with the question of continuation of an additional Judge, in situations where there were facts disclosing suspected misbehaviour and/or reported lack of integrity, the view expressed was, that while considering the question of continuation of a sitting additional Judge, on the expiry of his initial term, the test of suitability

contemplated within the consultative process under Article 217(1) should not be evoked — at least till a proper mechanism, having a legal sanction, was provided for holding an inquiry, against the Judge concerned, with reference to any suspected misbehavior and/or lack of integrity (paragraph 628).

(v) On the scope of consideration, for continuation as a sitting additional Judge (on the expiry of a Judge's initial term), it was opined, that the consultative process should be confined only to see, whether the preconditions mentioned in Article 224(1) existed or not, or whether, pendency of work justified continuation or not. It was held, that the test of suitability contemplated within the consultative process under Article 217(1), could not and should not, be resorted to (paragraph 629).

(vi). On the question of primacy of the Chief Justice of India, with reference to Article 217(1), the view expressed was, that the scheme envisaged therein, by implication and intent, clearly gave primacy to the advice tendered by the Chief Justice of India. It was however sought to be clarified, that giving primacy to the advice of the Chief Justice of India, in the matter of appointment of Judges of the High Court, should not be construed as a power to veto any proposal. And that, if the advice of the Chief Justice of India, had proceeded on extraneous or non germane considerations, the same would be subject to judicial review, just as the President's final decision, if he were to disregard the advice of the Chief Justice of India, but for justified and cogent reasons. Interpreting Article

217(1) in the above manner, it was felt, would go a long way in preserving the "independence of the judiciary" (paragraph 632).

(vii) With regard to the scope of 'consultation', contemplated under Article 222(1), the conclusion(s) drawn by the majority view, in the Sankalchand Himatlal Sheth case[5], were endorsed.

(viii). Insofar as, the issue of taking the consent of the concerned Judge, prior to his transfer is concerned, based on the decision rendered in the Sankalchand Himatlal Sheth case[5], it was felt, that transfers could be made without obtaining the consent of the concerned Judge. And accordingly it was held, that non-consensual transfers, were within the purview of Article 222(1) (paragraphs 645 and 646).

(ix) With reference to the letter written by the Union Law Minister dated 18.3.1981, it was asserted, that even a policy transfer, without fixing the requisite mechanism or modality of procedure, would not ensure complete insulation against executive interference. Conversely it was felt, that a selective transfer in an appropriate case, for strictly objective reasons, and in public interest, could be non-punitive. It was therefore concluded, that each case of transfer, whether based on policy, or for individual reasons, would have to be judged on the facts and circumstances of its own, for deciding, whether it was punitive (paragraph 649).

(x) It was concluded, that by requiring a sitting additional Judge, to give his consent for being appointed to another High Court, virtually amounted to seeking his consent for his transfer from his own High

Court to another High Court, falling within the ambit of Article 222(1). Referring to the judgment rendered in the Sankalchand Himatlal Sheth case[5], it was felt, that the circular letter dated 18.3.1981 was an attempt to circumvent the safeguards and the stringent conditions expressed in the above judgment (paragraph 652). And further, that the circular letter clearly exuded an odour of executive dominance and arrogance, intended to have coercive effects on the minds of sitting additional Judges, by implying a threat to them, that if they did not furnish their consent to be shifted elsewhere, they would neither be continued nor made permanent. The above letter, was held to be amounting to, executive interference with the "independence of the judiciary", and thus illegal, unconstitutional and void. Any consent obtained thereunder, was also held to be void (paragraph 654).

(xi) It was also concluded that, the advice of the Chief Justice of India, would be robbed of its real efficacy, in the face of such pre-obtained consent, and it would have to be regarded as having been issued malafide and for a collateral purpose, namely, to bypass Article 222(1) and to confront the Chief Justice of India, with a *fait accompli*, and as such, the same was liable to be declared as illegal and unconstitutional (paragraph 655).

(xii) The above circular letter dated 18.3.1981, was also held to be violative of Article 14, since invidious discrimination was writ large on the face of the circular letter. For this additional reason, the letter of the

Union Law Minister dated 18.3.1981, it was felt, was liable to be struck down (paragraphs 659 and 660).

(xiii) On the subject of non-continuation of S.N. Kumar, J., it was held, that it was abundantly clear from the correspondence and notings, that further details and concrete facts and materials relating to his integrity, though specifically asked for by the Chief Justice of India, were not furnished, and the letter dated 7.5.1981, which contained such details and concrete facts and materials, were kept away from him, leading to the inference, that facts which were taken into consideration by the Union Law Minister and the Chief Justice of Delhi High Court (which provided the basis to the appointing authority, not to extend the appointment of S.N. Kumar, J.), were not placed before the Chief Justice of India, and therefore, there was neither full nor effective consultation, between the President and the Chief Justice of India, as required by Article 217(1). It was accordingly concluded, that the decision against S.N. Kumar, J., stood vitiated by legal *mala fides*, and as such, was liable to be held void and *non est,* and his case had to be sent back to the President, for reconsideration and passing appropriate orders, after the requisite consultation was undertaken afresh (paragraphs 664 and 666 to 668).

(xiv) With respect to the validity of the transfer of K.B.N. Singh, CJ., it was felt, that in the absence of any connivance or complicity, since no unfair play was involved in the procedure followed by the Chief Justice of India, it was liable to be concluded, that the impugned transfer had been

made in public interest, and not by way of punishment. The above transfer was accordingly held to be valid (paragraph 680).

D.A. Desai, J.:

(i) After noticing, that the President under Article 74, acts on the advice of the Council of Ministers, and that, while acting under Article 217(3), the President performs functions of grave importance. It was felt, that it could not be said that while exercising the power of appointment of Judges to the higher judiciary, the President was performing either judicial or quasi judicial functions. The function of appointment of Judges was declared as an executive function, and as such, it was held, that Article 74 would come into operation. And therefore concluded, that the President would have to act, on the advice of the Council of Ministers, in the matter of appointment of Judges under Article 217 (paragraph 715). And therefore it came to be held, that the ultimate power of appointment under Article 217, "unquestionably" rested with the President.

(ii) It was pointed out, that before exercising the power of appointment of a Judge (other than the Chief Justice of a High Court), the President was under a constitutional obligation, to consult the three constitutional functionaries, mentioned in Article 217 (paragraphs 718 and 719). And that the aforementioned three constitutional functionaries were at par with one another. They were coordinate authorities, without any relative hierarchy, and as such, the opinion of the Chief Justice of India could

not be given primacy on the issue of appointment of Judges of High Courts (paragraphs 724, 726 and 728).

(iii) It was also concluded, that on the expiry of the original term of appointment of an additional Judge under Article 224, the continuation of the concerned Judge, would envisage the re-adoption of the procedure contained in Article 217 (paragraphs 736 and 745).

(iv) It was felt, that there was no gainsaying, that a practice which had been followed for over 25 years, namely, that an additional Judge was always considered for a fresh tenure, if there was no permanent vacancy, and if there was such a vacancy, he was considered for appointment as a permanent Judge. It was held, that the contention of the Attorney General, that such additional Judge had no priority, preference, weightage or right to be considered, and that, he was on par with any other person, who could be brought from the market, would amount to disregarding the constitutional scheme, and must be rejected (paragraph 759). It was held, that when a Judge was appointed for a term of two years, as an additional Judge, it was sufficient to contemplate, that his appointment was not as a permanent Judge. And therefore, if a permanent vacancy arose, the additional Judge could not enforce his appointment against the permanent vacancy (paragraph 762).

(v) It was also concluded, that the term of an additional Judge could not be extended for three months or six months, since such short term appointments, were wholly inconsistent and contrary to the clear

intendment of Article 224, and also, unbecoming of the dignity of a High Court Judge (paragraphs 763 and 764).

(vi) On the subject of extension of the term of an additional Judge, it was felt, that it was not open to the constitutional functionaries, to sit tight over a proposal, without expressing their opinion on the merits of the proposal, and by sheer inaction, to kill a proposal. It was accordingly opined, that when the term of an additional Judge was about to expire, it was obligatory on the Chief Justice of the High Court, to initiate the proposal for completing the process of consultation, before the period of initial appointment expired (paragraph 772).

(vii) With reference to the non-extension of the tenure of S.N. Kumar, J., it was felt, that when two high constitutional functionaries, namely, the Chief Justice of the Delhi High Court and the Chief Justice of India, had met with a specific reference to his doubtful integrity, the act of not showing the letter dated 7.5.1981 to the Chief Justice of India, would not detract from the fullness of the consultation, as required by Article 217. Accordingly, it was held, that there was a full and effective consultation, on all relevant points, including those set out in the letter dated 7.5.1981. And the claim of the concerned Judge for continuation, was liable to be rejected. It was however suggested, that the Government of India could even now, show the letter dated 7.5.1981 to the Chief Justice of India, and request him to give his comments. After receiving his comments, the Government of India could decide afresh, whether S.N. Kumar, J., should be re-appointed as an additional Judge of the Delhi

High Court. It was however clarified, that the proposed reconsideration, should not be treated as a direction, but a mere suggestion.

(viii) On the question, whether the consent of the concerned Judge should be obtained prior to his transfer under Article 222(1), it was concluded, that the requirement of seeking a prior consent, as a prerequisite for exercising the power of transfer under Article 222(1), deserved to be rejected (paragraph 813). It was however observed, that the above power of transfer under Article 222(1) could not be exercised in the absence of public interest, merely on the basis of whim, caprice or fancy of the executive, or its desire to bend a Judge to its own way of thinking. Three safeguards, namely, full and effective consultation with the Chief Justice of India, the exercise of power only aimed at public interest, and judicial review — in case the power was exercised contrary to the mandate of law, were suggested to insulate the "independence of the judiciary", against an attempt by the executive to control it (paragraphs 813 to 815).

(ix) It was also concluded, that the transfer of an individual Judge, for something improper in his behavior, or conduct, would certainly cast a slur or attach a stigma, and would leave an indelible mark on his character. Even the High Court to which he was transferred would shun him, and the consumers of justice would have little or no faith in his judicial integrity. Accordingly it was concluded, that a transfer on account of any complaint or grievance against a Judge, referable to his conduct or behaviour, was impermissible under Article 222(1).

(x) On the question of transfer of K.B.N. Singh, CJ., it was felt, that his order of transfer was vitiated for want of effective consultation, and his selective transfer would cast a slur or stigma on him. It was felt, that the transfer did not appear to be in public interest. The order of transfer dated 20.12.1980 was accordingly, considered to be vitiated, and as such, was declared void.

R.S. Pathak, J. (as he then was):

(i) With reference to the issue of "independence of the judiciary", it was observed, that while the administration of justice drew its legal sanction from the Constitution, its credibility rested in the faith of the people. Indispensable to such faith, was the "independence of the judiciary". An independent and impartial judiciary, it was felt, gives character and content to the constitutional milieu (paragraph 874).

(ii) On the subject of appointment of Judges to High Courts, it was essential for the President, to consult the Governor of the State, the Chief Justice of India and the Chief Justice of the concerned High Court. It was pointed out, that three distinct constitutional functionaries were involved in the consultative process, and each had a distinct role to play (paragraph 887). In a case where the Chief Justice of the High Court and the Chief Justice of India, were agreed on a recommendation, it was within reason to hold, that the President would ordinarily accept the recommendation, unless there were strong and cogent reasons, for not doing so (paragraph 889). It was however pointed out, that the President was not always obliged to agree, with a recommendation, wherein the

Chief Justice of the High Court and the Chief Justice of India, had concurred. In this behalf, it was observed, that even though, during the Constituent Assembly debates, a proposal was made, that the appointment of a Judge should require the "concurrence" of the Chief Justice of India, and the above proposal was endorsed by the Law Commission of India, yet the proposal had fallen through, and as such, the Constitution as it presently exists, contemplated "consultation" and not "concurrence" (paragraph 890).

(iii) On the question, as to whether the Chief Justice of India had primacy, over the recommendation made by the Chief Justice of the High Court, it was felt, that the Chief Justice of India did not sit in appellate judgment, over the advice tendered by the Chief Justice of the High Court. It was pointed out, that the advice tendered by the Chief Justice of India, emerged after taking into account, not only the primary material before him, but also, the assessment made by the Chief Justice of the High Court. And therefore, when he rendered his advice, the assessment of the Chief Justice of the High Court, must be deemed to have been considered by him. It was pointed out, that from the constitutional scheme, it appeared, that in matters concerning the High Courts, there was a close consultative relationship, between the President and the Chief Justice of India. In that capacity, the Chief Justice of India functioned, as a constitutional check, on the exercise of arbitrary power, and was the protector of the "independence of the judiciary" (paragraph 891).

(iv) On the subject of appointment of Judges to the High Courts, it was concluded, that the appointment of an additional Judge, like the appointment of a permanent Judge, must be made in the manner prescribed in Article 217(1). Accordingly, it was felt, that there was no reason to suspect, that a person found fit for appointment as an additional Judge, and had already gained proficiency and experience, would not be appointed as a Judge for a further period, in order that the work may be disposed of (paragraph 893).

(v) It was also opined, that the judiciary by judicial verdict, could not decide, how many permanent Judges were required for a High Court. And if a Court was not competent to do that, it could not issue a direction to the Government, that additional Judges should be appointed as permanent Judges (paragraph 895). Accordingly it was felt, that there was no doubt whatever, that the provision of Article 217(1) would come into play, when an additional Judge was to be considered for further appointment as an additional Judge, or was to be considered for appointment as a permanent Judge (paragraph 897).

(vi) With reference to the non-continuation of S.N. Kumar, J., it was pointed out, that the allegations contained in the letter dated 7.5.1981 strongly influenced the decision of the Government. Since the aforesaid letter was not brought to the notice of the Chief Justice of India, it was inevitable to conclude, that the process of consultation with the Chief Justice of India was not full and effective, and the withholding of important and relevant material from the Chief Justice of India, vitiated

the process. It was accordingly held, that the non-continuation of the term of S.N. Kumar, J., was in violation of the mandatory constitutional requirements contained in Article 217(1). It was felt, that the issue pertaining to the continuation of S.N. Kumar, J., needed to be reconsidered, and a decision needed to be taken, only after full and effective consultation (paragraph 904).

(vii) On the issue of transfer of Judges under Article 222(1), it was concluded, that the consent of the concerned Judge was not one of the mandated requirements (paragraph 913). It was pointed out, that the transfer of a Judge, could be made only in public interest, and that no Judge could be transferred, on the ground of misbehaviour or incapacity. The question of invoking Article 222(1), for purposes of punishing a Judge, was clearly ruled out (paragraphs 917 and 918). It was clarified, that the Judge proposed to be transferred, did not have a right of hearing. And that, the scope and degree of inquiry by the Chief Justice of India, fell within his exclusive discretion. All that was necessary was, that the Judge should know why his transfer was proposed, so that he would be able to acquaint the Chief Justice of India, why he should not be so transferred. It was further clarified, that the process of consultation envisaged under Article 222(1) required, that all the material in possession of the President must be placed before the Chief Justice of India (paragraph 919).

(viii) It was held that, it was open to the Judge, who was subjected to transfer, to seek judicial review, by contesting his transfer on the ground that it violated Article 222(1) (paragraph 920).

(ix) It was also felt, that the power to transfer a Judge from one High Court to another, could constitute a threat, to the sense of independence and impartiality of the Judge, and accordingly, it was held, that the said power should be exercised sparingly, and only for very strong reasons (paragraph 921).

(x) On the validity of the transfer of K.B.N. Singh, CJ., it was concluded, that the considerations on which the transfer had been made, could be regarded as falling within the expression "public interest", and therefore, the order of transfer did not violate Article 222(1).

(xi) Insofar as the validity of the letter of the Union Law Minister dated 18.3.1981 is concerned, it was observed, that neither the proposal nor the consent given thereto, had any legal status. In the above view, it was held, that the circular letter could not be acted upon, and any consent given pursuant thereto, was not binding.

E.S. Venkataramiah, J. (as he then was):

(i) With reference to the "independence of the judiciary", it was opined, that the same was one of the central values on which the Constitution was based. It was pointed out, that in all countries, where the rule of law prevailed, and the power to adjudicate upon disputes between a man and a man, and a man and the State, and a State and another State, and a State and the Centre, was entrusted to a judicial body, it was natural

that such body should be assigned a status, free from capricious or whimsical interference from outside, so that it could act, without fear and in consonance with judicial conscience (paragraph 1068).

(ii) Referring to Article 217(1) it was asserted, that each of the three functionaries mentioned therein, had to be consulted before a Judge of a High Court could be appointed. It was pointed out, that each of the consultees, had a distinct and separate role to play. Given the distinct roles assigned to them, which may to some extent be overlapping, it could not be said, that the Chief Justice of India occupied a position of primacy, amongst the three consultees (paragraph 1019).

(iii) The power of appointment of a Judge of a High Court was considered to be an executive power (paragraph 1023). Accordingly, while making an appointment of a High Court Judge, the President was bound to act, on the advice of his Council of Ministers, and at the same time, giving due regard to the opinions expressed by those who were required to be consulted under Article 217(1). Despite the above, it was felt, that there was no scope for holding, that either the Council of Ministers could not advise the President, or the opinion of the Chief Justice of India was binding on the President. Although, it was felt, that such opinion should be given due respect and regard (paragraph 1032). It was held, that the above method was intrinsic in the matter of appointment of Judges, as in that way, Judges may be called people's Judges. If the appointments of Judges were to be made on the basis of the recommendations of Judges only, then they will be Judges' Judges,

and such appointments may not fit into the scheme of popular democracy (paragraph 1042).

(iv) It was held, that the Constitution did not prescribe different modes of appointment for permanent Judges, additional Judges, or acting Judges. All of them were required to be appointed by the same process, namely, in the manner contemplated under Article 217(1) (paragraph 1061). The appointment of almost all High Court Judges initially as additional Judges under Article 224(1), and later on as permanent Judges under Article 217(1), was not conducive to the independence of judiciary (paragraph 1067). It was held, that the Constitution did not confer any right upon an additional Judge, to claim as of right, that he should be appointed again, either as a permanent Judge, or as an additional Judge. Accordingly, it was held, that there was no such enforceable right (paragraph 1074).

(v) Despite the above, it was observed, that in the absence of cogent reasons for not appointing an additional Judge, the appointment of somebody else in his place, would be an unreasonable and a perverse act, which would entitle the additional Judge, to move a Court for appropriate relief, in the peculiar circumstances (paragraph 1086). It was held, that having regard to the high office, to which the appointment was made, and the association of high dignitaries, who had to be consulted before any such appointment was made, the application of principles of natural justice, as of right, was ruled out (paragraph 1087).

(vi) With reference to Article 222, it was opined, that the consent of the Judge being transferred, was not a prerequisite before passing an order of transfer (paragraphs 1097 and 1099). It was held, that the transfer of a Judge of a High Court to another High Court, could not be construed as a fresh appointment, in the High Court to which the Judge was transferred. An order of transfer made under Article 222, it was held, was liable to be struck down by a Court, if it could be shown, that it had been made for an extraneous reason, i.e., on a ground falling outside the scope of Article 222. Under Article 222, a Judge could be transferred, when the transfer served public interest. It was held, that the President had no power to transfer a High Court Judge, for reasons not bearing on public interest, or arising out of whim, caprice or fancy of the executive, or because of the executive desire to bend a Judge to its own way of thinking (paragraphs 1097, 1099 and 1132).

(vii) It was held, that Article 222 cannot be resorted to on the ground of alleged misbehaviour or incapacity of a Judge (paragraph 1139).

(viii) Based on the opinion expressed by several expert bodies, it was opined, that any transfer of a Judge of a High Court under Article 222, in order to implement the policy of appointing Chief Justice of every High Court from outside the concerned State, and of having at least 1/3rd of Judges of every High Court from outside the State, would not be unconstitutional (paragraph 1164).

(ix) The letter of the Union Minister of Law dated 18.3.1981, was found to be valid. All contentions raised against the validity thereof were rejected (paragraph 1239).

(x) The decision of the President not to issue a fresh order of appointment to S.N. Kumar, J., on the expiry of his term as an additional Judge of the Delhi High Court, was held to be justified (paragraph 1128).

(xi) The transfer of K.B.N. Singh, CJ., was held to have been made strictly in consonance with the procedure indicated in the Sankalchand Himatlal Sheth case[5]. It was accordingly concluded, that there was no ground to hold, that the above transfer was not considered by the Chief Justice of India, in a fair and reasonable way. On the facts and circumstances of the case, it was concluded that it was not possible to hold that the above transfer was either illegal or void (paragraphs 1252 and 1257).

The Second Judges Case - (1993) 4 SCC 441:

17. For the purpose of adjudication of the present issue, namely, whether the judgment rendered by this Court in the Second Judges case needs to be re-examined, it is not necessary to delineate the views expressed by the individual Judges, as the conclusions drawn by them are *per se* not subject matter of challenge. The limited challenge being, that vital aspects of the matter, which needed to have been considered were not canvassed, and therefore, could not be taken into consideration in the process of decision making. In the above perspective, we consider

it just and proper to extract hereunder, only the conclusions drawn by the majority view:

"(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.
(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a .High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.
(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy.
(4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.
(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.
(6) Appointment to the office of the Chief Justice of India should be of the seniormost Judge of the Supreme Court considered fit to hold the office.
(7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court judges/Chief Justices.
(8) Consent of the transferred Judge/Chief Justice is not required for either the first of any subsequent transfer from one High Court to another.
(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.
(10) In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in any one.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.
(12) The initial appointment of Judge can be made to a High Court other than that for which the proposal was initiated.
(13) Fixation of Judge-strength in the High Courts is justiciable, but only to the extent and in the manner indicated.
(14) The majority opinion in S.P. Gupta v. Union of India (1982) 2 SCR 365: AIR 1982 SC 149, in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation to Judge-strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution, including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us."

The Third Judges case - (1998) 7 SCC 739:

18. For exactly the same reasons as have been noticed with reference to the Second Judges case, it is not necessary to dwell into the unanimous view expressed in the Third Judges case. The concession of the Attorney General for India, as was expressly recorded in paragraph 11 of the Third Judges case, needs to be extracted to highlight the fact, that the then Attorney General had conceded, that the opinion recorded by the majority in the Second Judges case, had been accepted by the Union of India and, as such, would be binding on it. Paragraph 11 is accordingly reproduced hereunder:

"11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case (1993) 4 SCC 441 and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference."

19. It is likewise necessary to extract herein, only the final summary of conclusions expressed in the Third Judges case, which are placed below:

"1. The expression "consultation with the Chief justice of India" in Articles 217(1) of the Constitution of India requires consultation with a

plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of Indian does not constitute "consultation" within the meaning of the said Articles.

2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four seniormost puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with two seniormost puisne Judges of the Supreme Court.

4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment.

5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. "Strong cogent reasons" do not have to be recorded as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.

7. The views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.

8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India.

9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India."

III. MOTION BY THE RESPONDENTS, FOR THE REVIEW OF THE SECOND AND THIRD JUDGES CASES:

20. It was the contention of the learned Attorney General, that in the submissions advanced at the hands of the learned counsel representing

the petitioners, for adjudication of the merits of the controversy, emphatic reliance had been placed on the judgments rendered by this Court in the Second and Third Judges cases. It was the contention of the learned Attorney General, that the conclusions drawn in the above judgments, needed a reconsideration by way of a fresh scrutiny, to determine, whether the conclusions recorded therein, could withstand the original provisions of the Constitution, viewed in the background of the debates in the Constituent Assembly.

21. In order to record the facts truthfully, it was emphasized, that the submissions advanced by him, could not be canvassed on behalf of the Union of India as in the Third Judges case, the Union had consciously accepted as binding the judgment rendered in the Second Judges case. Despite the above, the Attorney General was emphatic, that the Union of India could not be debarred from seeking reconsideration of the judgment rendered by this Court in the Second Judges case. In order to dissuade the learned Attorney General from the course he insisted to pursue, it was suggested, that the determination by this Court in the Second Judges case would not prejudice the claim of the Union of India, if the Union could establish, that the "basic structure" of the Constitution, namely, the "independence of the judiciary" would not stand compromised by the Constitution (99th Amendment) Act. Despite the instant suggestion, the Attorney General pleaded, that he be allowed to establish, that the determination rendered by the nine-Judge Bench in the Second Judges case, was not sustainable in law. At his insistence,

we allowed him to advance his submissions. Needless to mention, that if the Attorney General was successful in persuading us, that the said judgment did not *prima facie* lay down the correct legal/constitutional position, the matter would have to be examined by a Constitution Bench, with a strength of nine or more Judges of this Court, only if, we would additionally uphold the challenge to the impugned constitutional amendment, and strike down the same, failing which the new regime would replace the erstwhile system.

22. First and foremost, our attention was drawn to Article 124 of the Constitution, as it existed, prior to the present amendment. It was submitted that Article 124 contemplated, that the Supreme Court would comprise of the Chief Justice of India, and not more than seven other Judges (unless, the Parliament by law, prescribed a larger number). It was submitted, that clause (2) of Article 124 vested the power of appointment of Judges of the Supreme Court, with the President. The proviso under Article 124(2) postulated a mandatory "consultation" with the Chief Justice of India. Appointments contemplated under Article 124, also required a non-mandatory "consultation" with such other Judges of the Supreme Court and High Courts, as the President may deem necessary. It was accordingly submitted, that the consultation contemplated under Article 124(2), at the hands of the President was wide enough to include, not only the collegium of Judges, in terms of the judgment rendered by this Court in the Second Judges case, but each and every single Judge on the strength of the Supreme Court, and also

the Judges of the High Courts of the States, as the President may choose to consult. It was submitted, that only a limited role assigned to the Chief Justice of India, had been altered by the judgment in the Second Judges case, into an all pervasive decision taken by the Chief Justice of India, in consultation with a collegium of Judges. It was pointed out, that the term "consultation" expressed in Article 124 with reference to the Chief Justice of India, had been interpreted to mean "concurrence". And accordingly, the President has been held to be bound, by the recommendation made to him, by the Chief Justice of India and his collegium of Judges. It was contended, that the above determination, was wholly extraneous to the plain reading of the language engaged in Article 124 (in its original format). It was asserted, that there was never any question of "concurrence", as Article 124 merely contemplated "consultation". It was contended, that the above "consultation" had been made mandatory and binding, on the President even in a situation where, the opinion expressed by the Chief Justice and the collegium of Judges, was not acceptable to the President. It was asserted, that it was not understandable, how this addition came to be made to the plain and simple language engaged in framing Article 124. It was submitted, that once primacy is given to the Chief Justice of India (i.e., to the collegium of Judges, contemplated under the Second and Third Judges cases), then there was an implied exclusion of "consultation", with the other Judges of the Supreme Court, and also, with the Judges of the High Courts, even though, there was an express provision, empowering the President to

make up his mind, after consulting the other Judges of the Supreme Court and the Judges of the High Courts, as he may choose.

23. The Attorney General further contended, that the interpretation placed on Article 124 in the Second Judges case, was an absolutely unsustainable interpretation, specially when examined, with reference to the following illustration. That even if all the Judges of the Supreme Court, recommend a name, to which the Chief Justice of India alone, was not agreeable, the said recommendee could not be appointed as a Judge. This illustration, it was submitted, placed absolute power in the hands of one person – the Chief Justice of India.

24. The learned Attorney General, then invited the Court's attention to Article 125, so as to contend, that the salary payable to the Judges of the Supreme Court has to be determined by the Parliament by law, and until such determination was made, the emoluments payable to a Judge would be such, as were specified in the Second Schedule. It was submitted, that the Parliament was given an express role to determine even the salary of Judges, which is a condition of service of the Judges of the Supreme Court. He also pointed to Article 126, which contemplates, the appointment of one of the Judges of the Supreme Court, to discharge the functions of Chief Justice of India, on account of his absence or otherwise, or when the Chief Justice of India, was unable to perform the duties of his office. The Court's attention was also drawn to Article 127, to point out, that in a situation where the available Judges of the Supreme Court, could not satisfy the quorum of the Bench, required to

adjudicate upon a controversy, the Chief Justice of India could continue the proceedings of the case, by including therein, a Judge of a High Court (who was qualified for appointment as a Judge of the Supreme Court), in order to make up the quorum, with the previous consent of the President of India. It was submitted, that the role of the President of India was manifestly inter-twined with administration of justice, by allowing the President to appoint a Judge of the High Court, as a Judge of the Supreme Court on '*ad hoc*' basis. Reference was then made to Article 128, whereby the Chief Justice of India, with the previous approval of the President, could require a retired Judge of the Supreme Court, or a person who has held office as a Judge of a High Court, and was duly qualified for appointment as a Judge of the Supreme Court, to sit and act as a Judge of the Supreme Court. It was pointed out, that this was yet another instance, where the President's noticeable role in the functioning of the higher judiciary, was contemplated by the Constitution itself. The Court's attention was then drawn to Article 130, whereunder, even though the seat of the Supreme Court was to be at Delhi, it could be moved to any other place in India, if so desired by the Chief Justice of India, with the approval of the President. Yet again, depicting the active role assigned to the President, in the functioning of the higher judiciary. Likewise, the Court's attention was invited to Articles 133 and 134, providing for an appellate remedy in civil and criminal matters respectively, to the Supreme Court, leaving it open to the Parliament to vary the scope of the Courts' appellate jurisdiction. Insofar as Article 137

is concerned, it was pointed out, that the power of review of the judgments or orders passed by the Supreme Court, was subject to the provisions of any law made by the Parliament, or any rules that may be made under Article 145. With reference to Article 138, it was contended, that the jurisdiction of the Supreme Court, could be extended to matters falling in the Union List, as the Parliament may choose to confer. Similar reference was made to clause (2) of Article 138, wherein further jurisdiction could be entrusted to the Supreme Court, when agreed to, by the Government of India and by any State Government, if the Parliament by law so provides. Based on the above, it was contended, that Article 138 was yet another provision, which indicated a participatory role of the Parliament, in the activities of the Supreme Court. Likewise, this Court's attention was drawn to Article 139, whereby the Parliament could confer, by law, the power to issue directions, orders or writs, in addition to the framework demarcated through Article 32(2). This, according to the learned Attorney General, indicated another participatory role of the Parliament in the activities of the Supreme Court. Pointing to Article 140, it was submitted, that the Parliament could by law confer upon the Supreme Court supplemental powers, in addition to the powers vested with it by the Constitution, as may appear to the Parliament to be necessary or desirable, to enable the Supreme Court to exercise its jurisdiction more effectively. It was submitted, that one Article after the other, including Article 140, indicated a collective and participatory role of the President and the Parliament, in the activities of the Supreme

Court. Having read out Article 142(2), it was asserted, that even on the subject of securing the attendance of any person, and the discovery or production of any documents, or the investigation or punishment of any contempt of itself, the jurisdiction of the Supreme Court was subject to the law made by the Parliament. The learned Attorney General, also referred to Article 145, whereunder, it was open to the Parliament to enact law framed by the Parliament, for regulating generally the practice and procedure of the Supreme Court. In the absence of any such law, the Supreme Court had the liberty to make rules for regulating the practice and procedure of the Court, with the approval of the President. It was submitted, that even on elementary issues like procedure, the Parliament and/or the President were assigned a role by the Constitution, in activities strictly in the judicial domain. With reference to the activities of the Supreme Court, the Court's attention was also drawn to Article 146, which envisages that appointments of officers and servants of the Supreme Court, were to be made by the Chief Justice of India. It was pointed out, that the authority conferred under Article 146, was subservient to the right of the President, to frame rules requiring future appointments to any office connected to the Supreme Court, to be made, only in consultation with the Union Pubic Service Commission. The aforesaid right of appointing officers and servants to the Supreme Court, is also clearly subservient to the right of the Parliament, to make provisions by enacting law on the above subject. In the absence of a legislation, at the hands of the Parliament, the conditions of service of

officers and servants of the Supreme Court would be such, as may be prescribed by rules framed, by the Chief Justice of India. The rules framed by the Chief Justice, are subject to the approval by the President, with reference to salaries, allowances, leave and pension.

25. With reference to the appointments made to the High Courts, the Court's attention was invited to Article 217, whereunder, the authority of appointing a Judge to a High Court was vested with the President. The President alone, was authorized to make such appointments, after "consultation" with the Chief Justice of India, the Governor of the State, and the Chief Justice of the concerned High Court. The Court's attention was also drawn to Article 221, whereunder, the power to determine the salary payable to a Judge, was to be determined by law to be enacted by the Parliament. Till any such law was framed by the Parliament, High Court Judges would be entitled to such salaries, as were specified in the Second Schedule. The allowances payable to Judges of the High Court, as also, the right in respect of leave of absence and pension, were also left to the wisdom of Parliament, to be determined by law. And until such determination, Judges of the High Courts were entitled to allowances and rights, as were indicated in the Second Schedule. The Court's attention was also drawn to Article 222, wherein, the President was authorized, after "consulting" the Chief Justice of India, to transfer a Judge from one High Court to another. Inviting the Court's attention to the provisions referred to in the foregoing two paragraphs contained in Part V, Chapter IV – The Union Judiciary, and Part VI, Chapter V – The High Courts in

the States, it was asserted, that the role of the President, and also, that of the Parliament was thoughtfully interwoven in various salient aspects, pertaining to the higher judiciary. Exclusion of the executive and the legislature, in the manner expressed through the Second Judges case, in the matter of appointment of Judges to the higher judiciary, as also, transfer of Judges and Chief Justices of one High Court to another, was clearly against the spirit of the Constitution.

26. It was submitted, that the method of appointment of Judges to the higher judiciary, was not the "be all" or the "end all", of the independence of the judiciary. The question of independence of the judiciary would arise, with reference to a Judge, only after his appointment as a Judge of the higher judiciary. It was submitted, that this Court had repeatedly placed reliance on the debates in the Constituent Assembly, so as to bring out the intention of the framers of the Constitution, with reference to constitutional provisions. In this behalf, he placed reliance on T.M.A. Pai Foundation v. State of Karnataka[6], Re: Special Reference No.1 of 2002[7], and also on S.R. Chaudhuri v. State of Punjab[8]. The following observations in the last cited judgment were highlighted:

"33. Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. Debates in the Constituent Assembly referred to in an earlier part of this judgment clearly indicate that a non-member's inclusion in the Cabinet was considered to be a

[6] (2002) 8 SCC 481
[7] (2002) 8 SCC 237
[8] (2001) 7 SCC 126

"privilege" that extends *only* for six months, during which period the member must get elected, otherwise he would cease to be a Minister. It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution. We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit. The debates clearly indicate the "privilege" to extend "only" for six months."

For the same purpose, he referred to Indra Sawhney v. Union of India[9],

and drew the Court's attention to the opinion expressed therein:

"217. Further, it is clear for the afore-mentioned reasons that the executive while making the division or sub-classification has not properly applied its mind to various factors, indicated above which may ultimately defeat the very purpose of the division or sub-classification. In that view, para 2(*i*) not only becomes constitutionally invalid but also suffers from the vice of non-application of mind and arbitrariness.

xxx xxx xxx

772. We may now turn to Constituent Assembly debates with a view to ascertain the original intent underlying the use of words "backward class of citizens". At the outset we must clarify that we are not taking these debates or even the speeches of Dr Ambedkar as conclusive on the meaning of the expression "backward classes". We are referring to these debates as furnishing the context in which and the objective to achieve which this phrase was put in clause (4). We are aware that what is said during these debates is not conclusive or binding upon the Court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision is borne out by a series of decisions of this Court. [See Madhu Limaye, in re, AIR 1969 SC 1014, Golak Nath v. State of Punjab, AIR 1967 SC 1643 (Subba Rao,

[9] 1992 Supp (3) SCC 217

CJ); opinion of Sikri, CJ, in Union of India v. H.S. Dhillon (1971) 2 SCC 779 and the several opinions in Kesavananda Bharati (1973) 4 SCC 225, where the relevance of these debates is pointed out, emphasing at the same time, the extent to which and the purpose for which they can be referred to.] Since the expression "backward" or "backward class of citizens" is not defined in the Constitution, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable."

Reliance was also placed on Kesavananda Bharati v. State of Kerala[10],

and this Court's attention was invited to the following:

"1088. Before I refer to the proceedings of the Constituent Assembly, I must first consider the question whether the Constituent Assembly Debates can be looked into by the Court for construing these provisions. The Advocate-General of Maharashtra says until the decision of this Court in H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur and others v. Union of India, (1971) 1 SCC 85 - commonly known as Privy Purses case - debates and proceedings were held not to be admissible. Nonetheless counsel on either side made copious reference to them. In dealing with the interpretation of ordinary legislation, the widely held view is that while it is not permissible to refer to the debates as an aid to construction, the various stages through which the draft passed, the amendments proposed to it either to add or delete any part of it, the purpose for which the attempt was made and the reason for its rejection may throw light on the intention of the framers or draftsmen. The speeches in the legislatures are said to afford no guide because members who speak in favour or against a particular provision or amendment only indicate ,their understanding of the provision which would not be admissible as an aid for construing the provision. The members speak and express views which differ from one another, and there is no way of ascertaining what views are held by those who do not speak. It is, therefore, difficult to get a resultant of the views in a debate except for the ultimate result that a particular provision or its amendment has been adopted or rejected, and in any case none of these can be looked into as an aid to construction except that the legislative history of the provision can be referred to for finding out the mischief sought to be remedied or the purpose for which it is enacted, if they are relevant. But in Travancore Cochin and others v. Bombay Company Ltd., AIR 1952 SC 366, the Golaknath case (supra), the Privy Purses case (supra), and Union of India v. H.S. Dhillon, (1971) 2 SCC 779, there are dicta against referring to the speeches in the Constituent Assembly and in the last mentioned case they were referred to as supporting the conclusion

[10] (1973) 4 SCC 225

already arrived at. In Golaknath case (supra), as well as Privy Purses case (supra), the speeches were referred to though it was said not for interpreting a provision but for either examining the transcendental character of Fundamental Rights or for the circumstances which necessitated the giving of guarantees to the rulers. For whatever purpose speeches in the Constituent Assembly were looked at though it was always claimed that these are not admissible except when the meaning was ambiguous or where the meaning was clear for further support of the conclusion arrived at. In either case they were looked into. Speaking for myself, why should we not look into them boldly for ascertaining what was the intention of our framers and how they translated that intention? What is the rationale for treating them as forbidden or forbidding material. The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned. Unlike a statute, a Constitution is a working instrument of Government, it is drafted by people who wanted it to be a national instrument to subserve successive generations. The Assembly constituted Committees of able men of high calibre, learning and wide experience, and it had an able adviser, Shri B.N. Rau to assist it. A memorandum was prepared by Shri B.N. Rau which was circulated to the public of every shade of opinion, to professional bodies, to legislators, to public bodies and a host of others and was given the widest publicity. When criticism, comments and suggestions were received, a draft was prepared in the light of these which was submitted to the Constituent Assembly, and introduced with a speech by the sponsor Dr Ambedkar. The assembly thereupon constituted three Committees: (1) Union Powers Committee; (2) Provincial Powers Committee; and (3) Committee on the Fundamental Rights and Minorities Committee. The deliberations and the recommendations of these Committees, the proceedings of the Drafting Committee, and the speech of Dr Ambedkar introducing the draft so prepared along with the report of these Committees are all valuable material. The objectives of the Assembly, the manner in which they met any criticism, the resultant decisions taken thereupon, amendments proposed, speeches in favour or against them and their ultimate adoption or rejection will be helpful in throwing light on the particular matter in issue. In proceedings of a legislature on an ordinary draft bill, as I said earlier, there may be a partisan and heated debate, which often times may not throw any light on the issues which come before the Court but the proceedings in a .Constituent Assembly have no such partisan nuances and their only concern is to give the national a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an interplay of forces which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and

expounding it, should not, if it has to catch the objectives of the framers, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly. Be that as it may, all I intend to do for the present is to examine the stages through which the draft passed and whether and what attempts were made to introduce words or expressions or delete any that were already there and for what purpose. If these proceedings are examined from this point of view, do they throw any light on or support the view taken by me?"

For the same proposition, reliance was also placed on Samsher Singh v. State of Punjab[11], and on Manoj Narula v. Union of India[12].

27. Having emphasized, that Constituent Assembly debates, had been adopted as a means to understand the true intent and import of the provisions of the Constitution, reference was made in *extenso* to the Constituent Assembly debates, with reference to the provisions (more particularly, to Article 124) which are subject matter of the present consideration. It was pointed out, that after the constitution of the Constituent Assembly, the issue of judicial appointments and salaries was taken up by an *ad hoc* committee on the Supreme Court. The committee comprised of S. Varadachariar (a former Judge of the Federal Court), B.L. Mitter (a former Advocate General of the Federal Court), in addition to some noted jurists – Alladi Krishnaswamy Ayyar, K.M. Munshi and B.N. Rau (Constitutional Adviser to the Constituent Assembly of India). The *ad hoc* committee presented its report to the Constituent Assembly on 21.5.1947. With reference to judicial independence, it modified the consultative proposal suggested in the Sapru Committee report, by recommending a panel of 11 persons,

[11] (1974) 2 SCC 831
[12] (2014) 9 SCC 1

nominated by the President, in consultation with the Chief Justice of India. Alternatively, it was suggested, that the panel would recommend three candidates, and the President in consultation with the Chief Justice of India, would choose one of the three. It was suggested, that the panel would take its decision(s) by 2/3rd majority. To ensure independence, it was recommended, that the panel should have a tenure of ten years. Based on the above report, it was submitted, that the proposal suggested a wider participation of a collegium of Judges, politicians and law officers, in addition to the President and the Chief Justice of India, in the matter of appointment of Judges to the higher judiciary. Learned Attorney General went on to inform the Court, that on the basis of the above report, B.N. Rau prepared a memorandum dated 30.5.1947, wherein he made his own suggestions. The above suggestions related to Judges of the Supreme Court, as also, of High Courts. The Court was also informed, that the Union Constitution Committee presented its report to the Constituent Assembly on 4.7.1947, also pertaining to appointments to the higher judiciary. Yet another memorandum, on the Principles of a Model Provincial Constitution was prepared by the Constitutional Adviser on 13.5.1947, relating to appointments to the higher judiciary, which was adopted by the Provincial Constitution Committee. Reliance was placed by the Attorney General, on the speech delivered by Sardar Vallabhbhai Patel on 15.7.1947, wherein he expressed the following views:

"The committee have given special attention to the appointment of judges of the High Court. This is considered to be very important by the committee and as the judiciary should be above suspicion and should be above party influences, it was agreed that the appointment of High Court judges should be made by the President of the Union in consultation with the Chief Justice of the Supreme Court, the Chief Justice of the Provincial High Court and the Governor with the advice of the Ministry of the Province concerned. So there are many checks provided to ensure fair appointments to the High Court."

The Court was informed, that the first draft of the new constitution prepared by B.N. Rau was presented to the Constituent Assembly in October 1947, wherein, it was expressed that Judges of the Supreme Court, would be appointed by the President, in consultation with the sitting Judges of the Supreme Court, and Judges of High Courts in consultation with the Chief Justice of India, except in the matter of appointment of the Chief Justice of India himself. It was suggested, that this was the immediate precursor to Article 124(2) of the Constitution, as it was originally framed.

28. It was pointed out, that in the above report prepared by the Constitutional Adviser, the following passage related to the judiciary:

"Regarding the removal of judges, he (Justice Frankfurter, Judge, Supreme Court of the United States of America) drew attention to a provision which had just been proposed in New York State – the provision has since been approved and which had the support of most of the judges and lawyers in this country. The provision is reproduced below:
9-a (1) A judge of the court of appeals, a justice of the supreme court, a judge of the court of claims… (types of judges) may be removed or retired also by a court on the judiciary. The court shall be composed of the chief judge of the court of appeals, the senior associate judges of the court of appeals and one justice of the appellate division in each department designated by concurrence of a majority of the justices of such appellate division…
(2) No judicial officer shall be removed by virtue of this section except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been

served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard…
(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be held before a court on the judiciary…
(4) The chief judge of the court of appeals may convene the court on the judiciary upon his own motion and shall convene the court upon written request by the governor or by the presiding justice of any appellate division…"

It was submitted, that the above suggestion of vesting the power of impeachment, in-house by the judiciary itself, as recommended by Justice Frankfurter, was rejected. It was pointed out, that the second draft of the Constitution was placed before the Constituent Assembly on 21.2.1948. Articles 103 and 193 of the above draft, pertained to appointments of Judges to the Supreme Court and High Courts. It was submitted, that several public comments were received, with reference to the second draft. In this behalf, a memorandum was also received, from the Judges of the Federal Court and the Chief Justices of the High Courts which, *inter alia,* expressed as under:

"It seems desirable to insert a provision in these articles (Draft Articles 103(2) and 193(2) to the effect that no person should be appointed a judge of the Supreme Court or of a High Court who has at any time accepted the post of a Minister in the Union of India or in any State. <u>This is intended to prevent a person who has accepted office of a Minister from exercising his influence in order to become a judge at any time. It is the unanimous view of the judges that a member of the Indian Civil Service should not be a permanent Chief Justice of any High Court</u>. Suitable provision should be made in the article for this."

It was submitted, that in response to the above memorandum, B.N. Rau made the following observations:

"It is unnecessary to put these prohibitions into the Constitution. The Attorney-General in England is invariably one of the Ministers of the Crown and often even a Cabinet Minister; he is often appointed a judge

afterwards (The Lord Chancellor is, of course, both a Cabinet Minister and the head of the judiciary). In India, Sapru and Sircar were Law Members, or Law Ministers, as they would be called in future; no one would suggest that men of this type should be ineligible for appointment as judges afterwards…
Merit should be the only criterion for these high appointments; no constitutional ban should stand in the way of merit being recognized."

It was asserted, that in the memorandum submitted by the Judges of the Federal Court and the Chief Justices of the High Courts, the following suggestions were made:

"It is therefore suggested that Article 193(1) may be worded in the following or other suitable manner:
Every Judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India…
We do not think it is necessary to make any provision in the Constitution for the possibility of the Chief Justice of India refusing to concur in an appointment proposed by the President. Both are officers of the highest responsibility and so far no case of such refusal has arisen although a convention now exists that such appointments should be made after referring the matter to the Chief Justice of India and obtaining his concurrence. If per chance such a situation were ever to arise it could of course be met by the President making a different proposal, and no express provision need, it seems to us, be made in that behalf.
The foregoing applies *mutatis mutandi*s to the appointment of the Judges of the Supreme Court, and article 103(2) may also be suitably modified. In this connection it is not appreciated why a constitutional obligation should be cast on the President to consult any Judge or Judges of the Supreme Court or of the High Court in the States before appointing a Judge of the Supreme Court. There is nothing to prevent the President from consulting them whenever he deems it necessary to do so."

It was pointed out, that none of the above proposals were accepted. Reference was also made to the Editor of the Indian Law Review and the Members of the Calcutta Bar Association, who made the following suggestions:

"That in clause (4) of Article 103 the words "and voting" should be deleted, as they consider that in an important issue as the one

contemplated in this clause, opportunity should be as much minimized as practicable for the legislators for remaining neutral."

to which, the response of B.N. Rau was as under:

"In the Constitutions of Canada, Australia, South Africa and Ireland, a bare majority of the members present and voting suffices for the presentation of the address for removal of a judge. Article 103(4) requires a two-thirds majority of those present and voting. It is hardly necessary to tighten it further by deleting the words "and voting".

With reference to the suggestions regarding non-reduction of salaries of Judges, the Constitutional Adviser made the following comments:

"The constitutional safeguard against the reduction of salary of the Chief Justice and the judges of a High Court below the minimum has been prescribed in article 197 so as to prevent the Legislatures of the States from reducing the salaries below a reasonable figure. It is hardly necessary to put such a check on the power of Parliament to fix the salaries of the judges of the Supreme Court."

The suggestions made by Pittabhi Sitaramayya and others, with reference to officers, and servants and the expenses of the Supreme Court, were also highlighted. They are extracted hereunder:

"That in article 122, for the words "the Chief Justice of India in consultation with the President" the words "the President in consultation with the Chief Justice of India" be substituted."

The response of the Constitutional Adviser was as follows:

"The provision for the fixation of the salaries, allowances and pensions of the officers and servants of the Supreme Court by the Chief Justice of India in consultation with the President contained in clause (1) of article 122 is based on the existing provision contained in section 242(4) of the Government of India Act, 1935, as adapted. The Drafting Committee considered such a provision to be necessary to ensure the independence of the judiciary, the safeguarding of which was so much stressed by the Federal Court and the High Courts in their comments on the Draft Constitution."

29. It was pointed out, that the second draft of the Constitution, was introduced in the Constituent Assembly on 4.11.1948. The Court's

attention was drawn to the discussions, with reference to appointments to the higher judiciary, including the suggestion of B. Pocker Sahib, who proposed an alternative to Article 103(2). Reference was also made to the proposal made by Mahboob Ali Baig Sahib, guarding against party influences, that may be brought to the fore, with reference to appointment of Judges. It was submitted, that the above suggestion was rejected by the Chairman of the Drafting Committee, who felt that it would be dangerous to enable the Chief Justice to veto the appointment of a Judge to the higher judiciary. The opinion of T.T. Krishnamachari was also to the following effect:

"[T]he independence of the Judiciary should be maintained and that the Judiciary should not feel that they are subject to favours that the Executive might grant to them from time to time and which would naturally influence their decision in any matter they have to take where the interests of the Executive of the time being happens to be concerned. At the same time, Sir, I think it should be made clear that it is not the intention of this House or of the framers of this Constitution that they want to crate specially favoured bodies which in themselves becomes an Imperium in Imperio, completely independent of the Executive and the legislature and operating as a sort of superior body to the general body politic".

30. The proposals and the decision taken thereon, were brought to our notice, specially the observations made by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar, Ananthasayanam Ayyangar, and finally Dr. B.R. Ambedkar. Dr. B.R. Ambedkar had stated thus:

"Finally, BR Ambedkar said:
Mr. President, Sir, I would just like to make a few observations in order to clear the position. Sir, there is no doubt that the House in general, has agreed that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law. At the same

time, there is the fear that in the name of the independence of the Judiciary, we might be creating, what my Friend Mr. T.T. Krishnamachari very aptly called an *"Imperium in Imperio"*. We do not want to create an *Imperium in Imperio*, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive. My friends, if they will carefully examine the provisions of the new amendment which I have proposed in place of the original article 122, will find that the new article proposes to steer a middle course. It refuses to create an *Imperium in Imperio*, and I think it gives the Judiciary as much independence as is necessary for the purpose of administering justice without fear or favour."

31. Having extensively brought to our notice, the nature of the debates before the Constituent Assembly, and the decisions taken thereon, the learned Attorney General ventured to demonstrate, that the participation of the executive in the matter of appointment of high constitutional functionaries, "could not – and did not", impinge upon their independence, in the discharge of their duties. Illustratively, reliance was placed on Part IV Chapter V of the Constitution, comprising of 4 Articles of the Constitution (Articles 148 to 151), dealing with the Comptroller and Auditor-General of India. It was submitted, that duties and powers of the Comptroller and Auditor-General of India, delineated in Article 149, revealed, that the position of the Comptroller and Auditor-General of India, was no less in importance vis-a-vis the Judges of the higher judiciary. Pointing out to Article 148, it was his contention, that the appointment of the Comptroller and Auditor-General of India is made by the President. His removal under clause (1) of Article 148 could only, in the like manner, be made on the like grounds as a Judge of the Supreme Court of India. Just like a Judge of the Supreme Court, his salary and other conditions of service were to be determined by

Parliament by law, and until they were so determined, they were to be as expressed in the Second Schedule. Further more, just like a Judge of the Supreme Court, neither the salary of the Comptroller and Auditor-General, nor his rights in respect of leave of absence, pension or age of retirement, could be varied to his disadvantage, after his appointment. In a similar fashion, as in the case of the Supreme Court, persons serving in the Indian Audit and Accounts Department, were to be subject to such conditions of service, as were determined by law made by Parliament, and till such legislative enactment was made, their conditions of service were determinable by the President, by framing rules, in consultation with the Comptroller and Auditor-General of India. Based on the above, it was contended, that even though the appointment of the Comptroller and Auditor-General of India, was exclusively vested with the executive, there had never been an adverse murmur with reference to his being influenced by the executive. The inference sought to be drawn was, that the manner of "appointment" is irrelevant, to the question of independence. Independence of an authority, according to the learned Attorney General, emerged from the protection of the conditions of the incumbent's service, after the appointment had been made.

32. In the like manner, our attention was drawn to Part XV of the Constitution, pertaining to elections. It was submitted, that Article 324 vested the superintendence, direction and control of elections to the Parliament, and the Legislatures of every State, and election to the offices of President and Vice-President, with the Election Commission. The

Election Commission in terms of Article 324(2) was comprised of the Chief Election Commissioner, and such number of other Election Commissioners as the President may from time to time fix. It was submitted, that the appointment of the Chief Election Commissioner, and the other Election Commissioners, was to be made by the President, and was subject to the provisions of law made by Parliament. It was further pointed out, that under Article 324(5), the conditions of service and the tenure of the office of the Election Commissioners (and the Regional Commissioners) is regulated in the manner, as the President may by rules determine. Of course, subject to, enactment of law by Parliament. So as to depict similarity with the matter under consideration, it was contended, that the proviso under Article 324(5) was explicit to the effect, that the Chief Election Commissioner could not be removed from his office, except in like manner, and on like grounds, as a Judge of the Supreme Court. And further more, that the conditions of service of the Chief Election Commissioner, could not be varied to his disadvantage, after his appointment. It was contended, that the Indian experience had been, that the Chief Election Commissioner, and the other Election Commissioners, had functioned with absolute independence, and that, their functioning remained unaffected, despite the fact that their appointment had been made, by the executive. It was submitted, that impartiality/independence emerged from the protection of the conditions of service of the incumbent after his appointment, and not by the method or manner of his appointment.

33. It was also the contention of the learned Attorney General, that implicit in the scheme of the Constitution, was a system of checks and balances, wherein the different constitutional functionaries participate in various processes of selection, appointment, etc., so as to ensure, that the constitutional functionaries did not exceed, the functions/responsibilities assigned to them. To substantiate the above contention, reliance was placed on the Kesavananda Bharati case[10], wherein this Court observed as under:

"577. We are unable to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process; (per Bose, J., in Bidi Supply Co. v. Union of India, AIR 1956 SC 479). The observations of Patanjali Sastri, C.J., in State of Madras v. V.G. Row, AIR 1952 SC 196, which have become locus classicus need alone be repeated in this connection. Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down upon them by the Constitution". The respondents have also contended that to let the court have judicial review over constitutional amendments would mean involving the court in political questions. To this the answer may be given in the words of Lord Porter in Commonwealth of Australia v. Bank of New South Wales 1950 AC 235 at 310:

"The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue, it is vain to invoke the voice of Parliament."

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution but it envisages such a separation to a degree as was found in Ranasinghe's case. The judicial review provided expressly in our Constitution by means of Articles 226

and 32 is one of the features upon which hinges the system of checks and balances. Apart from that, as already stated, the necessity for judicial decision on the competence or otherwise of an Act arises from the very federal nature of a Constitution (per Haldane, L.C. in Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. 1914 AC 237 and Ex Parte Walsh & Johnson; In re Yates, (1925) 37 CLR 36 at p.58. The function of interpretation of a Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the Legislature conferred by the Constitution would always be a question of interpretation of the Constitution. It may be added that at no stage the respondents have contested the proposition that the validity of a constitutional amendment can be the subject of review by this Court. The Advocate-General of Maharashtra has characterised judicial review as undemocratic. That cannot, however, be so in our Constitution because of the provisions relating to the appointment of judges, the specific restriction to which the fundamental rights are made subject, the deliberate exclusion of the due process clause in Article 21 and the affirmation in Article 141 that judges declare but not make law. To this may be added the none too rigid amendatory process which authorises amendment by means of 2/3 majority and the additional requirement of ratification."

The Court's attention was also invited to the observations recorded in

Bhim Singh v. Union of India[13]:

"77. Another contention raised by the petitioners is that the Scheme violates the principle of separation of powers under the Constitution. The concept of separation of powers, even though not found in any particular constitutional provision, is inherent in the polity the Constitution has adopted. The aim of separation of powers is to achieve the maximum extent of accountability of each branch of the Government.

78. While understanding this concept, two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability.

[13] (2010) 5 SCC 538

79. In Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549, this Court held that: (AIR p. 556, para 12)

"12. ...The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law."

80. In Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225, and later in Indira Nehru Gandhi v. Raj Narain (1976) 3 SCC 321, this Court declared separation of powers to be a part of the basic structure of the Constitution. In Kesavananda Bharati case Shelat and Grover, JJs. in SCC para 577 observed the precise nature of the concept as follows: (SCC p. 452)

"577. ... There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in .all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in Ranasinghe case. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances."

and conclusion no.5, which is reproduced as under:

".....

(5) Indian Constitution does not recognise strict separation of powers. The constitutional principle of separation of powers will only be violated if an essential function of one branch is taken over by another branch, leading to a removal of checks and balances."

Last of all, the learned Attorney General placed reliance on State of U.P.

v. Jeet S. Bisht[14], wherein this Court held:

"78. Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act

[14] (2007) 6 SCC 586

as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times."

34. The learned Attorney General emphasized, that there was a very serious and sharp cleavage of opinion on the subject, which is being canvassed before this Court. Relying on the judgment rendered by in the Sankalchand Himatlal Sheth case[5], he pointed out, that in the aforesaid judgment, this Court had arrived at the conclusion, that the term "consultation" could not be deemed to be "concurrence", with reference to Article 222. In conjunction with the above, he invited our attention to the judgment in the Samsher Singh case[11], wherein a seven-Judge Bench, which was dealing with a controversy relating to Judges of subordinate courts, and the impact of Article 311, had examined the question whether the President was to act in his individual capacity, i.e., at his own discretion; or he was liable to act on the aid and advice of the Council of Ministers, as mandated under Article 74. Reliance was placed on the following observations from the aforesaid judgment:

"149. In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and

should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."

35. It was submitted, that the aforesaid observations as were recorded in the Samsher Singh case[11], were relied upon in the Second Judges case. This Court, it was pointed out, had clarified that the observations recorded in paragraph 149 in the Samsher Singh case[11], were merely in the nature of an *obiter.* It was submitted, that the aforesaid observations in the Samsher Singh case[11], were also noticed in paragraph 383 (at page 665), wherein it was sought to be concluded, that the President, for all practical purposes, should be construed, as the concerned Minister or the Council of Ministers. Having noticed the constitutional provisions regarding "consultation" with the judiciary, this Court had expressed, that the Government was bound by such counsel. Reference was then made to the judgment of this Court in the First Judges case, wherein it was held, that "consultation" did not include "concurrence", and further, that the power of appointment of Judges under Article 124, was vested with the President, and also, that the President could override the views of the consultees. Last of all, to substantiate his submission(s) pertaining to the cleavage of opinion, reliance was placed on the Kesavananda Bharati case[10], wherein a thirteen-Judge Bench of this

Court, had held, with reference to the power of amendment under Article 368, that the concept of "basic structure", was a limitation, to the otherwise plenary power of amendment of the Constitution.

36. In his effort to persuade us, to refer the instant matter, to a nine-Judge Bench (or, to a still larger Bench), the learned Attorney General placed reliance on Suraz India Trust v. Union of India[15], and invited our attention to the following:

"3. Shri A.K. Ganguli, learned Senior Advocate, has submitted that the method of appointment of a Supreme Court Judge is mentioned in Article 124(2) of the Constitution of India which states:

"124. (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

It may be noted that there is no mention:

(i) Of any Collegium in Article 124(2).

(ii) The word used in Article 124(2) is "consultation", and not "concurrence".

(iii) The President of India while appointing a Supreme Court Judge can consult any Judge of the Supreme Court or even the High Court as he deems necessary for the purpose, and is not bound to consult only the five seniormost Judges of the Supreme Court.

4. That by the judicial verdicts in the aforesaid two cases, Article 124(2) has been practically amended, although amendment to the Constitution can only be done by Parliament in accordance with the procedure laid down in Article 368 of the Constitution of India.

5. That under Article 124(2) while appointing a Supreme Court Judge, the President of India has to consult the Chief Justice of India, but he may also consult any other Supreme Court Judge and not merely the four .seniormost Judges. Also, the President of India can even consult a High Court Judge, whereas, according to the aforesaid two decisions the President of India cannot consult any Supreme Court Judge other than the four seniormost Judges of the Supreme Court, and he cannot consult any High Court Judge at all.

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[15] (2012) 13 SCC 497

6. Shri Ganguli submits that the matter is required to be considered by a larger Bench as the petition raises the following issues of constitutional importance:

(1) Whether the aforesaid two verdicts viz. the seven-Judge Bench and nine-Judge Bench decisions of this Court referred to above really amount to amending Article 124(2) of the Constitution?

(2) Whether there is any "Collegium" system for appointing the Supreme Court or High Court Judges in the Constitution?

(3) Whether the Constitution can be amended by a judicial verdict or can it only be amended by Parliament in accordance with Article 368?

(4) Whether the constitutional scheme was that the Supreme Court and High Court Judges can be appointed by mutual discussions and mutual consensus between the judiciary and the executive; or whether the judiciary can alone appoint Judges of the Supreme Court and High Courts?

(5) Whether the word "consultation" in Article 224 means "concurrence"?

(6) Whether by judicial interpretation words in the Constitution can be made redundant, as appears to have been done in the aforesaid two decisions which have made consultation with the High Court Judges redundant while appointing a Supreme Court Judge despite the fact that it is permissible on the clear language of Article 124(2)?

(7) Whether the clear language of Article 124(2) can be altered by judicial verdicts and instead of allowing the President of India to consult such Judges of the Supreme Court as he deems necessary (including even junior Judges) only the Chief Justice of India and four seniormost Judges of the Supreme Court can alone be consulted while appointing a Supreme Court Judge?

(8) Whether there was any convention that the President is bound by the advice of the Chief Justice of India, and whether any such convention (assuming there was one) can prevail over the clear language of Article 124(2)?

(9) Whether the opinion of the Chief Justice of India has any primacy in the aforesaid appointments?

(10) Whether the aforesaid two decisions should be overruled by a larger Bench?

7. Mr G.E. Vahanvati, learned Attorney General for India, supports the petitioner contending that the aforesaid judgments require reconsideration. However, he also submits:

(a) A writ petition under Article 32 is not maintainable at the behest of a trust as the trust cannot claim violation of any of its fundamental rights;

(b) The petitioner has no locus standi to seek review of the judgments of this Court. In fact, a petition under Article 32 of the Constitution does not lie to challenge the correctness of a judicial order; and

(c) A Bench of two Judges cannot examine the correctness of the judgment of a nine-Judge Bench.

(d) A Bench of two Judges cannot refer the matter to the larger Bench of nine Judges or more, directly.

xxxx xxxx xxxx

11. However, Mr Ganguli dealing with the issue of locus standi of the Trust has submitted that the petition may not be maintainable but it should be entertained because it raises a large number of substantial questions of law. In order to fortify his submission he places reliance upon a recent Constitution Bench judgment of this Court in B.P. Singhal v. Union of India (2010) 6 SCC 331 wherein while dealing with the issue of removal of Governors, this Court held as under: (SCC p. 346, para 15)

."15. The petitioner has no locus to maintain the petition in regard to the prayers claiming relief for the benefit of the individual Governors. At all events, such prayers no longer survive on account of passage of time. However, with regard to the general question of public importance referred to the Constitution Bench, touching upon the scope of Article 156(1) and the limitations upon the doctrine of pleasure, the petitioner has the necessary locus."

Thus, Mr Ganguli submits that considering the gravity of the issues involved herein, the matter should be entertained.

12. While dealing with the issue of reference to the larger Bench, Mr Ganguli has placed a very heavy reliance on the recent order of this Court dated 30-3-2011 in Mineral Area Development Authority v. SAIL (2011) 4 SCC 450, wherein considering the issue of interpretation of the constitutional provisions and validity of the Act involved therein, a three-Judge Bench presided over by the Hon'ble Chief Justice has referred the matter to a nine-Judge Bench.

13. At this juncture, Mr Ganguli as well as Mr Vahanvati have submitted that even at the stage of preliminary hearing for admission of the petition, the matter requires to be heard by a larger Bench as this matter has earlier been dealt with by a three-Judge Bench and involves very complicated legal issues.

14. In view of the above, we place the matter before the Hon'ble the Chief Justice for appropriate directions."

It was pointed out, that when the above matter was placed before a three-Judge Bench of this Court, the same was dismissed on the ground of *locus standi.* Yet, since the above order was passed in the absence of the petitioner trust, an application had been moved for recall of the above order. It was his assertion, that whether or not a recall order was passed with reference to the questions raised, it was apparent, that a

Bench of this Court has already expressed the view, that the conclusions drawn in the Second and Third Judges cases, need a relook.

37. Finally, to support the above suggestions, the Court's attention was drawn to the observations recorded by H.M. Seervai in the 4th edition of his book "Constitutional Law of India" wherein, with reference to the Second Judges case, very strong and adverse views were expressed. The aforesaid views are contained in paragraphs 25.448 to 25.497. For reasons of brevity, it is not possible for us to extract the same herein. Suffice it to state, that the submissions advanced by the learned Attorney General, as have been detailed in the foregoing paragraphs, were more or less, in accord with the views expressed by H.M. Seervai.

38. In order to contend, that it was open to this Court, to make a reference for reconsideration of the matters already adjudicated upon, the learned Attorney General, invited our attention to Jindal Stainless Limited v. State of Haryana[16].

"6. In Keshav Mills Co. Ltd. v. CIT AIR 1965 SC 1636…(AIR pp.1643-44, para 23) a Constitution Bench of this Court enacted the circumstances in which a reference to the larger Bench would lie. It was held that in revisiting and revising its earlier decision, this Court should ask itself whether in the interest of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised? Whether on the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision bearing on the point not noticed? What was the impact of the error in the previous decision on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief?

[16] (2010) 4 SCC 595

7. According to the judgment in Keshav Mills case these and other relevant considerations must be born in mind whenever this Court is called upon to exercise its jurisdiction to review and revisit its earlier decisions. Of course, in Keshav Mills case a caution was sounded to the effect that frequent exercise of this Court of its power to revisit its earlier decisions may incidentally tend to make the law uncertain and introduce confusion which must be avoided. But, that is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error.
8. In conclusion, in Keshav Mills case, this Court observed that it is not possible to lay down any principles which should govern the approach of the Court in dealing with the question of revisiting its earlier decision. It would ultimately depend upon several relevant considerations.
9. In Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673..., a Constitution Bench of this Court observed that, in case of doubt, a smaller Bench can invite attention of Chief Justice and request for the matter being placed for hearing before a Bench larger than the one whose decision is being doubted."

39. With the above noted submissions, learned Attorney General for India concluded his address, for the review of the judgments in the Second and Third Judges cases.

40. Mr. K.K. Venugopal, learned senior counsel, commenced his submissions by highlighting the main features of the Constitution (67th Amendment) Bill, 1990. He invited our attention, to the proposed amendments of Articles 124, 217, 222 and 231, and more particularly, to the inserstion of Part XIIIA in the Constitution, under the heading "National Judicial Commission". Article 307A was proposed as the singular Article in Part XIIIA. Based on the constitution of the National Judicial Commission, it was asserted, that the above Bill, had been introduced, to negate the effect of the judgment of this Court in the First Judges case. It was submitted, that when the aforesaid Bill was introduced in the Parliament, the Supreme Court Bar Association, of

which Mr. Venugopal himself was the then President, organized a seminar on 1.9.1990, for the purpose of debating the pros and cons of the Constitution (67th Amendment) Bill, 1990. It was submitted, that a large number of speakers had taken part in the debate and had made important suggestions. The above suggestions, drafted as a resolution of the seminar, were placed before the House, and were passed either unanimously or with an overwhelming majority. It was submitted, that the aforesaid resolutions were forwarded to the Chief Justice of India, through a covering letter dated 5.10.1990. It was pointed out, that resolutions were also passed, at the conclusion of the Chief Justices' Conference, held between 31.8.1990 and 2.9.1990, wherein also, the provisions of the Constitution (67th Amendment) Bill, 1990, were deliberated upon. It was submitted, that he had made a compilation of the resolutions passed at the Chief Justices Conference, and the conclusions drawn in the Second Judges case, which would give a bird's eye view, of the views expressed. The compilation to which learned counsel drew our attention, is being extracted hereunder:

"…(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a .High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for

the transfers of Judges/Chief Justices of the High Courts must invariably be made.
(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy.
(4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.
(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention. …"

Based on the aforesaid compilation, it was contended, that the judgment rendered in the Second Judges case, completely obliterated three salient features of Article 124. Firstly, under the original Article 124, the main voice was that of the President. It was submitted, that the voice of the President was totally choked in the Second Judges case. Secondly, Article 124, as it was originally framed, vested the executive with primacy, in respect of the appointments to the higher judiciary, whereas the position was reversed by the Second Judges case, by vesting primacy with the judiciary. Thirdly, the role of the Chief Justice of India, which was originally, that of a mere consultee, was "turned over its head", by the decision in the Second Judges case. Now, the collegium of Judges, headed by the Chief Justice of India, has been vested with the final determinative authority for making appointments to the higher judiciary. And the President is liable to "concur", with the recommendations made. Based on the above assertions, it was the submission of the learned

counsel, that by wholly misconstruing Article 124, the Supreme Court had assumed the entire power of appointment. And the voice of the executive had been completely stifled. It was submitted, that the judiciary had performed a legislative function, while interpreting Article 124. It was asserted, that originally the founding fathers had the power to frame the provisions of the Constitution, and thereafter, the Parliament had the power to amend the Constitution in terms of Article 368. It was submitted, that the role assigned to the Constituent Assembly, as also to the Parliament, has been performed by this Court in the Second Judges case. It was submitted, that all this had been done in the name of "judicial independence". The above logic was sought to be seriously contested by asserting, that judicial independence could not stand by itself, there was something like judicial accountability also, which had to be kept in mind.

41. It was also contended, that the judiciary had taken upon itself, the exclusive role of making appointments to the higher judiciary, without taking into consideration any of the stakeholders. It is submitted, that the judiciary is meant for the litigating community, and therefore, the litigating community was liable to be vested with some role in the matter of appointments to the higher judiciary. Likewise, it was pointed out, that there were about ten lakhs lawyers in this country. They also had not been given any say in the matter. Even the Bar Associations, which have the ability to represent the lawyers' fraternity, had been excluded from any role in the process of appointments. It was highlighted, that under

the old system, all the above stakeholders, had an opportunity to make representations to the executive, in the matter of appointments to the higher judiciary. But, that role has now been totally excluded, by the interpretation placed on Article 124, by the Second Judges case. The Court's attention was drawn to conclusion no.14 drawn in the summary of conclusions (recorded in paragraph 486, in the Second Judges case) that the majority opinion in the First Judges case, insofar as, it had taken a contrary view, relating to primacy of the role of the Chief Justice of India, in matters of appointments and transfers, and the justiciability of these matters, as well as, in relation to judge-strength, did not commend itself as being the correct view. Accordingly it was concluded, that the relevant provisions of the Constitution including the constitutional scheme must now be construed, understood and implemented, in the manner indicated in the conclusions drawn in the Second Judges case. The above determination, according to learned counsel, was absolutely misconceived, as the same totally negated the effect of Article 74, which required the President to act only on the aid and advice of the Council of Ministers. According to learned counsel, the President would now have to act as per the dictate of the Chief Justice of India and the collegium of Judges. It was submitted, that it was impermissible in law, for a party to make a decision in its own favour. This, according to learned counsel, is exactly what the Supreme Court had done in the Second Judges case. It was contented, that the impugned constitutional amendment was an effort at the behest of the

Parliament, to correct the above historical aberration. Learned counsel concluded, by asserting, that there were two Houses of Parliament under the Constitution, but the Supreme Court in the Second Judges case, had acted as a third House of Parliament, namely, as the House of corrections. In the background of the aforesaid factual position, it was submitted, that when the Union of India and the States which ratified the Constitution (99th Amendment) Act, seek reconsideration of the Second Judges case, was it too much, that the Union and the States were asking for?

42. Following the submissions noticed hereinabove, we heard Mr. K. Parasaran, Senior Advocate, who also supported the prayer made by the learned Attorney General. It was submitted, that the appointment of Judges had nothing to do with "independence of the Judge" concerned, or the judicial institution as a whole. It was submitted, that subsequent to their appointment to the higher judiciary, the conditions of service of Judges of the High Court and the Supreme Court were securely protected. Thereafter, the independence of the Judges depended on their judicial conscience, and the executive has no role to play therein.

43. It was asserted, that the Judges who expressed the majority view, in the Second Judges case, entertained a preconceived notion about the "basic structure", even before hearing commenced, in the Second Judges case. In this behalf, he placed reliance on the resolutions passed at the conclusion of the Chief Justices' Conference, held between 31.8.1990 and 2.9.1990. It was asserted, that the controversy had not been adjudicated

on the basis of an independent assessment, of the views expressed in the Constituent Assembly debates (with reference to the text of Article 124). It was submitted, that the interpretation rendered on Article 124, expressly ignored, not only the simple language indicating the procedure for appointment of Judges, but also the surrounding constitutional provisions. According to learned senior counsel, the judiciary had encroached into the executive power of appointment of Judges. This amounted to encroaching into a constitutional power, reserved for the executive, by the Constitution. It was asserted, that the power of amendment of the Constitution, vested in the Parliament under Article 368, was only aimed at keeping the Constitution in constant repair. It was submitted, that the aforesaid power vested with the Parliament, could not have been exercised by the Supreme Court, by substituting the procedure of appointment of Judges, in the manner the Supreme Court felt. It was submitted, that in the Second Judges case, as also, the Third Judges case, the Supreme Court had violated the "basic structure", by impinging upon legislative power. It was contended, that it was imperative for this Court to have a re-look at the two judgments, so as to determine, whether there had been a trespass by the judiciary, into the legislative domain. And, if this Court arrives at the conclusion, that such was the case, it should strike down its earlier determination. It was further submitted, that the majesty of the Constitution, must be maintained and preserved at all costs, and there should be no hesitation in revisiting any earlier judgment, so as to correct an erroneous decision.

With the aforesaid observations, learned counsel commended the Bench, to accept the prayer made by the learned Attorney General, and to make a reference for reconsideration of the judgments rendered by this Court, in the Second and Third Judges cases, to a Bench with an appropriate strength.

44. Mr. Ravindra Srivastava, Senior Advocate, also supported the submissions for reference to a larger Bench. It was submitted, that the conclusions drawn by this Court in the Second Judges case, and the Third Judges case, were liable to be described as doubtful, because a large number of salient facts, had not been taken into consideration, when the same were decided. It was the contention of the learned counsel, that the submissions advanced on behalf of the petitioners, on merits, could not be supported by the text of the constitutional provisions, and that, the petitioners' reliance squarely based on the majority judgment in the Second Judges case, as was further explained in the Third Judges case, was seriously flawed. It was submitted, that the thrust of the submissions advanced on behalf of the petitioners on merits had been, not only that the consultation with the Chief Justice of India was mandatory, but the opinion of the collegium of Judges was binding on the executive. It was asserted, that neither of the above requirements emerged from the plain reading of Article 124. It was asserted, that the basis of the learned counsel representing the petitioners, to assail the impugned constitutional amendment, as also the NJAC Act, was squarely premised on the above determination. It was

asserted, that the conclusion of primacy of the judiciary, in the matter of appointment of Judges in the higher judiciary, could not be supported by any text of the original constitutional provisions. It was, accordingly suggested, that it was absolutely imperative to correct the majority view expressed in the Second Judges case.

45. According to the learned counsel, the primary objection raised, at the behest of the petitioners, opposing the reconsideration of the decision rendered in the Second Judges case, was based on the observations recorded in paragraph 10 of the Third Judges case, wherein the statement of the then Attorney General for India, had been recorded, that the Union of India was not seeking a review or reconsideration of the judgment in the Second Judges case. It was submitted, that the aforesaid statement, could not bar the plea of reconsideration, for all times to come. It was further submitted, that the above statement would not bind the Parliament. It was contended, that the statement to the effect, that the Union of India, was not seeking a review or reconsideration of the Second Judges case, should not be understood to mean, that it was impliedly conceded, that the Second Judges case had been correctly decided. It was pointed out, that the advisory jurisdiction under Article 143, which had been invoked by the Presidential Reference made on 23.7.1998, requiring this Court to render the Third Judges case, was neither appellate nor revisionary in nature. In this behalf, learned counsel placed reliance on Re: Cauvery Water Disputes Tribunal[17],

[17] 1993 Supp (1) SCC 96(II)

wherein it was held, that an order passed by the Supreme Court, could be reviewed only when its jurisdiction was invoked under Article 137 of the Constitution (read with Rule 1 of Order 40 of the Supreme Court Rules, 1946). And that, a review of the judgment rendered by the Supreme Court, in the Second Judges case, could not be sought through a Presidential Reference made under Article 143. In fact, this Court in the above judgment, had gone on to conclude, that if the power of review was to be read in Article 143, it would be a serious inroad into the "independence of the judiciary". It was therefore submitted, that the statement of the then Attorney General, during the course of hearing of the Third Judges case, could not be treated as binding, for all times to come, so as to deprive the executive and the legislature from even seeking a review of the judgments rendered. It was therefore contended, that it was implicit while discharging its duty, that this Court was obliged to correct the errors of law, which may have been committed in the past. Learned counsel contended, that a perusal of the judgment of this Court in the Subhash Sharma case[4], clearly brought out, that no formal request was made to this Court for reconsideration of the legal position declared by this Court in the First Judges case. Yet, this Court, on its own motion, examined the correctness of the First Judges case, and *suo motu*, made a reference of the matter, to a nine-Judge Bench, to reconsider the law declared in the First Judges case.

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46. While pointing to the reasons for reconsideration of the law laid down by this Court in the Second Judges case (read with the Third Judges case), learned senior counsel, asserted, that the essence of Article 124, had been completely ignored by the majority view. Learned senior counsel, accordingly, invited our attention to the scheme of Article 124(2) and canvassed and summarized the following salient features emerging therefrom:

"i. The authority to appoint Judges of the higher judiciary was vested in the President.
ii. The above power of appointment by the President, was subject to only one condition, namely, 'consultation'.
iii. The above consultation was a two-fold – one which in the opinion of the President may be deemed necessary, and the other which was mandatory.
iv. The mandatory consultation was with the Chief Justice of India. The consultation which the President may have 'if deemed necessary for the purpose, was with judges of the Supreme Court and also of the High Courts in the states, as may be felt appropriate.
v. There was no limitation on the power, scope and ambit of the President to engage in consultation, he may not only with the judges of the Supreme Court, but may also consult judges of High Courts as he may deem necessary, for this purpose.
vi. There was also no limitation on the President's power of consultation. He could consult as many judges of the Supreme Court and High Courts which he deemed necessary for the purpose.
vii. Having regard to the object and purpose of the appointment of a judge of the Supreme Court, and that, such appointment was to the highest judicial office in the Republic, was clearly intended to be broad-based, interactive, informative and meaningful, so that, the appointment was made of the most suitable candidate.
viii. This aspect of the power of consultation of the President, as had been provided had been completely ignored in the majority judgment in Second Judges' case. And the focus has been confined only to the consultation, with the Chief Justice of India.
ix. The interpretation of the consultative process, and the procedure laid down, in the majority judgement in the Second Judges case, that the President's power of consultation, was all-pervasive had been 'circumscribed', having been so held expressly in paragraph 458 (by Justice J.S. Verma) in the Second Judges' case.

x. The majority judgment has focused only on the requirement of consultation by the President with the Chief Justice of India which is requirement of proviso, ignoring the substantive part.
xi. The collegium system had been evolved, for consultation with the Chief Justice of India on the interpretation, that for purposes of consultation with the Chief Justice of India, the CJI alone as an individual would not matter, but would mean in plurality i.e. his collegium. But this is an interpretation only of the proviso and not of the substantive part of Article 124(2).
xii The collegium system was evolved for consultation with the CJI and his colleagues in particular in fixed numbers as laid down in the judgment.
xiii. The whole provision for consultation by the President of India with the judges of the Supreme Court and the High Court, had thus been stultified, in ignorance of the substantive part of Article 124(2), and as such, one was constrained to question the majority judgment as being '*per incuriam*'."

47. According to learned senior counsel, a perusal of the judgment in the Subhash Sharma case[4] would reveal, that reconsideration of the judgments in the First Judges case, was only on two issues. Firstly, the status and importance of consultation, and the primacy of the position of the Chief Justice of India. And secondly, the justiceability of fixation, of the judge-strength of a Court. It was asserted, that no other issue was referred for reconsideration. This assertion was sought to be supported with the following observations, noticed in the Subhash Sharma case[4]:

"49. .....Similarly, the writ application filed by Subhash Sharma for the reasons indicated above may also be disposed of without further directions. As and when necessary the matter can be brought before the court. As in our opinion the correctness of the majority view in S.P. Gupta case [(1981) Supp. SCC 87] should be considered by a larger bench we direct the papers of W.P. No.1303 of 1987 to be placed before the learned Chief Justice for constituting a bench of nine Judges to examine the two questions we have referred to above, namely, the position of the Chief Justice of India with reference to primacy and, secondly, justiciability of fixation of Judge strength."

It was asserted, that there was no scope or occasion for the Bench hearing the Second Judges case, to rewrite the Constitution, on the subject of appointment of Judges to the higher judiciary. It was submitted, that the observations recorded in the Second Judges case, in addition to the above mentioned two issues, were liable to be regarded as *obiter dicta*. In the Second Judges case, the *ratio decidendi*, according to learned counsel, was limited to the declaration of the legal position, only on the two issues, referred to the larger Bench for consideration. Thus viewed, it was asserted, that all other conclusions recorded in the Second Judges case, on issues other than the two questions referred for reconsideration, cannot legitimately be described as binding law under Article 141. To support the above contention, reliance was placed on Kerala State Science and Technology Museum v. Rambal Co.[18], wherein this Court held as under:

"8. It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the larger Bench cannot adjudicate upon an issue which is not the question referred to. (See Kesho Nath Khurana v. Union of India [(1981) Supp. SCC 38], Samaresh Chandra Bose v. District Magistrate, Burdwan [(1972) 2 SCC 476] and K.C.P. Ltd. v. State Trading Corpn. of India [(1995) Supp. (3) SCC 466]."

48. Learned senior counsel submitted, that in the Second Judges case, this Court assigned an innovative meaning to the words "Chief Justice of India", by holding that the term "Chief Justice of India" in Article 124, included a plurality of Judges, and not the individual Chief Justice of

[18] (2006) 6 SCC 258

India. This, according to learned counsel, was against the plain meaning and text of Article 124. Learned counsel, went on to add, that this Court in the Second Judges case, had laid down an inviolable rule of seniority, for appointment of Chief Justice of India. It also laid down, the rules and the norms, for transfer of Judges and Chief Justices, from one High Court to another. It also concluded, that any transfer of a Judge or Chief Justice of a High Court, made on the recommendation of the Chief Justice of India, would be deemed to be non-punitive. In sum and substance, learned counsel contended, that the Second Judges case, laid down a new structure, in substitution to the role assigned to the Chief Justice of India. The conclusions recorded in the Second Judges case, according to learned counsel, could not be described as a mere judicial interpretation. It was asserted, that the same was nothing short of judicial activism (or, judicial legislation).

49. Learned senior counsel then invited the Court's attention, to the principles laid down for reconsideration, or review of a previous judgment. For this he pointedly invited the Court's attention to Bengal Immunity Co. Ltd. v. State of Bihar[19], Maganlal Chhaganlal (P) Ltd. v. Municipal Corpn. of Greater Bombay[20], and Union of India v. Raghubir Singh[21]. Learned counsel also referred to Pradeep Kumar Biswas v. Indian Institute of Chemical Biology[22], wherein it was observed:

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[19] (1955) 6 SCR 603
[20] (1974) 2 SCC 402
[21] (1989) 2 SCC 754
[22] (2002) 5 SCC 111

"61. Should Sabhajit Tewary (1975) 1 SCC 485 ... still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the facts leading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them and
"[t]here is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public." [Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661, 672] (AIR p. 672, para 15)
Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake."

It was pointed out, that in the Second Judges case, S. Ratnavel Pandian,

J. had observed as follows:

"17. So it falls upon the superior courts in a large measure the responsibility of exploring the ability and potential capacity of the Constitution with a proper diagnostic insight of a new legal concept and making this flexible instrument serve the needs of the people of this great nation without sacrificing its essential features and basic principles which lie at the root of Indian democracy. However, in this process, our main objective should be to make the Constitution quite understandable by stripping away the mystique and enigma that permeates and surrounds it and by clearly focussing on the reality of the working of the constitutional system and scheme so as to make the justice delivery system more effective and resilient. Although frequent overruling of decisions will make the law uncertain and later decisions unpredictable and this Court would not normally like to reopen the issues which are concluded, it is by now well settled by a line of judicial pronouncements that it is emphatically the province and essential duty of the superior courts to review or reconsider their earlier decisions, if so warranted under compelling circumstances and even to overrule any questionable decision, either fully or partly, if it had been erroneously held and that no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception grown along with the passage of time. This power squarely and directly falls within the rubric of judicial review or reconsideration."

It was submitted, that Kuldip Singh, J., in the Second Judges case, had

recorded as follows:

“320. It is no doubt correct that the rule of stare decisis brings about consistency and uniformity but at the same time it is not inflexible. Whether it is to be followed in a given case or not is a question entirely within the discretion of this Court. On a number of occasions this Court has been called upon to reconsider a question already decided. The Court has in appropriate cases overruled its earlier decisions. The process of trial and error, lessons of experience and force of better reasoning make this Court wiser in its judicial functioning. In cases involving vital constitutional issues this Court must feel to bring its opinions into agreement with experience and with the facts newly ascertained. Stare decisis has less relevance in constitutional cases where, save for constitutional amendments, this Court is the only body able to make needed changes. Re-examination and reconsideration are among the normal processes of intelligent living. We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice."

Based on the above, learned counsel summarized his assertions as follows. Firstly, the real constitutional question, requiring re-examination, was in the context of appointment of Judges to the higher judiciary, was the interpretation of Article 74. Because the Second Judges case, had made a serious inroad into the power of the President which was bound to be exercised in consonance with Article 74. It was contended, that the functioning of the President, in the absence of the aid and advice of the Council of Ministers, could not just be imagined under the scheme of the Constitution. And therefore, the substitution of the participatory role of the Council of Ministers (or, the Minister concerned), with that of the Chief Justice of India in conjunction with his collegium, was just unthinkable. And secondly, that the First Judges case, was wrongly overruled, and the correct law for appointment of Judges, vis-à-vis the role of the executive, was correctly laid down in the First Judges case, by duly preserving the “independence of the judiciary”. It

was submitted, that reference to a larger Bench was inevitable, because it was not open to the respondents, to canvass the above submission, before a five-Judge Bench."

50. Mr. Harish N. Salve and Mr. T.R. Andhyarujina, learned senior counsel, addressed the Court separately. Their submissions were however similar. It was their contention, that a Constitutional Court revisits constitutional issues, from time to time. This, according to learned counsel, has to be done because the Constitution is a living document, and needed to be reinvented, to keep pace with the change of times. It was submitted, that this may not be true for other branches of law, wherein judgments are not revisited, because the Courts were expected to clearly and unambiguously follow the principle of *stare decisis,* with reference to laws dealing with private rights. Insofar as the controversy in hand is concerned, it was submitted, that the conclusions recorded by this Court in the Second and Third Judges cases, indicated doubtful conclusions, because a large number of salient facts (as have been recorded above), had not been taken into consideration. It was submitted, that expediency in a controversy like the one in hand, should be in favour of the growth of law. It was submitted, that in their view this was one such case, wherein the issue determined by this Court in the Second and Third Judges cases, needed to be re-examined by making a reference to a larger Bench. Learned counsel pointed out, that the submissions made in the different petitions filed before this Court, were not supported by the text of any constitutional provision, but only relied

on the legal position declared by this Court, in the above two cases. In such an important controversy, according to learned counsel, this Court should not be hesitant in revisiting its earlier judgments. Mr. Andhyarujina posed a query, namely, can we decide the controversy raised in the present case, without the reconsideration of the judgments in the Second and Third Judges cases? He answered the same through another query, how can appointments of Judges be by Judges? The above position was again posed differently, by putting forth a further query, can primacy rest with the Chief Justice of India in the matter of appointment of Judges to the higher judiciary?

51. Mr. Ajit Kumar Sinha, learned Senior Advocate, in support of his contention, that the matter needed to be heard by a larger Bench, placed reliance on Mineral Area Development Authority v. Steel Authority of India[23], and invited our attention to question no.5 of the reference made by this Court:

"5. Whether the majority decision in State of W.B. v. Kesoram Industries Ltd. [(2004) 10 SCC 201] could be read as departing from the law laid down in the seven-Judge Bench decision in India Cement Ltd. v. State of T.N. [(1990) 1 SCC 12)?"

It was pointed out, that the above question came to be framed because in State of West Bengal v. Kesoram Industries Ltd.[24], this Court by a majority of 4:1 had clarified the judgment rendered by a seven-Judge Bench of this Court in India Cement Ltd. v. State of Tamil Nadu[25]. This Court had to frame the above question, and refer the matter to a

[23] (2011) 4 SCC 450
[24] (2004) 10 SCC 201
[25] (1990) 1 SCC 12

nine-Judge Bench. Learned counsel, then placed reliance on Sub-Committee of Judicial Accountability v. Union of India[26], wherein this Court had observed as under:

> "5. Even if the prayer is examined as if it were an independent substantive proceeding, the tests apposite to such a situation would also not render the grant of this relief permissible. The considerations against grant of this prayer are obvious and compelling. Indeed, no co-ordinate bench of this Court can even comment upon, let alone sit in judgment over, the discretion exercised or judgment rendered in a cause or matter before another co-ordinate bench……"

In view of the above, it was contended, that this Court while examining the merits of the controversy in hand, was bound to rely on the judgments in the Second and Third Judges cases, to record its conclusions. Referring to the factual position narrated above, it was submitted, that this Court would not be in a position to effectively adjudicate on the issues canvassed, till the matter was referred to a nine-Judge Bench (or even, a still larger Bench).

52. Mr. Ranjit Kumar, learned Solicitor General of India submitted, that he would support the claim for reference to a larger Bench, by relying upon two judgments, and say no more. First and foremost, he placed reliance on the Bengal Immunity Co. Ltd. case[19], which it was pointed out, had considered the judgment in State of Bombay v. United Motors (India) Ltd.[27]. The matter, it was submitted, came to be referred to a seven-Judge Bench, to decide whether the judgment needed to be reconsidered. This process, according to learned Solicitor General, need to be adopted in the present controversy as well, so as to take a fresh call

[26] (1992) 4 SCC 97
[27] (1953) SCR 1069

on the previous judgments. Learned Solicitor General then placed reliance on Keshav Mills Co. Ltd. v. Commissioner of Income-tax, Bombay North[28], wherein a seven-Judge Bench held as under:

"In dealing with the question as to whether the earlier decisions of this Court in the New Jehangir Mills case, (1960) 1 SCR 249 and the Petlad Co. Ltd. case, (1963) Supp. SCR 871, should be reconsidered and revised by us, we ought to be clear as to the approach which should be adopted in such cases. Mr. Palkhivala has not disputed the fact that, in a proper case, this Court has inherent jurisdiction to reconsider and revise its earlier decisions, and so, the abstract question as to whether such a power vests in this Court or not need not detain us. In exercising this inherent power, however, this would naturally like to impose certain reasonable limitations and would be reluctant to entertain pleas for the reconsideration and revision of its earlier decisions, unless it is satisfied that there are compelling and substantial reasons to do so. It is general judicial experience that in matters of law involving question of constructing statutory or constitutional provisions, two views are often reasonably possible and when judicial approach has to make a choice between the two reasonably possible views, the process of decision-making is often very difficult and delicate. When this Court hears appeals against decisions of the High Courts and is required to consider the propriety or correctness of the view taken by the High Courts on any point of law, it would be open to this Court to hold that though the view taken by the High Court is reasonably possible, the alternative view which is also reasonably possible is better and should be preferred. In such a case, the choice is between the view taken by the High Court whose judgment is under appeal, and the alternative view which appears to this Court to be more reasonable; and in accepting its own view in preference to that of the High Court, this Court would be discharging its duty as a Court of Appeal. But different considerations must inevitably arise where a previous decision of this Court has taken a particular view as to the construction of a statutory provision as, for instance, s. 66(4) of the Act. When it is urged that the view already taken by this Court should be reviewed and revised, it may not necessarily be an adequate reason for such review and revision to hold that though the earlier view is a reasonably possible view, the alternative view which is pressed on the subsequent occasion is more reasonable. In reviewing and revising its earlier decision, this Court should ask itself whether in interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. When this Court decides questions of law, its decisions are, under Art. 141, binding on all courts within the territory of India, and so, it must be the

[28] (1965) 2 SCR 908

constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations: — What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court.

..... The principle of stare decisis, no doubt, cannot be pressed into service in cases where the jurisdiction of this Court to reconsider and revise its earlier decisions is invoked; but nevertheless, the normal principle that judgments pronounced by this Court would be final, cannot be ignored, and unless considerations of a substantial and compelling character make it necessary to do so, this Court should and would be reluctant to review and revise its earlier decisions. That, broadly stated, is the approach which we propose to adopt in dealing with the point made by the learned Attorney-General that the earlier decisions of this Court in the New Jehangir Mills case, (1960) 1 SCR 249 and the Petlad Co. Ltd. case, (1963) Supp. 1 SCR 871, should be reconsidered and revised.

Let us then consider the question of construing s. 66(4) of the Act. Before we do so, it is necessary to read sub-section (1), (2) and (4) of s. 66. Section 66(1) reads thus: —

"Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33, the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, require the appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court." ....."

Based on the above, it was asserted, on the basis of the factual and legal position projected by the learned Attorney General, that the position declared by this Court in the Second Judges case, as also, in the Third Judges case, was clearly erroneous. It was submitted, that the procedure evolved by this Court for appointment of Judges to the higher judiciary having miserably failed, not because of any defect in the independence of the procedure prescribed, but because of the "intra-dependence of the Judges", who took part in discharging the responsibilities vested in the collegium of Judges, certainly required a re-examination.

53. It is apparent from the submissions advanced at the hands of the learned counsel representing the Union of India and the different State Governments, that rather than choosing to respond to the assertions made with reference to the constitutional validity of the Constitution (99th Amendment) Act, 2014 and the NJAC Act, had collectively canvassed, that the present five-Judge Bench should refer the present controversy for adjudication to a Bench of nine or more Judges, which could effectively revisit, if necessary, the judgments rendered by this Court in the Second and Third Judges cases. In view of the aforesaid consideration, we are of the view, that the observations recorded by this

Court, in the Suraz India Trust case[15], as also, the fact that the same is pending before this Court, is immaterial. Consequent upon the instant determination by us, the above matter will be liable to be disposed of, in terms of the instant judgment.

IV. OBJECTION BY THE PETITIONERS, TO THE MOTION FOR REVIEW:

54. Mr. Fali S. Nariman, disagreed with the suggestion that the controversy in hand, needed to be decided by a larger Bench. It was his pointed submission, that the issue canvassed had been improperly pressed, by overlooking certain salient features, which had necessarily to be taken into consideration, before a prayer for reference to a larger Bench could be agitated. It was submitted, that all the learned counsel representing the respondents had overlooked the fact, that the interpretation of Article 124 of the Constitution, was rendered in the first instance, by a seven-Judge Bench in the First Judges case. It was pointed out, that the law declared by this Court in the First Judges case, having been doubted, the matter was referred for reconsideration, before the nine-Judge Bench, which delivered the judgment in the Second Judges case. It was pointed out, that the prayer for revisitation, which is being made at the behest of the learned counsel representing the Union of India and the different participating States, was clearly unacceptable, because the legal position declared by this Court in the First Judges case had already been revisited in the Second Judges case by a larger Constitution Bench. Not only that, it was asserted, that when certain

doubts arose about the implementation of the judgment in the Second Judges case, a Presidential Reference was made under Article 143, resulting in the re-examination of the matter, at the hands of yet another nine-Judge Bench, where the Union of India clearly expressed its stand in paragraph 11 as under:

"11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference."

It was submitted, that thereupon, the matter was again examined and the declared legal position in the Second Judges case, was reiterated and confirmed, by the judgment rendered in the Third Judges case. Premised on the aforesaid factual position, learned counsel raised a poser, namely, how many times, can this Court revisit the same question? It was asserted, that just because such a prayer seems to be the only way out, for those representing the respondents, the same need not be accepted.

55. Learned senior counsel pointed out, that the legal position with reference to appointments to the higher judiciary came to be examined and declared, for the first time, in the First Judges case, in 1981. It was submitted, that the aforesaid determination would not have been rendered, had this Court's attention been drawn to the Samsher Singh case[11], during the course of hearing, in the First Judges case. It was submitted, that the position declared by this Court in the First Judges case needed to be revisited, was realized during the hearing of the case in the Subhash Sharma case[4]. While examining the justification of the

conclusions drawn by this Court, in the First Judges case, the matter was placed for consideration, before a nine-Judge Bench. It was submitted, that all the issues, which have now been raised at the hands of learned senior counsel representing the respondents, were canvassed before the Bench hearing the Second Judges case. This Court, in the Second Judges case, clearly arrived at the conclusion, that the earlier judgment rendered in the First Judges case, did not lay down the correct law. It was submitted, that the legal position had been declared in the Second Judges case, by a majority of 7:2.

56. It was submitted, that the minority view, in the Second Judges case, was expressed by A.M. Ahmadi and M.M. Punchhi, JJ., (as they then were). Learned senior counsel, referred to the observations recorded in the Second Judges case by M.M. Punchhi, J.:

"500. Thus S.P. Gupta case, as I view it, in so far as it goes to permit the Executive trudging the express views of disapproval or non-recommendation made by the Chief Justice of India, and for that matter when appointing a High Court Judge the views of the Chief Justice of the High Court, is an act of impermissible deprival, violating the spirit of the Constitution, which cannot he approved, as it gives an unjust and unwarranted additional power to the Executive, not originally conceived of. Resting of such power with the Executive would be wholly inappropriate and in the nature of arbitrary power. The constitutional provisions conceives, as it does, plurality and mutuality, but only amongst the constitutional functionaries and not at all in the extra-constitutional ones in replacement of the legitimate ones. The two functionaries can be likened to the children of the cradle, intimately connected to their common mother — the Constitution. They recognise each other through that connection. There is thus more an obligation towards the tree which bore the fruit rather than to the fruit directly. Watering the fruit alone is pointless ignoring the roots of the tree. The view that the two functionaries must keep distances from each other is counter-productive. The relationship between the two needs to be maintained with more consideration.

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503. A centuries old Baconian example given to describe the plight of a litigant coming to a court of law comes to my mind. It was described that when the sheep ran for shelter to the bush to save itself from rain and hail, it found itself deprived of its fleece when coming out. Same fate for the institution of the Chief Justice of India. Here it results simply and purely in change of dominance. In the post - S.P. Gupta period, the Central Government i.e. the Law Minister and the Prime Minister were found to be in a dominant position and could even appoint a Judge in the higher judiciary despite his being disapproved or not recommended by the Chief Justice of India and likewise by the Chief Justice of a State High Court. Exception perhaps could be made only when the Chief Justice was not emphatic of his disapproval and was non-committed. His stance could in certain circumstance be then treated, as implied consent. These would of course be rare cases. Now in place of the aforesaid two executive heads come in dominant position, the first and the second puisne, even when disagreeing with the Chief Justice of India. A similar position would emerge when appointing a Chief Justice or a Judge of the High Court. Thus in my considered view the position of the institution of the Chief Justice being singular and unique in character under the Constitution is not capable of being disturbed. It escaped S.P. Gupta case, though in a truncated form, and not to have become totally extinct, as is being done now. Correction was required in that regard in S.P. Gupta, but not effacement."

Pointing to the opinion extracted above, it was asserted, that the action of the executive to put off the recommendation made by the Chief Justice of India (disapproving the appointment of a person, as a Judge of the High Court) would amount to an act of deprival, "violating the sprit of the Constitution". Inasmuch as, the above demeanour/expression, would give an unjust and unwarranted power to the executive, which was not intended by the framers of the Constitution. The Court went on to hold, that the vesting of such power with the executive, would be wholly inappropriate, and in the nature of arbitrary power. It was also noted, that after this Court rendered its decision in the First Judges case, the Law Minister and the Prime Minister were found to be in such a dominant position, that they could appoint a Judge to the higher

judiciary, despite his being disapproved (or, even when he was not recommended at all) by the Chief Justice of India (and likewise, by the Chief Justice of the High Court). Thus, in the view of M.M. Punchhi, J., these details had escaped the notice of the authors of the First Judges case, and corrections were required, in that regard, in the said judgment. Accordingly, it was the contention of the learned senior counsel, that one of the minority Judges had also expressed the same sentiments as had been recorded by the majority, on the subject of primacy of the judiciary in matters regulated under Articles 124, 217 and 222.

57. It was submitted, that the issue in hand was examined threadbare by revisiting the judgment rendered in the First Judges case, when this Court reviewed the matter through the Second Judges case. It was submitted, that during the determination of the Third Judges case, the then Attorney General for India had made a statement to the Bench, that the Union of India, was not seeking a review or reconsideration of the judgment in the Second Judges case. Even though, the opinion tendered by this Court, consequent upon a reference made to the Supreme Court by the President of India under Article 143, is not binding, yet a statement was made by Attorney General for India, that the Union of India had accepted as binding, the answers of this Court to the questions set out in the reference. All this, according to learned counsel, stands recorded in paragraph 11 of the judgment rendered in the Third Judges case. According to learned senior counsel, it was clearly beyond the

purview of the Union of India, to seek a revisit of the Second and Third Judges cases.

58. Besides the position expressed in the foregoing paragraphs, even according to the legal position declared by this Court, it was not open to the Union of India and the State Governments, to require this Court to examine the correctness of the judgments rendered in the Second and Third Judges cases. It was submitted, that such a course could only be adopted, when it was established beyond all reasonable doubt, that the previous judgments were erroneous. Insofar as the instant aspect of the matter is concerned, learned counsel placed reliance on Lt. Col. Khajoor Singh v. Union of India[29] (Bench of 7 Judges), wherefrom learned counsel highlighted the following:

"We have given our earnest consideration to the language of Art. 226 and the two decisions of this Court referred to above. We are of opinion that unless there are clear and compelling reasons, which cannot be denied, we should not depart from the interpretation given in these two cases and indeed from any interpretation given in an earlier judgment of this Court, unless there is a fair amount of unanimity that the earlier decisions are manifestly wrong. This Court should not, except when it is demonstrated beyond all reasonable doubt that its previous ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue."

Reference was also made to the Keshav Mills Co. Ltd. case[28], wherein a seven-Judge Bench of this Court held as under:

"It must be conceded that the view for which the learned Attorney-General contends is a reasonably possible view, though we must hasten to add that the view which has been taken by this Court in its earlier decisions is also reasonably possible. The said earlier view has been followed by this Court on several occasions and has regulated the procedure in reference proceedings in the High Courts in this country

[29] (1961) 2 SCR 828

ever since the decision of this Court in the New Jehangir Mills, (1960) 1 SCR 249, was pronounced on May 12, 1959. Besides, it is somewhat remarkable that no reported decision has been cited before us where the question about the construction of s. 66(4) was considered and decided in favour of the Attorney-General's contention. Having carefully weighed the pros and cons of the controversy which have been pressed before us on the present occasion, we are not satisfied that a case has been made out to review and revise our decisions in the case of the New Jehangir Mills and the case of the Petlad Co. Ltd. (1963) Supp. 1 SCR 871. That is why we think that the contention raised by Mr. Palkhivala must be upheld. In the result, the order passed by the High Court is set aside and the matter is sent back to the High Court with a direction that the High Court should deal with it in the light of the two relevant decisions in the New Jehangir Mills and the Petlad Co. Ltd."

While referring to Ganga Sugar Corporation Ltd. v. State of Uttar Pradesh[30], our attention was drawn to the following observations recorded by the five-Judge Bench:

"28. We are somewhat surprised that the argument about the invalidity of the Act on the score that it is with respect to a controlled industry' dies hard, despite the lethal decision of this Court in Ch. Tika Ramji case [1956] SCR 393. Enlightened litigative policy in the country must accept as final the pronouncements of this Court by a Constitution Bench unless the subject be of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong. Stare decisis is not a ritual of convenience but a rule with limited exceptions, Pronouncements by Constitution Benches should not be treated so cavalierly as to be revised frequently. We cannot devalue the decisions of this Court to brief ephemerality which recalls the opinion expressed by Justice Roberts of the U.S. Supreme Court in Smith v. Allwright 321 U.S. 649 at 669 (1944) "that adjudications of the Court were rapidly gravitating 'into the same class as a restricted railroad ticket, good for this day and train only'"."

Learned counsel while relying upon Gannon Dunkerley and Co. v. State of Rajasthan[31] (Bench of 5 Judges), referred to the following:

"28. .....We are not inclined to agree. The principles governing reconsideration of an earlier decision are settled by the various decisions of this Court. It has been laid down: "This Court should not, accept when

[30] (1980) 1 SCC 223
[31] (1993) 1 SCC 364

it is demonstrated beyond all reasonable doubt that its previous ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue." (See: Lt. Col. Khajoor Singh vs. The Union of India, (1961) 2 SCR 828). In Keshav Mills Co. Ltd. vs. CIT, (1965) 2 SCR 908, it has been observed: (SCR pp. 921-22)

"…..but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified."

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30. Having regard to the observations referred to above and the stand of the parties during the course of arguments before us, we do not consider it appropriate to reopen the issues which are covered by the decision in Builders' Association case…."

Having referred to the above judgments, it was submitted, that it was clearly misconceived for the learned counsel for the respondents, to seek a reference of the controversy, to a larger Bench for the re-examination of the decisions rendered by this Court in the Second and Third Judges cases.

59. Yet another basis for asserting, that the prayer made at the behest of the learned counsel representing the respondents for revisiting the judgments rendered by this Court in the Second and Third Judges cases, was canvassed on the ground that the observations recorded by this Court in the Samsher Singh case[11] (in paragraph 149) could neither be understood as stray observations, nor be treated as *obiter dicta*. The reasons expressed by the learned senior counsel on the above issue were as follows:

"(i) In the other case relating to the independence of the judiciary (re transfer of High Court Judges) – UOI vs. Sankal Chand Seth, (1977) 4 SCC 193 (5J) – as to whether a Judge of a High Court can be transferred to another High Court without his consent, it was decided by majority that he could be: the majority consisted of Justice Chandrachud, Justice Krishna Iyer and Justice Murtaza Fazal Ali.

(ii) The judgment of Justice Krishna Iyer (on behalf of himself and Justice Murtaza Fazal Ali in Sankal Chand Seth – [with which Bhagwati, J. said he was “entirely in agreement”] reads as follows (paras 115-116):

“115. The next point for consideration in this appeal is as to the nature, ambit and scope of consultation, as appearing in Article 222(1) of the Constitution, with the Chief Justice of India. The consultation, in order to fulfil its normative function in Article 222(1), must be a real, substantial and effective consultation based on full and proper materials placed before the Chief Justice by the Government. 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 personal difficulty or any humanitarian ground on which his transfer may not be directed. Such grounds may be of a wide range including his health or extreme family factors. It is not necessary for the Chief Justice to issue formal notice to the Judge concerned but it is sufficient — although it is not obligatory — if he ascertains these facts either from the Chief Justice of the High Court or from his own colleagues or through any other means which the Chief Justice thinks safe, fair and reasonable. Where a proposal of transfer of a Judge is made the Government must forward every possible material to the Chief Justice so that he is in a position to give an effective opinion. Secondly, although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Article 222 cannot be exercised whimsically or arbitrarily. In the case of Chandramouleshwar Prasad v. Patna High Court, (1969) 3 SCC 36, while interpreting the word "consultation" as appearing in Article 233 of the Constitution this Court observed as follows:

“Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion....We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the prosper the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation.

In Samsher Singh's case, AIR 1974 SC 2192, one of us has struck the same chord. It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India. It seems to us that the word, 'consultation' has been used in Article 222 as a matter of constitutional courtesy in view of the fact that two very high dignitaries

are concerned in the matter, namely, the President and the Chief Justice of India. Of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly."
(iii) Justice Chandrachud (in the course of his judgment) agreeing – in paragraph 41 of Sankalchand Seth followed Shamsher Singh (para 149)."

Based on the aforesaid, it was the assertion of the learned senior counsel that even if the contention advanced by the counsel for the respondents was to be accepted, namely, that the decisions rendered by this Court in the above two cases were required to be re-examined, by a reference to a larger Bench, still the observations recorded in paragraph 149 in the Samsher Singh case[11] would continue to hold the field, as the review of the same had not been sought.

V. THE CONSIDERATION:

I.

60. In the scheme of the Constitution, the Union judiciary has been dealt in Chapter IV of Part V, and the High Courts in the States, as well as, the Subordinate-courts have been dealt with in Chapters V and VI respectively, of Part VI. The provisions of Parts V and VI of the Constitution, with reference to the Union and the States judiciaries including Subordinate-courts, have arisen for interpretative determination by this Court, on several occasions. We may chronologically notice the determination rendered by this Court, with reference to the above Parts, especially those dealing with the executive participation, in the matters relating to the Union judiciary, the High Courts in the States, and the Subordinate-courts. During the course of hearing, our attention was invited to the following:

(i) Samsher Singh v. State of Punjab, (1974) 2 SCC 831 – rendered by a five-Judge Bench,

(ii) Union of India v. Sankalchand Himatlal Sheth (1977) 4 SCC 193 - rendered by a five-Judge Bench,

(iii) S.P. Gupta v. Union of India, 1981 Supp SCC 87 – rendered by a seven-Judge Bench,

(iv) Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441 – rendered by a nine-Judge Bench, and

(v) Re: Special Reference No.1 of 1998, (1998) 7 SCC 739 – rendered by a nine-Judge Bench.

This Court on no less than five occasions, has examined the controversy which we are presently dealing with, through Constitution Benches. In the Samsher Singh case[11], it was concluded, that in all conceivable cases, consultation with the highest dignitary in the Indian judiciary – the Chief Justice of India, will and should be accepted by the Government of India, in matters relatable to the Chapters and Parts of the Constitution referred to above. In case, it was not so accepted, the Court would have an opportunity to examine, whether any other extraneous circumstances had entered into the verdict of the concerned Minister or the Council of Ministers (headed by the Prime Minister), whose views had prevailed in ignoring the counsel given by the Chief Justice of India. This Court accordingly concluded, that in practice, the last word must belong to the Chief Justice of India. The above position was also further clarified, that rejection of the advice tendered by the Chief Justice of India, would ordinarily be regarded as prompted by oblique considerations, vitiating the order. In a sense of understanding, this Court in the Samsher Singh

case[11], is seen to have read the term "consultation" expressed in Articles 124 and 217 as conferring primacy to the opinion tendered by the Chief Justice. When the matter came to be examined in the Sankalchand Himatlal Sheth case[5], with reference to Article 222, another Constitution Bench of this Court, reiterated the conclusion drawn in the Samsher Singh case[11], by holding, that in all conceivable cases, "consultation" with the Chief Justice of India, should be accepted, by the Government of India. And further, that in the event of any departure, it would be open to a court to examine whether, any other circumstances had entered into the verdict of the executive. More importantly, this Court expressly recorded an ardent hope, that the exposition recorded in the Samsher Singh case[11], would not fall on deaf ears. No doubt can be entertained, that yet again, this Court read the term "consultation" as an expression, conveying primacy in the matter under consideration, to the view expressed by the Chief Justice. The solitary departure from the above interpretation, was recorded by this Court in the First Judges case, wherein it came to be concluded, that the meaning of the term "consultation" could not be understood as "concurrence". In other words, it was held, that the opinion tendered by the Chief Justice of India, would not be binding on the executive. The function of appointment of Judges to the higher judiciary, was described as an executive function, and it was held by the majority, that the ultimate power of appointment, unquestionably rested with the President. The opinion expressed by this Court in the First Judges case, was doubted in the Subhash Sharma

case[4], which led to the matter being re-examined in the Second Judges case, at the hands of a nine-Judge Bench, which while setting aside the judgment rendered in the First Judges case, expressed its opinion in consonance with the judgments rendered in the Samsher Singh case[11] and the Sankalchand Himatlal Sheth case[5]. This Court expressly concluded, in the Second Judges case, that the term "consultation" expressed in Articles 124, 217 and 222 had to be read as vesting primacy with the opinion expressed by the Chief Justice of India, based on a participatory consultative process. In other words, in matters involving Articles 124, 217 and 222, primacy with reference to the ultimate power of appointment (or transfer) was held, to be vesting with the judiciary. The above position came to be reconsidered in the Third Judges case, by a nine-Judge Bench, wherein the then learned Attorney General for India, made a statement, that the Union of India was not seeking a review, or reconsideration of the judgment in the Second Judges case, and further, that the Union of India had accepted the said judgment, and would treat the decision of this Court in the Second Judges case as binding. It is therefore apparent, that the judiciary would have primacy in matters regulated by Articles 124, 217 and 222, was conceded, by the Union of India, in the Third Judges case.

61. We have also delineated hereinabove, the views of the Judges recorded in the First Judges case, which was rendered by a majority of 4:3. Not only, that the margin was extremely narrow, but also, the views expressed by the Judges were at substantial variance, on all the issues

canvassed before the Court. The primary reason for recording the view of each of the Judges in the First Judges case hereinbefore, was to demonstrate differences in the deductions, inferences and the eventual outcome. As against the above, on a reconsideration of the matters by a larger Bench in the Second Judges case, the decision was rendered by a majority of 7:2. Not only was the position clearly expressed, there was hardly any variance, on the issues canvassed. So was the position with the Third Judges case, which was a unanimous and unambiguous exposition of the controversy. We, therefore, find ourselves not inclined to accept the prayer for a review of the Second and Third Judges cases.

62. Having given pointed and thoughtful consideration to the proposition canvassed at the hands of the learned counsel for the respondents, we are constrained to conclude, that the issue of primacy of the judiciary, in the matter of appointment and transfer of Judges of the higher judiciary, having been repeatedly examined, the prayer for a re-look/reconsideration of the same, is just not made out. This Court having already devoted so much time to the same issue, should ordinarily not agree to re-examine the matter yet again, and spend more time for an issue, already well thrashed out. But time has not been the constraint, while hearing the present cases, for we have allowed a free debate, and have taken upon ourselves the task of examining the issues canvassed. Yet, the remedy of review must have some limitations. Mr. Fali S. Nariman, learned senior counsel, is right, in his submission, that the power of review was exercised and stood expended when the First Judges

case was reviewed by a larger Bench in the Second Judges case. And for sure, it was wholly unjustified for the Union of India, which had conceded during the course of hearing of the Third Judges case, that it had accepted as binding, the decision rendered in the Second Judges case, to try and reagitate the matter all over again. The matter having been revisited, and the position having been conceded by the Union of India, it does not lie in the mouth of the Union of India, to seek reconsideration of the judicial declaration, in the Second and Third Judges cases. Therefore, as a proposition of law, we are not inclined to accept the prayer of the Union of India and the other respondents, for a re-look or review of the judgments rendered in the Second and Third Judges cases. All the same, as we have indicated at the beginning of this order, because the matter is of extreme importance and sensitivity, we will still examine the merits of the submissions advanced by learned counsel.

II.

63. The most forceful submission advanced by the learned Attorney General, was premised on the Constituent Assembly debates. In this behalf, our attention was invited to the views expressed by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar, Ananthasayanam Ayyangar and Dr. B.R. Ambedkar. It was pointed out by the learned Attorney General, that the Members of the Constituent Assembly feared, that the process of selection and appointment of Judges to the higher judiciary should not be exclusively vested with the

judiciary. The process of appointment of Judges by Judges, it was contended, was described as *Imperium in Imperio,* during the Constituent Assembly debates. In responding to the above observations, Dr. B.R. Ambedkar while referring to the contents of Article 122 (which was renumbered as Article 124 in the Constitution), had assured the Members of the Constituent Assembly, that the drafted Article had adopted the middle course, while refusing to create an *Imperium in Imperio,* in such a manner, that the "independence of the judiciary" would be fully preserved. The exact text of the response of Dr. B.R. Ambedkar, has been extracted in paragraph 30 above.

64. It was the contention of the learned Attorney General, that despite the clear intent expressed during the Constituent Assembly debates, not to create an *Imperium in Imperio*, the Second and Third Judges cases had done just that. It was submitted, that in the process of selection and appointment of Judges to the higher judiciary, being followed since 1993, Judges alone had been appointing Judges. It was also contended, that the Constitution contemplates a system of checks and balances, where each pillar of governance is controlled by checks and balances, exercised by the other two pillars. It was repeatedly emphasized, that in the present system of selection and appointment of Judges to the higher judiciary, the executive has no role whatsoever. It was accordingly the contention of the respondents, that the manner in which Articles 124, 217 and 222 had been interpreted in the Second and Third Judges cases, fell foul of the intent of the Constituent Assembly. This, according to the learned

counsel for the respondents, was reason enough, to revisit and correct, the view expressed in the Second and Third Judges cases.

65. It is not possible for us to accept the contention advanced at the hands of the learned counsel for the respondents. Consequent upon the pronouncement of the judgments in the Second and Third Judges cases, a Memorandum of Procedure for Appointment of Judges and Chief Justices to the Higher Judiciary was drawn by the Ministry of Law, Justice and Company Affairs on 30.6.1999. The Memorandum of Procedure aforementioned, is available on the website of the above Ministry. The above Memorandum of Procedure has been examined by us. In our considered view, the Memorandum of Procedure provides for a participatory role, to the judiciary as well as the political-executive. Each of the above components are responsible for contributing information, material and data, with reference to the individual under consideration. While the judicial contribution is responsible for evaluating the individual's professional ability, the political-executive is tasked with the obligation to provide details about the individual's character and antecedents. Our analysis of the Memorandum of Procedure reveals, that the same contemplates *inter alia* the following steps for selection of High Court Judges:

Step 1: The Chief Justice of the concerned High Court has the responsibility of communicating, to the Chief Minister of the State concerned, names of persons to be selected for appointment. Details are furnished to the Chief Minister, in terms of the format appended to the

memorandum. Additionally, if the Chief Minister desires to recommend name(s) of person(s) for such appointment, he must forward the same to the Chief Justice for his consideration.

Step 2: Before forwarding his recommendations to the Chief Minister, the Chief Justice must consult his senior colleagues comprised in the High Court collegium, regarding the suitability of the names proposed. The entire consultation must be in writing, and these opinions must be sent to the Chief Minister along with the Chief Justice's recommendation.

Step 3: Copies of recommendations made by the Chief Justice of the High Court, to the Chief Minister of the concerned State, require to be endorsed, to the Union Minister of Law and Justice, to the Governor of the concerned State, and to the Chief Justice of India.

Step 4: Consequent upon the consideration of the names proposed by the Chief Justice, the Governor of the concerned State, as advised by the Chief Minister, would forward his recommendation along with the entire set of papers, to the Union Minister for Law and Justice.

Step 5: The Union Minister for Law and Justice would, at his own, consider the recommendations placed before him, in the light of the reports, as may be available to the Government, in respect of the names under consideration. The proposed names, would be subject to scrutiny at the hands of the Intelligence Bureau, through the Union Ministry of Home Affairs. The Intelligence Bureau would opine on the integrity of the individuals under consideration.

Step 6: The entire material, as is available with the Union Minister for Law and Justice, would then be forwarded to the Chief Justice of India for his advice. The Chief Justice of India would, in consultation with his senior colleagues comprised in the Supreme Court collegium, form his opinion with regard to the persons recommended for appointment.

Step 7: Based on the material made available, and additionally the views of Judges of the Supreme Court (who were conversant with the affairs of the concerned High Court), the Chief Justice of India in consultation with his collegium of Judges, would forward his recommendation, to the Union Minister for Law and Justice. The above noted views of Judges of the Supreme Court, conversant with the affairs of the High Court, were to be obtained in writing, and are to be part of the compilation incorporating the recommendation.

Step 8: The Union Minister for Law and Justice would then put up the recommendation made by the Chief Justice of India, to the Prime Minister, who would examine the entire matter in consultation with the Union Minister for Law and Justice, and advise the President, in the matter of the proposed appointments.

66. We shall venture to delineate the actual consideration at the hands of the executive, in the process of selection and appointment of High Court Judges, in terms of the Memorandum of Procedure, as well as, the actual prevailing practice.

67. Steps 1 to 3 of the Memorandum of Procedure reveal, that names of persons to be selected for appointment are forwarded to the Chief

Minister and the Governor of the concerned State. On receipt of the names, the Chief Minister discharges the onerous responsibility to determine the suitability of the recommended candidate(s). Specially the suitability of the candidate(s), pertaining to integrity, social behaviour, political involvement and the like. Needless to mention, that the Chief Minister of the concerned State, has adequate machinery for providing such inputs. It would also be relevant to mention, that the consideration at the hands of the Governor of the concerned State, is also not an empty formality. For it is the Governor, through whom the file processed by the Chief Minister, is forwarded to the Union Minister for Law and Justice. There have been occasions, when Governors of the concerned State, have recorded their own impressions on the suitability of a recommended candidate, in sharp contrast with the opinion expressed by the Chief Minister. Whether or not the Governors participate in the above exercise, is quite a separate matter. All that needs to be recorded is, that there are instances where Governors have actively participated in the process of selection of Judges to High Courts, by providing necessary inputs. Record also bears testimony to the fact, that the opinion expressed by the Governor, had finally prevailed on a few occasions.

68. The participation of the executive, with reference to the consideration of a candidate recommended by the Chief Justice of High Court, continues further at the level of the Government of India. The matter of suitability of a candidate, is also independently examined at the hands of the Union of Minister for Law and Justice. The Ministry of

Law and Justice has a standard procedure of seeking inputs through the Union Ministry of Home Affairs. Such inputs are made available by the Union Ministry for Home Affairs, by having the integrity, social behaviour, political involvement and the like, examined through the Intelligence Bureau. After the receipt of such inputs, and the examination of the proposal at the hands of the Union Minister for Law and Justice, the file proceeds to the Chief Justice of India, along with the details received from the quarters referred to above.

69. After the Chief Justice of India, in consultation with his collegium of Judges recommends the concerned candidate for elevation to the High Court, the file is processed for a third time, by the executive. On this occasion, at the level of the Prime Minister of India. During the course of the instant consideration also, the participation of the executive is not an empty formality. Based on the inputs available to the Prime Minister, it is open to the executive, to yet again return the file to the Chief Justice of India, for a reconsideration of the proposal, by enclosing material which may have escaped the notice of the Chief Justice of India and his collegium of Judges. There have been occasions, when the file returned to the Chief Justice of India for reconsideration, has resulted in a revision of the view earlier taken, by the Chief Justice of India and his collegium of Judges. It is therefore clear, that there is a complete comity of purpose between the judiciary and the political-executive in the matter of selection and appointment of High Court Judges. And between them, there is clear transparency also. As views are exchanged in writing, views

and counter-views, are in black and white. Nothing happens secretly, without the knowledge of the participating constitutional functionaries.

70. It is not necessary for us to delineate the participation of the judiciary in the process of selection and appointment of Judges to the High Courts. The same is apparent from the steps contemplated in the Memorandum of Procedure, as have been recorded above. Suffice it to state, that it does not lie in the mouth of the respondents to contend, that there is no executive participation in the process of selection and appointment of Judges to High Courts.

71. The Memorandum of Procedure, for selection of Supreme Court Judges, provides for a similar participatory role to the judiciary and the political-executive. The same is not being analysed herein, for reasons of brevity. Suffice it to state, that the same is also a joint exercise, with a similar approach.

72. For the reasons recorded by us hereinabove, it is not possible for us to accept, that in the procedure contemplated under the Second and Third Judges cases, Judges at their own select Judges to the higher judiciary, or that, the system of *Imperium in Imperio* has been created for appointment of Judges to the higher judiciary. It is also not possible for us to accept, that the judgment in the Second Judges case, has interfered with the process of selection and appointment of Judges to the higher judiciary, by curtailing the participatory role of the executive, in the constitutional scheme of checks and balances, in view of the role of

the executive fully described above. We find no merit in the instant contention advanced at the hands of the respondents.

III.

73. The learned Attorney General placed emphatic reliance on the Constituent Assembly debates. It was sought to be asserted, that for an apposite understanding of the provisions of the Constitution, it was imperative to refer to the Constituent Assembly debates, which had led to formulating and composing of the concerned Article(s). Reliance was accordingly placed on the debates, which had led to the drafting of Article 124. It was submitted, that the conclusions drawn by this Court, in the Second Judges case, overlooked the fact, that what had been expressly canvassed and raised by various Members of the Constituent Assembly, and rejected on due consideration, had been adopted by the judgment in the Second Judges case. It was, therefore, the contention of the learned Attorney General, that the judgments rendered in the Second and Third Judges cases recorded a view, diagonally opposite the intent and resolve of the Constituent Assembly.

74. For reasons of brevity, it is not essential for us to extract herein the amendments sought by some of the eminent Members of the Constituent Assembly in the draft provision (to which our attention was drawn). At this stage, we need only to refer to paragraph 772 (already extracted above), from the Indra Sawhney case[9], in order to record, that it is not essential to refer to individual views of the Members, and that, the view expressed at the end of the debate by Dr. B.R. Ambedkar, would be

sufficient to understand what had prevailed, and why. Suffice it to state, that during the course of the Constituent Assembly debates, it was expressly proposed that the term "consultation" engaged in Articles 124 and 217, be substituted by the word "concurrence". The proposed amendment was however rejected by Dr. B.R. Ambedkar. Despite the above, this Court in the Second and Third Judges cases had interpreted the word "consultation" in clause (2) of Article 124, and clause (1) of Article 217, as vesting primacy in the judiciary, something that was expressly rejected, during the Constituent Assembly debate. And therefore, the contention advanced on behalf of the respondents was, that this Court had interpreted the above provisions, by turning the Constituent Assembly's intent and resolve, on its head. It was submitted, that the erroneous interpretation recorded in the Second Judges case, was writ large, even on a cursory examination of the debates.

75. We are of the view, that it would suffice, for examining the above contention, to extract herein a relevant part of the response of Dr. B.R. Ambedkar, to the above noted amendments, in the provisions noted above:

"Now, Sir, with regard to the numerous amendments that have been moved, to this article, there are really three issues that have been raised. The first is, how are the Judges of the Supreme Court to be appointed? Now, grouping the different amendments which are related to this particular matter, I find three different proposals. <u>The first proposal is that the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice</u>. That is one view. The other view is that the appointments made by the President should be subject to the confirmation of two-thirds vote by Parliament; and the third suggestion is that they should be appointed in consultation with the Council of States.

With regard to this matter, I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two different ways in which this matter is governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, offices of the Supreme Court as well as other offices of the State shall be made only with the concurrence of the Senate in the United States. It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.
With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent, person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition."

The first paragraph extracted hereinabove reveals, that there were three proposals on the issue of appointment of Judges to the Supreme Court. The first proposal was, that the Judges of the Supreme Court should not be appointed by the President in "consultation" with the Chief Justice of

India, but should be appointed with the "concurrence" of the Chief Justice of India. The second proposal was, that like in the United States, appointments of Judges to the Supreme Court, should be made by the President, subject to confirmation by the Parliament, through a two-thirds majority. The third proposal was, that Judges of the Supreme Court, should be appointed by the President in "consultation" with the Rajya Sabha.

76. The response of Dr. B.R. Ambedkar to all the suggestions needs a very close examination, inasmuch as, even though rightfully pointed out by the Attorney General, and the learned counsel representing the respondents, all the issues which arise for consideration in the present controversy, were touched upon in the above response. Before dwelling upon the issue, which strictly pertained to the appointment of Judges, Dr. B.R. Ambedkar expressed in unequivocal terms, that the unanimous opinion of the Constituent Assembly was, that "our judiciary must be independent of the executive". The same sentiment was expressed by Dr. B.R. Ambedkar while responding to K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar and Anathasayanam Ayyangar (extracted in paragraph 30 above) wherein he emphasized, that "…there is no doubt that the House in general, has agreed that the independence of the Judiciary, from the Executive should be made as clear and definite as we could make it by law…" The above assertion made while debating the issue of appointment of Judges to the Supreme Court, effectively acknowledges, that the appointment of Judges to the higher judiciary,

has a direct nexus to the issue of "independence of the judiciary". It therefore, does not lie in the mouth of the respondents to assert, that the subject of "appointment" would not fall within the domain/realm of "independence of the judiciary".

77. While responding to the second and third proposals referred to above, Dr. B.R. Ambedkar, cited the manner of appointment of Judges in Great Britain, and pointed out, that in the United Kingdom appointments were made by the Crown, without any kind of limitation, and as such, fell within the exclusive domain of the executive. Referring to the system adopted in the United States, he noted, that Judges of the Supreme Court in the United States, could only be appointed with the "concurrence" of the Senate. Suffice it to state, that the latter reference was to a process of appointment which fell within the domain of the legislature (because the Senate is a legislative chamber in the bicameral legislature of the United States, which together with the U.S. House of Representatives, make up the U.S. Congress). It is important to notice, that he rejected both the systems, where appointments to the higher judiciary were made by the executive, as well as, by the legislature. Dr. B.R. Ambedkar therefore, very clearly concluded the issue by expressing, that it would be improper to leave the appointments of Judges to the Supreme Court, to be made by the President – the executive (i.e., on the aid and advice of the Council of Ministers, headed by the Prime Minister). In the words of Dr. B.R. Ambedkar, it would be dangerous to leave such appointments in the hands of the executive of the day, without any kind

of reservation and limitation. We are therefore satisfied, that the word "consultation" expressed in Articles 124 and 217, was contemplated by the Constituent Assembly, to curtail the free will of the executive. If that was the true intent, the word "consultation" could never be assigned its ordinary dictionary meaning. And Article 124 (or Article 217) could never be meant to be read with Article 74. It is therefore not possible for us to accept, that the main voice in the matter of selection and appointment of Judges to the higher judiciary was that of the President (expressed in the manner contemplated under Article 74). Nor is it possible to accept that primacy in the instant matter rested with the executive. Nor that, the judiciary has been assigned a role in the matter, which was not contemplated by the provisions of the Constitution. It is misconceived for the respondents to assert, that the determination of this Court in the Second and Third Judges cases was not interpretative in nature, but was factually legislative. Dr. B.R. Ambedkar, therefore rejected, for the same reasons, the proposal that appointments of Judges to the Supreme Court should be made by the legislature. But the reason he expressed in this behalf was most apt, namely, the procedure of appointing Judges, by seeking a vote of approval by one or the other (or both) House(s) of Parliament would be cumbersome. More importantly, Dr. B.R. Ambedkar was suspicious and distrustful of the possibility of the appointments being directed and impacted by "political pressure" and "political consideration", if the legislature was involved. We are therefore satisfied, that when the Constituent Assembly used the term "consultation", in the

above provisions, its intent was to limit the participatory role of the political-executive in the matter of appointments of Judges to the higher judiciary.

78. It was the view of Dr. B.R. Ambedkar, that the draft article had adopted a middle course, by not making the President – the executive "the supreme and absolute authority in the matter of making appointments" of Judges. And also, by keeping out the legislators for their obvious political inclinations and biases, which render them unsuitable for shouldering the responsibility. We are therefore of the view, that the judgments in the Second and Third Judges cases cannot be blamed, for not assigning a dictionary meaning to the term "consultation". If the real purpose sought to be achieved by the term "consultation" was to shield the selection and appointment of Judges to the higher judiciary, from executive and political involvement, certainly the term "consultation" was meant to be understood as something more than a mere "consultation".

79. It is clear from the observations of Dr. B.R. Ambedkar, that the President – the executive was required by the provisions of the draft article, to consult "…persons, who were *ex hypothesi,* well qualified to give proper advice on the matter of appointment of Judges to the Supreme Court." The response of Dr. B.R. Ambedkar in a singular paragraph (extracted above), leaves no room for any doubt that Article 124, in the manner it was debated, was clearly meant to propound, that the matter of "appointments of Judges was an integral part of the

"independence of the judiciary". The process contemplated for appointment of Judges, would therefore have to be understood, to be such, as would be guarded/shielded from political pressure and political considerations.

80. The paragraph following the one, that has been interpreted in the foregoing paragraphs, also leaves no room for any doubt, that the Constituent Assembly did not desire to confer the Chief Justice of India, with a veto power to make appointments of Judges. It is therefore that a consultative process was contemplated under Article 124, as it was originally drafted. The same mandated consultation not only with the Chief Justice of India, but with other Judges of the Supreme Court and the High Courts. Viewed closely, the judgments in the Second and Third Judges cases, were rendered in a manner as would give complete effect to the observations made by Dr. B.R. Ambedkar with reference to Article 124 (as originally incorporated). It is clearly erroneous for the respondents to contend, that the consultative process postulated between the President with the other Judges of the Supreme Court or the High Courts in the States, at the discretion of the President, had been done away with by the Second and Third Judges cases. Nothing of the sort. It has been, and is still open to the President, in his unfettered wisdom, to the consultation indicated in Article 124. Additionally, it is open to the President, to rely on the same, during the course of the mandatory "consultation" with the Chief Justice of India. The above, further demonstrates the executive role in the selection of Judges to the

higher judiciary, quite contrary to the submission advanced on behalf of the respondents. We are satisfied, that the entire discussion and logic expressed during the debates of the Constituent Assembly, could be given effect to, by reading the term "consultation" as vesting primacy with the judiciary, on the matter being debated. We are also of the view, that the above debates support the conclusions drawn in the judgments of which review is being sought. For the reasons recorded hereinabove, we find no merit in the submissions advanced by the learned counsel for the respondents based on the Constituent Assembly debates.

IV.

81. The consideration in hand, also has a historic perspective. We would venture to examine the same, from experiences gained, after the Constitution became operational i.e., after the people of this country came to govern themselves, in terms of the defined lines, and the distinctiveness of functioning, set forth by the arrangement and allocation of responsibilities, expressed in the Constitution. In this behalf, it would be relevant to highlight the discussion which took place in Parliament, when the Fourteenth Report of the Law Commission on Judicial Reform (1958) was tabled for discussion, in the Rajya Sabha on 24-25.11.1959. Replying to the debate on 24.11.1959, Govind Ballabh Pant, the then Union Home Minister's remarks, as stand officially recorded, were *inter alia* as under:

"Sir, so far as appointments to the Supreme Court go, since 1950 when the Constitution was brought into force, nineteen Judges have been appointed and everyone of them was so appointed on the

recommendation of the Chief Justice of the Supreme Court. I do not know if any other alternative can be devised for this purpose. The Chief Justice of the Supreme Court is, I think, rightly deemed and believed to be familiar with the merits of his own colleagues and also of the Judges and advocates who hold leading positions in different States. So we have followed the advice of the most competent, dependable and eminent person who could guide us in this matter.
Similarly, Sir, so far as High Courts are concerned, since 1950, 211 appointments have been made and out of these except one, i.e., 210 out of 211 were made on the advice, with the consent and concurrence of the Chief Justice of India. And out of the 211, 196 proposals which were accepted by Government had the support of all persons who were connected with this matter. As Hon. Members are aware, under, I think, article 217, the Chief Justice of the High Court; the Chief Minister of the State concerned and the Governor first deal with these matters. Then they come to the Home Ministry and are referred by the Ministry to the Chief Justice of India and whatever suggestions or comments he makes are taken into consideration and if necessary, a reference is again made to the Chief Minister and the High Court. But as I said, these 196 appointments were made in accordance with the unanimous advice of the Chief Justice of the High Court, the Chief Minister of the State, the Governor and the Chief Justice of India…"

The remarks made by Ashoke Kumar Sen, the then Union Law Minister on 25.11.1959, during the course of the debate pertaining to the Law Commission Report, also need a reference:

".....it is my duty to point out to the honourable House again, as I did in the Lok Sabha when the Law Commission first sent an interim report – call it an interim report or some report before the final one – pointing out that Judges have been appointed on extraneous considerations, we gave them the facts and figures concerning all the appointments made since 1950. We drew their pointed attention to the fact that, as the Home Minister pointed out yesterday, except in the case of one Judge out of the 176 odd Judges appointed since 1950, all were appointed on the advice of the Chief Justice. With regard to the one there was difference of opinion between the local Chief Justice and the Chief Justice of India and the Government accepted the advice of the local Chief Justice rather than the Chief Justice of India. But it was not their nominee. We should have expected the Law Commission, in all fairness, to have dealt with the communication from the Government giving facts of all the appointments not only of the High Courts but of the Supreme Court. I am not saying that they were obliged to do so, but it is only a fair thing to do, namely, when you bring certain accusation in a solemn document like the Law Commission's Report, you should deal with all the arguments for and

against. We should have expected in all fairness that these facts ought to have been dealt with. Unfortunately, no facts are set out so that it is impossible to deal with. If it was said that this had been the case with A, this had been the case with B or C, it would have been easy for us to deal with them. Especially when we had given all the facts concerning the appointment of each and every Judge since 1950."

82. If one were to draw an inference, from the factual numbers indicated in the statements of the Home Minister and the Law Minister, and the inferences drawn therefrom, it is more than apparent, that the understanding of those in-charge of working the provisions of the Constitution, relating to the appointment of Judges to the higher judiciary, was that, the advice of the Chief Justice of India was to be, and was actually invariably accepted, by the President (or whosoever, exercised the power of appointment).

83. Historically again, from the perspective of judicial declarations, the practice adopted on the issue in hand, came to be so understood, in the Samsher Singh case[11], wherein this Court through a seven-Judge Bench held as under:

"In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being

ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."

84. Ever since 1974, when the above judgment was rendered, the above declaration, has held the field, as the above judgment has neither been reviewed nor set aside. It cannot be overlooked, that the observations extracted from the Samsher Singh case[11], were reaffirmed by another five-Judge Bench, in the Sankalchand Himatlal Sheth case[5], as under:

"This then, in my judgment, is the true meaning and content of consultation as envisaged by Article 222(1) of the Constitution. 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, not his concurrence with the proposed transfer. But it is necessary to reiterate what Bhagwati and Krishna Iyer, JJ., said in Shamsher Singh (supra) that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India and that the Court will have an 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 practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." (page 873). It is hoped that these words will not fall on deaf ears and since normalcy has now been restored, the differences, if any, between the executive and the judiciary will be resolved by mutual deliberation, each party treating the views of the other with respect and consideration."

85. Even in the First Judges case, P.N. Bhagwati, J., corrected his own order through a corrigendum, whereby his order, *inter alia*, came to be recorded, as under:

"Even if the opinion given by all the constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion, though being a unanimous opinion of all three constitutional functionaries, it would have great weight and if

an appointment is made by the Central Government in defiance of such unanimous opinion, it may prima facie be vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds. The same position would obtain if an appointment is made by the Central Government contrary to the unanimous opinion of the Chief Justice of the High Court and the Chief Justice of India."

From the above extract, it is apparent, that the observations recorded by this Court in paragraph 149 in the Samsher Singh case[11], were endorsed in the Sankalchand Himatlal Sheth case[5], and were also adopted in the First Judges case. The position came to be expressed emphatically in the Second and Third Judges cases, by reading the term "consultation" as vesting primacy with the judiciary, in the matter of appointments of Judges to the higher judiciary. This time around, at the hands of two different nine-Judge Benches, which reiterated the position expressed in the Samsher Singh case[11].

86. The above sequence reveals, that the executive while giving effect to the procedure, for appointment of Judges to the higher judiciary (and also, in the matter of transfer of Chief Justices and Judges from one High Court, to another), while acknowledging the participation of the other constitutional functionaries (referred to in Articles 124, 217 and 222), adopted a procedure, wherein primacy in the decision making process, was consciously entrusted with the judiciary. This position was followed, from the very beginning, after the promulgation of the Constitution, by the executive, at its own. Insofar as the legislature is concerned, it is apparent, that the issue came up for discussion, in a responsive manner when the Fourteenth Report of the Law Commission on Judicial Reforms

(1958), was discussed by the Parliament, as far back as in 1959, just a few years after the country came to be governed by the Constitution. It is apparent, that when the two Houses of the Parliament, reflected *inter alia* on Articles 124, 217 and 222, in the matter of appointment of Judges to the higher judiciary, the unanimous feeling which emerged was, that "… the advice of the most competent dependent and eminent person…" – the Chief Justice of India, had been followed rightfully. Two aspects of the parliamentary discussion, which were kept in mind when the issue was deliberated, need to be highlighted. First, that the President meant (for all practical purposes), the concerned Minister, or the Council of Ministers headed by the Prime Minister. And second, that the provisions in question envisaged only a participatory role, of the other constitutional authorities. Therefore, the above affirmation, to the primacy of the judiciary, in the matter of appointment of Judges to the higher judiciary, was consciously recorded, after having appreciated the gamut of the other participating constitutional authorities. In the matter of judicial determination, the issue was examined by a Constitution Bench of the Supreme Court as far back, as in 1974 in the Samsher Singh case[11], wherein keeping in mind the cardinal principle – the "independence of the judiciary", it was concluded, that consultation with the highest dignitary in the judiciary – the Chief Justice of India, in practice meant, that the last word must belong to the Chief Justice of India i.e., the primacy in the matter of appointment of Judges to the higher judiciary, must rest with the judiciary. The above position was maintained in the

Sankalchand Himatlal Sheth case[5] in 1977, by a five-Judge Bench, only to be altered in the First Judges case, by a seven-Judge Bench in 1981, wherein it was held, that the term "consultation" could not be read as "concurrence". The position expounded even in this case by P.N. Bhagwati, J. (as he then was), extracted above, must necessarily also be kept in mind. The earlier position was restored in 1993 by a nine-Judge Bench in the Second Judges case (which overruled the First Judges case). The position was again reaffirmed by a nine-Judge Bench, through the Third Judges case. Historically, therefore, all the three wings of governance, have uniformally maintained, that while making appointments of Judges to the higher judiciary, "independence of the judiciary" was accepted as an integral component of the spirit of the Constitution, and thereby, the term "consultation" used in the provisions under consideration, had to be understood as vesting primacy with the judiciary, with reference to the subjects contemplated under Articles 124, 217 and 222. In view of the above historical exposition, there is really no legitimate reason for the respondents to seek a review of the judgments in the Second and Third Judges cases.

V.

87. Whilst dwelling on the subject of the intention expressed by the Members of the Constituent Assembly, it is considered just and expedient, also to take into consideration the views expressed in respect of the adoption of "separation of powers" in the Constitution. When the draft prepared by the Constituent Assembly came up for debate, Dr. B.R.

Ambedkar proposed an amendment of Article 39A. It would be relevant to mention, that the aforesaid amendment, on being adopted, was incorporated as Article 50 in the Constitution (as originally enacted). It is also necessary to notice, that the Government had already commenced to function, with Jawaharlal Nehru as the Prime Minister, when the draft of the Constitution was being debated before the Constituent Assembly. His participation in the debates of the Constituent Assembly, therefore, was not only in his capacity as a Member of the Constituent Assembly, but also, as a representative of the Government of India. It is necessary to extract hereunder, the views expressed by Jawaharlal Nehru, Bakshi Tek Chand and Loknath Misra, in the above debates, relating to "separation of powers". Relevant extracts are being reproduced hereunder:

"The Honourable Pandit Jawaharlal Nehru (United Provinces: General):
.....Coming to this particular matter, the honourable speaker, Pandit Kunzru, who has just spoken and opposed the amendment of Dr. Ambedkar seems to me; if I may say so with all respect to him, to have gone off the track completely, and to suspect a sinister motive on the part of Government about this business. Government as such is not concerned with this business, but it is true that some members of Government do feel rather strongly about it and would like this House fully to consider the particular view point that Dr. Ambedkar has placed before the House today. I may say straight off that so far as the Government is concerned, it is entirely in favour of the separation of judicial and executive functions (Cheers). I may further say that the sooner it is brought about the better (Hear, hear) and I am told that some of our Provincial Governments are actually taking steps to that end now. If anyone asked me, if anyone suggested the period of three years or some other period, my first reaction would have been that this period is too long. Why should we wait so long for this? It might be brought about, if not all over India, in a large part of India, much sooner than that. At the same time, it is obvious that India at the present moment, specially during the transitional period, is a very mixed country politically, judicially, economically and in many ways, and any fixed rule of thumb

to be applied to every area may be disadvantageous and difficult in regard to certain areas. On the one hand, that rule will really prevent progress in one area, and on the other hand, it may upset the apple-cart in some other area. Therefore, a certain flexibility is desirable. Generally speaking, I would have said that in any such directive of policy, it may not be legal, but any directive of policy in a Constitution must have a powerful effect. In any such directive, there should not be any detail or time-limit etc. It is a directive of what the State wants, and your putting in any kind of time-limit therefore rather lowers it from that high status of a State policy and brings it down to the level of a legislative measure, which it is not in that sense. I would have preferred no time-limit to be there, but speaking more practically, any time-limit in this, as Dr. Ambedkar pointed out, is apt on the one hand to delay this very process in large parts of the country, probably the greater part of the country; on the other hand, in some parts where practically speaking it may be very difficult to bring about, it may produce enormous confusion. I think, therefore, that Dr. Ambedkar's amendment, far from lessening the significance or the importance of this highly desirable change that we wish to bring about, places it on a high level before the country. And I do not see myself how any Provincial or other Government can forget this Directive or delay it much. After all, whatever is going to be done in the future will largely depend upon the sentiment of the people and the future Assemblies and Parliaments that will meet. But so far as this Constitution is concerned, it gives a strong opinion in favour of this change and it gives it in a way so as to make it possible to bring it about in areas where it can be brought about - the provinces, etc. - and in case of difficulty in any particular State, etc., it does not bind them down. I submit, therefore, that this amendment of Dr. Ambedkar should be accepted. (Cheers)."

"Dr. Bakshi Tek Chand (East Punjab: General): Mr. Vice-President, Sir, I rise to lend my whole hearted support to the amendment which has been moved by Dr. Ambedkar today. The question of the separation of executive and judicial functions is not only as old as the Congress itself, but indeed it is much older. It was in the year 1852 when public opinion in Bengal began to express itself in an organised form that the matter was first mooted. That was more than thirty years before the Congress came into existence. After the Mutiny, the movement gained momentum and in the early seventies, in Bengal, under the leadership of Kisto Das Pal and Ram Gopal Ghosh, who were the leaders of public opinion in those days, definite proposals with regard to the separation of judicial and executive functions were put forward. Subsequently, the late Man Mohan Ghosh took up this matter and he and Babu Surendranath Bannerji year in and year out raised this question in all public meetings. When the Congress first met in the session in Bombay in 1885, this reform in the administration was put in the forefront of its programme. Later on, not only politicians of all schools of thought, but even retired officers who had actually spent their lives in the administration, took up

the matter and lent their support to it. I very well remember the Lucknow Congress of 1899 when Romesh Chunder Dutt, who had just retired from the Indian Civil Service, presided. He devoted a large part of his presidential address to this subject and created a good deal of enthusiasm for it. Not only that: even retired High Court Judges and Englishmen like Sir Arthur Hobhouse and Sir Arthur Wilson, both of whom subsequently became members of the Judicial Committee of the Privy Council, lent their support to this and they jointly with many eminent Indians submitted a representation to the Secretary of State for India to give immediate effect to this reform.

In the year 1912, when the Public Service Commission was appointed, Mr. Abdur Rahim, who was a Judge of the Madras High Court and was for many years the President of the Central Legislature, appended a long Minute of Dissent and therein he devoted several pages to this question.

Therefore, Sir, the matter has been before the country for nearly a century and it is time that it is given effect to immediately. One of the Honourable Members who spoke yesterday, observed that this matter was of great importance when we had a foreign Government but now the position has changed, and it may not be necessary to give effect to it. Well, an effective reply to this has been given by the Honourable the Prime Minister today. He has expressly stated that it is the policy of the Government, and it is their intention to see that this reform is given immediate effect to.

xxxx xxxx xxxx

I am glad to hear that he confirms it. This gives the quietus to these two objections which have been raised, that because of the changed circumstances, because we have attained freedom, it is no longer necessary and that the financial burden will be so heavy that it might crush provincial Governments. Both these objections are hollow.

One word more I have to say in this connection and that is, that with the advent of democracy and freedom, the necessity of this reform has become all the greater. Formerly it was only the district magistrate and a few members of the bureaucratic Government from whom interference with the judiciary was apprehended, but now, I am very sorry to say that even the Ministers in some provinces and members of political parties have begun to interfere with the free administration of justice. Those of you, who may be reading news paper reports of judicial decisions lately, must have been struck with this type of interference which has been under review in the various High Courts lately. In one province we found that in a case pending in a Criminal Court, the Ministry sent for the record and passed an order directing the trying Magistrate to stay proceedings in the case. This was something absolutely unheard of. The matter eventually went up to the High Court and the learned Chief Justice and another Judge had to pass very strong remarks against such executive interference with the administration of justice.

In another province a case was being tried against a member of the Legislative Assembly and a directive went from the District Magistrate to

the Magistrate trying the case not to proceed with it further and to release the man. The Magistrate who was a member of the Judicial Service and was officiating as a Magistrate had the strength to resist this demand. He had all those letters put on the record and eventually the matter went up to the High Court and the Chief Justice of the Calcutta High Court made very strong remarks about this matter.
Again in the Punjab, a case has recently occurred in which a Judge of the High Court, Mr. Justice Achu Ram, heard a habeas corpus petition and delivered a judgment of 164 pages at the conclusion of which he observed that the action taken by the District Magistrate and the Superintendent of Police against a member of the Congress Party was mala fide and was the result of a personal vendetta. These were his remarks.
In these circumstances, I submit that with the change of circumstances and with the advent of freedom and the introduction of democracy, it has become all the more necessary to bring about the separation of the judiciary from the executive at the earliest possible opportunity."

88. A perusal of the statements made before the Constituent Assembly, which resulted in the adoption of Article 50 of the Constitution reveals, that the first Prime Minister of this country, was entirely in favour of the separation of judicial and executive "functions". On the subject of separation, it was pointed out, that it was a directive which the Government itself wanted. The statement of Dr. Bakshi Tek Chand in the Constituent Assembly projects the position, that the idea of separating the judiciary from the executive was mooted for the first time as far back as in 1852, and that thereafter, the political leadership and also public opinion, were directed towards ensuring separation of judicial and executive functioning. He pointed out, that "year in and year out", the late Man Mohan Ghosh and Bapu Surendranath Banerji had raised the instant question, in all public meetings. And when the Congress first met in Bombay in 1885, the matter of separating the judiciary from the executive, was placed above all other issues under consideration.

Thereafter, not only the politicians of all schools of thought, but even retired officers, who had actually spent their lives in administration, had supported the issue of "separation of powers". He also highlighted, that in 1899, Romesh Chunder Dutt had devoted a large part of his presidential address to the issue. And that, retired High Court Judges and Englishmen like Sir Arthur Hobhouse and Sir Arthur Wilson (both of whom, subsequently became Members of the Judicial Committee of the Privy Council), also supported the above reform. The debate, it was pointed out, had been on going, to accept the principle of "separation of powers", whereby, the judiciary would be kept apart from the executive. He also pointed to instances, indicating interference by Ministers and members of the administration, which necessitated a complete separation of powers between the judiciary and the executive. Loknath Misra fully supported the above amendment, as a matter of principle. It is, therefore, imperative to conclude that the framers of the Constitution while drafting Article 50 of the Constitution, were clear and unanimous in their view, that there need to be a judiciary, separated from the influences of the executive.

89. Based on the consideration recorded in the immediately preceding paragraphs also, it seems to us, that the necessity of making a detailed reference to the Constituent Assembly debates in the Second Judges case, may well have been regarded, as of no serious consequence, whether it was on the subject of appointment of Judges to the higher

judiciary, as a component of "independence of the judiciary", or, on the subject of "separation of powers", whereby the judiciary was sought to be kept apart, and separate, from the executive. This Court having concluded, that the principle of "separation of powers" was expressly ingrained in the Constitution, which removes the executive from any role in the judiciary, the right of the executive to have the final word in the appointment of Judges to the higher judiciary, was clearly ruled out. And therefore, this Court on a harmonious construction of the provisions of the Constitution, in the Second and Third Judges cases, rightfully held, that primacy in the above matter, vested with the judiciary, leading to the inference, that the term "consultation" in the provisions under reference, should be understood as giving primacy to the view expressed by the judiciary, through the Chief Justice of India.

VI.

90. It is imperative to deal with another important submission advanced by the learned Attorney General, namely, that the issue of "independence of the judiciary" has nothing to do with the process of "appointment" of Judges to the higher judiciary. It was submitted, that the question of independence of a Judge arises, only after a Judge has been appointed (to the higher judiciary), for it is only then, that he is to be shielded from the executive/political pressures and influences. It was sought to be elaborated, that Judges of the higher judiciary, immediately after their appointment were so well shielded, that there could be no

occasion of the "independence of the judiciary" being compromised, in any manner, either at the hands of the executive, or of the legislature.

91. Whilst advancing the instant contention, it was the pointed assertion of the learned Attorney General, that neither of the judgments rendered in the Second and Third Judges cases had held, that the "selection and appointment" of Judges, to the higher judiciary, would fall within the purview of "independence of the judiciary". It was therefore his contention, that it was wrongful to assume, on the basis of the above two judgments, that the question of "appointment" of Judges to the higher judiciary would constitute a component of the "basic structure" of the Constitution. It was the contention of the learned Attorney General, that the Parliament, in its wisdom, had now amended the Constitution, admittedly altering the process of "selection and appointment" of Judges to the higher judiciary (including their transfer). It was further contended, that the process contemplated through the Constitution (99th Amendment) Act, coupled with the NJAC Act, was such, that it cannot be considered to have interfered with, or impinged upon, the "independence of the judiciary", and thus viewed, it would not be rightful to conclude, that the impugned constitutional amendment, as also the NJAC Act, were *per se* violative of the "basic structure".

92. We may preface our consideration by noticing, that every two years since 1985, a conference of Supreme Court Chief Justices from the Asia Pacific region, has been held by the Judicial Section of the Law Association for Asia and the Pacific. Since its inception, the conference

has served as a useful forum for sharing information and discussing issues of mutual concern among Chief Justices of the region. At its 6th Conference held in Beijing in 1997, 20 Chief Justices adopted a joint Statement of Principles of the "Independence of the Judiciary". This statement was further refined during the 7th Conference of Chief Justices held in Manila, wherein it was signed by 32 Chief Justices from the Asia Pacific region. The Beijing Statement of Principles of the "Independence of the Judiciary" separately deals with appointment of Judges. The position expressed in the above statement with reference to "appointment" of Judges is extracted hereunder:

"Appointment of Judges
11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.
12.The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.
13. In the selection of judges there must no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, expect that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.
14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the judiciary is a career service; in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, difference procedures and safeguards may be adopted to ensure the proper appointment of judges.
15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives the higher Judiciary and the independent legal

profession as a means of ensuring that judicial competence, integrity and independence are maintained.
16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.
17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience."

Therefore to contend, that the subject of "appointment" is irrelevant to the question of the "independence of the judiciary", must be considered as a misunderstanding of a well recognized position.

93. Whilst dealing with the instant contention, we will also examine if this Court in the Second and Third Judges cases, had actually dealt with the issue, whether "appointment" of Judges to the higher judiciary, was (or, was not) an essential component of the principle of "independence of the judiciary"? Insofar as the instant aspect of the matter is concerned, reference in the first instance, may be made to the Second Judges case, wherein S. Ratnavel Pandian, J., while recording his concurring opinion, supporting the majority view, observed as under:

"47. The above arguments, that the independence of judiciary is satisfactorily secured by the constitutional safeguard of the office that a judge holds and guarantees of the service conditions alone and not beyond that, are in our considered opinion, untenable. In fact we are unable even to conceive such an argument for the reason to be presently stated."

In addition to the above extract, it is necessary to refer to the following observations of Kuldip Singh, J.:

"335. Then the question which comes up for consideration is, can there be an independent judiciary when the power of appointment of judges vests in the executive? To say yes, would be illogical...."

From the above it is clear, that the issue canvassed by the learned Attorney General, was finally answered by the nine-Judge Bench, which disposed of the Second Judges case by holding, that if the power of "appointment" of Judges, was left to the executive, the same would breach the principle of the "independence of the judiciary". And also conversely, that providing safeguards after the appointment of a Judge to the higher judiciary, would not be sufficient to secure "independence of the judiciary". In the above view of the matter, it is necessary to conclude, that the "manner of selection and appointment" of Judges to the higher judiciary, is an integral component of "independence of the judiciary". The contentions advanced on behalf of the Union of India, indicating the participation of the President and the Parliament, in the affairs of the judiciary, would have no bearing on the controversy in hand, which primarily relates to the issue of "appointment" of Judges to the higher judiciary. And, extends to transfer of Chief Justices and Judges from one High Court, to another. The fact that there were sufficient safeguards, to secure the independence of Judges of the higher judiciary after their "appointment", and therefore, there was no need to postulate, that in the matter of "appointment" also, primacy need not be in the hands of the judiciary, is also not acceptable. It is quite another matter, whether the manner of selection and appointment of Judges, introduced through the Constitution (99th Amendment) Act coupled with the NJAC Act, can indeed be considered to be violative of "independence of the judiciary". This aspect, shall be examined and determined

independently, while examining the merits of the challenge raised by the petitioners.

VII.

94. A perusal of the provisions of the Constitution reveals, that in addition to the appointment of the Chief Justice of India and Judges of the Supreme Court, under Article 124, the President has also been vested with the authority to appoint Judges and Chief Justices of High Courts under Article 217. In both the above provisions, the mandate for the President, *inter alia* is, that the Chief Justice of India "shall always be consulted", (the first proviso, under Article 124(2), as originally enacted), and with reference to Judges of the High Court, the language engaged in Article 217 was, that the President would appoint Judges of High Courts "after consultation with the Chief Justice of India" (per sub-Article (1) of Article 217).

95. To understand the term "consultation" engaged in Articles 124 and 217, it is essential to contrast the above two provisions, with other Articles of the Constitution, whereunder also, the President is mandated to appoint different constitutional authorities. Reference in this behalf may be made to the appointment of the Comptroller and Auditor-General of India, under Article 148. The said provision vests the authority of the above appointment with the President, without any consultative process. The position is exactly similar with reference to appointment of Governors of States, under Article 155. The said provision also contemplates appointments, without any consultative process. The

President is also vested with the authority, to appoint the Chairman and four Members of the Finance Commission, under Article 280. Herein also, the power is exclusively vested with the President, without any consultative process. The power of appointment of Chairman and other Members of the Union Public Service Commission, is also vested with the President under Article 316. The aforesaid appointment also does not contemplate any deliberation, with any other authority. Under Article 324, the power of appointment of Chief Election Commissioner and Election Commissioners is vested with the President exclusively. Likewise, is the case of appointment of Chairperson, Vice-Chairperson and Members of the National Commission for Scheduled Castes under Article 338, and Chairperson, Vice-Chairperson and other Members of the National Commission for Scheduled Tribes under Article 338A. Under the above stated provisions, the President has the exclusive authority to make appointments, without any deliberation with any other authority. Under Article 344, the President is also vested with the authority to appoint Chairman and other Members to the Commission of Parliament on Official Languages. The instant provision also does not provide for any consultative process before such appointment. The same position emerges from Article 350B, whereunder the President is to appoint a Special Officer for Linguistic Minorities. Herein too, there is no contemplation of any prior consultation.

96. It is apparent that the Council of Ministers, with the Prime Minister as its head, is to "aid and advise" the President in the exercise of his

functions. This position is not disputed by the learned counsel representing the respondents. Interpreted in the above manner, according to the learned Attorney General, in exercising his responsibilities under Articles 124, 217, 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, the President is only a figurative authority, whereas truthfully, the authority actually vests in the Council of Ministers headed by the Prime Minister. And as such, for all intents and purposes, the authority vested in the President for appointing different constitutional authorities, truly means that the power of such appointment is vested in the executive.

97. If one were to understand the words, as they were expressed in Article 74, in our considered view, it would be difficult to conclude, that "aid and advice" can be treated synonymous with a binding "direction", an irrevocable "command" or a conclusive "mandate". Surely, the term "aid and advice" cannot individually be construed as an imperative dictate, which had to be obeyed under all circumstances. In common parlance, a process of "consultation" is really the process of "aid and advice". The only distinction being, that "consultation" is obtained, whereas "aid and advice" may be tendered. On a plain readingtherefore, neither of the two ("aid and advice" and "consultation") can be understood to convey, that they can be of a binding nature. We are of the view, that the above expressions were used, keeping in mind the exalted position which the President occupies (as the first citizen, of the country). As the first citizen, it would have been discourteous to provide,

that he was to discharge his functions in consonance with the directions, command, or mandate of the executive. Since, both the expressions ("aid and advice" and "consultation"), deserve the same interpretation, if any one of them is considered to be mandatory and binding, the same import with reference to the other must follow. Through the Constitution (Forty-second Amendment) Act, 1976, Article 74 came to be amended, and with the insertion of the words "shall … act in accordance with such advice", the President came to be bound, to exercise his functions, in consonance with the "aid and advice" tendered to him, by the Council of Ministers headed by the Prime Minister. The instant amendment, in our view, has to be considered as clarificatory in character, merely reiterating the manner in which the original provision ought to have been understood.

98. If "aid and advice" can be binding and mandatory, surely also, the term "consultation", referred to in Articles 124 and 217, could lead to the same exposition. The President of India, being the first citizen of the country, is entitled to respectability. Articles 124 and 217, were undoubtedly couched in polite language, as a matter of constitutional courtesy, extended to the first citizen of the country. It is important to notice, that the first proviso under Article 124(2) clearly mandates, that the Chief Justice of India "shall always" be consulted. It was a reverse obligation, distinguishable from Article 74. Herein, the President was obliged to consult the Chief Justice of India, in all matters of appointment of Judges to the Supreme Court. The process of

"consultation" contemplated therein, has to be meaningfully understood. If it was not to be so, the above provision could have been similarly worded as those relating to the appointment of the Comptroller and Auditor-General of India, Governors of States, Chairman and Members of the Finance Commission, Chairman and Members of the Union Public Service Commission, Chief Election Commissioner and Election Commissioners, Chairperson and Vice Chairperson and Members of the National Commission for Scheduled Castes, as also, those of the National Commission for Scheduled Tribes. This contrast between Articles 124 and 217 on the one hand, and the absence of any "consultation", with reference to the appointments contemplated under Articles 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, leaves no room for any doubt, that the above "consultation" was not a simplicitor "consultation". And since, the highest functionary in the judicial hierarchy was obliged to be consulted, a similar respectability needed to be bestowed on him. What would be the worth of the mandatory "consultation", with the Chief Justice of India, if his advice could be rejected, without any justification? It was therefore, concluded by this Court, that in all conceivable cases, consultation with the highest dignitary in the judiciary – the Chief Justice of India, will and should be accepted. And, in case it was not so acceptd, it would be permissible to examine whether such non acceptance was prompted by any oblique consideration. Rightfully therefore, the term "consultation" used in Articles 124 and 217, as they were originally enacted meant, that primacy had to be given to the

opinion tendered by the Chief Justice of India, on the issues for which the President was obliged to seek such "consultation". The submission advanced on behalf of the respondents, cannot be accepted, also for the reason, that the interpretation placed by them on the term "consultation", would result in an interpretation of Articles 124 and 217, as at par with Articles 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, wherein the term "consultation" had not been used. Such an interpretation, would be clearly unacceptable. Since the manner of appointment of Judges to the higher judiciary, is in contrast with that of the constitutional authorities referred to by the learned Attorney General, the submission advanced on behalf of the respondents with reference to the other constitutional authorities cannot have a bearing on the present controversy.

99. We would unhesitatingly accept and acknowledge the submission made by the learned Attorney General, as has been noticed hereinabove, but only limited to situations of appointment contemplated under various Articles of the Constitution, where the power of appointment is exclusively vested with the President. As such, there is no room for any doubt that the provisions of the Constitution, with reference to the appointment of Judges to the higher judiciary, contemplated that the "aid and advice" (– the "consultation") tendered by the Chief Justice of India, was entitled to primacy, on matters regulated under Articles 124 and 217 (as also, under Article 222).

VIII.

100. In continuation with the conclusions drawn in the foregoing analysis, the matter can be examined from another perspective as well. The term "consultation" (in connection with, appointments of Judges to the higher judiciary) has also been adopted in Article 233 on the subject of appointment of District Judges. Under Article 233, the power of appointment is vested with the Governor of the concerned State, who is empowered to make appointments (including promotions) of District Judges. This Court, through a five-Judge Bench, in Registrar (Admn.), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy[32], has held, that recommendations made by the High Court in the consultative process envisaged under Article 233, is binding on the Governor. In the face of the aforestated binding precedent, on a controversy, which is startlingly similar to the one in hand, and has never been questioned, it is quite ununderstandable how the Union of India, desires to persuade this Court, to now examine the term "consultation" differently with reference to Articles 124 and 217, without assailing the meaning given to the aforesaid term, with reference to a matter also governing the judiciary.

VI. <u>CONCLUSION:</u>

101. Based on the conclusions drawn hereinabove, while considering the submissions advanced by the learned counsel for the rival parties, as have been recorded in "V – The Consideration", we are of the view, that

[32] (1999) 7 SCC 725

the prayer made at the hands of the learned counsel for the respondents, for revisiting or reviewing the judgments rendered by this Court, in the Second and Third Judges cases, cannot be acceded to. The prayer is, accordingly, hereby declined.

.....J.
(Jagdish Singh Khehar)

New Delhi;
October 16, 2015.

THE ORDER ON MERITS

I. PREFACE:

1. It is essential to begin the instant order by a foreword, in the nature of an explanation. For, it would reduce the bulk of the instant order, and obviate the necessity to deal with issues which have been considered and dealt with, while hearing the present set of cases.

2. The question which arises for consideration in the present set of cases pertains to the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 [hereinafter referred to as the Constitution (99th Amendment) Act], as also, that of the National Judicial Appointments Commission Act, 2014 (hereinafter referred to as, the NJAC Act). The core issue that arises for consideration, relates to the validity of the process of selection and appointment of Judges to the higher judiciary (i.e., Chief Justices and Judges of the High Courts and the Supreme Court), and transfer of Chief Justices and Judges of one High Court, to another.

3. This is the third order in the series of orders passed by us, while adjudicating upon the present controversy. The first order, dealt with the prayer made at the Bar, for the "recusal" of one of us (J.S. Khehar, J.) from hearing the present set of cases. As and when a reference is made to the above first order, it would be adverted to as the "Recusal Order". The second order, considered the prayer made by the learned Attorney General and some learned counsel representing the respondents, seeking a "reference" of the present controversy, to a nine-Judge Bench (or even,

to a further larger Bench) for re-examining the judgment rendered in Supreme Court Advocates-on-Record Association v. Union of India[2] (hereinafter referred to as, the Second Judges case), and the advisory opinion in Re: Special Reference No.1 of 1998[3] (hereinafter referred to, as the Third Judges case), for the alleged object of restoring and re-establishing, the declaration of the legal position, expounded by this Court in S.P. Gupta v. Union of India[1] (hereinafter referred to as, the First Judges case). As and when a reference is made to the above second order, it would be mentioned as the "Reference Order".

4. We would, therefore, not examine the issues dealt with in the Recusal Order and/or in the Reference Order, even though they may arise for consideration yet again, in the process of disposal of the present controversy on merits. As and when a reference is made to the instant third order, examining the "merits" of the controversy, it would be adverted to as the "Order on Merits".

II. PETITIONERS' CONTENTIONS, ON MERITS:

5. On the subject of amending the Constitution based on the procedure provided for in Article 368, it was submitted by Mr. Fali S. Nariman, Senior Advocate, that the power of amendment of the Constitution is not a plenary power. It was pointed out, that the above power was limited, inasmuch as, the power of amendment did not include the power of amending the "core" or the "basic structure" of the Constitution. In this behalf, learned counsel placed reliance on Minerva

Mills Ltd. v. Union of India[33], wherein majority view was expressed through Y.V. Chandrachud, CJ., as under:

"17. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."

In the above judgment, the minority view was recorded by P.N. Bhagwati, J., (as he then was), as under:

"88. That takes us to clause (5) of Article 368. This clause opens with the words "for the removal of doubts" and proceeds to declare that there shall be no limitation whatever on the amending power of Parliament under Article 368. It is difficult to appreciate the meaning of the opening words "for the removal of doubts" because the majority decision in Kesavananda Bharati case : AIR 1973 SC 1461 clearly laid down and left no doubt that the basic structure of the Constitution was outside the competence of the amendatory power of Parliament and in Indira Gandhi case : [1976] 2 SCR 341, all the judges unanimously accepted theory of the basic structure as a theory by which the validity of the amendment impugned before them, namely, Article 329-A(4) was to be judged. Therefore, after the decisions in Kesavananda Bharati case and Indira Gandhi case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and clause (5) could not remove the doubt which did not exist. What clause (5), really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basic structure. That would clearly be in excess of the limited amending power possessed by Parliament. The Constitution has conferred only a limited amending power on Parliament so that it cannot damage or destroy the basic structure of the Constitution and Parliament

[33] (1980) 3 SCC 625

cannot by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to Parliament to enlarge the limited amending power conferred upon it into an absolute power of amendment, then it was meaningless to place a limitation on the original power of amendment. It is difficult to appreciate how Parliament having a limited power of amendment can get rid of the limitation by exercising that very power and convert it into an absolute power. Clause (5) of Article 368 which sought to remove the limitation on the amending power of Parliament by making it absolute must therefore be held to be outside the amending power of Parliament. There is also another ground on which the validity of this clause can be successfully assailed. This clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure. I would in the circumstances hold clause (5) of Article 368, to be unconstitutional and void."

With reference to the same proposition, learned counsel placed reliance on Kihoto Hollohan v. Zachillhu[34]. It was submitted, that the acceptance of the principle of "basic structure" of the Constitution, resulted in limiting the amending power postulated in Article 368.

6. According to the learned counsel, it is now accepted, that "independence of the judiciary", "rule of law", "judicial review" and "separation of powers" are components of the "basic structure" of the Constitution. In the above view of the matter, provisions relating to appointment of Judges to the higher judiciary, would have to be such, that the above principles would remain unscathed and intact. It was submitted, that any action which would have the result of making appointment of the Judges to the Supreme Court, and to the High Courts, subservient to an agency other than the judiciary itself, namely, by allowing the executive or the legislature to participate in their

[34] 1992 Supp (2) SCC 651

selection and appointment, would render the judiciary subservient to such authority, and thereby, impinge on the "independence of the judiciary".

7. Learned counsel invited the Court's attention to the 1st Law Commission Report on "Reform of Judicial Administration" (14th Report of the Law Commission of India, chaired by M.C. Setalvad), wherein it was debated, that by enacting Articles 124 and 217, the framers of the Constitution had endeavoured to put the Judges of the Supreme Court "above executive control". Paragraph 4 of the said Report is being extracted hereunder:

"(Appointment and removal of Judges)
4. Realizing the importance of safeguarding the independence of the judiciary, the Constitution has provided that a Judge of the Supreme Court shall be appointed by the President in consultation with the Chief Justice of India and after consultation with such of the other Judges of the Supreme Court and the High Courts as he may deem necessary. He holds office till he attains the age of 65 years and is irremovable except on the presentation of an address by each House of Parliament passed by a specified majority on the ground of proved misbehaviour or incapacity. Thus has the Constitution endeavoured to put Judges of the Supreme Court above executive control."

8. It was submitted, that "independence of the judiciary" had been held to mean and include, insulation of the higher judiciary from executive and legislative control. In this behalf, reference was made to Union of India v. Sankalchand Himatlal Sheth[5], wherein this Court had observed:

"50. Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great Judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential

features, judicial independence is prized as a basic value and so natural . and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise. But this has been accomplished after a long fight culminating in the Act of Settlement, 1688. Prior to the enactment of that Act, a Judge in England held tenure at the pleasure of the Crown and the Sovereign could dismiss a Judge at his discretion, if the Judge did not deliver judgments to his liking. No less illustrious a Judge than Lord Coke was dismissed by Charles I for his glorious and courageous refusal to obey the King's writ *de non procedendo rege inconsulto* commanding him to step or to delay proceedings in his Court. The Act of Settlement, 1688 put it out of the power of the Sovereign to dismiss a Judge at pleasure by substituting 'tenure during good behaviour' for 'tenure at pleasure'. The Judge could then say, as did Lord Bowen so eloquently:
These are not days in which any English Judge will fail to assert his right to rise in the proud consciousness that justice is administered in the realms of Her Majesty the Queen, immaculate, unspotted, and unsuspected. There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour or disfavour can start the pulse of an English Judge upon the Bench, or move by one hair's breadth the even equipoise of the scales of justice.
The framers of our Constitution were aware of these constitutional developments in England and they were conscious of our great tradition of judicial independence and impartiality and they realised that the need for securing the independence of the judiciary was even greater under our Constitution than it was in England, because ours is a federal or quasi-federal Constitution which confers fundamental rights, enacts other constitutional limitations and arms the Supreme Court and the High Courts with the power of judicial review and consequently the Union of India and the States would become the largest single litigants before the Supreme Court and the High Courts. Justice, as pointed out by this Court in Shamsher Singh v. State of Punjab, (1974) 2 SCC 831, can become "fearless and free only if institutional immunity and autonomy are guaranteed". The Constitution-makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control. I shall briefly refer to these provisions to show how great was the anxiety of the constitution-makers to ensure the independence of the superior judiciary and with what meticulous care they made provisions to that end."

In continuation of the instant submission, learned counsel placed reliance on the Second Judges case, and drew our attention to the following observations recorded by S. Ratnavel Pandian, J.:

"54. Having regard to the importance of this concept the Framers of our Constitution having before them the views of the Federal Court and of the High Court have said in a memorandum:

"We have assumed that it is recognised on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive ... in making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independent and efficient judiciary has been steadily kept in view. (vide B. Shiva Rao: The Framing of India's Constitution, Volume I-B, p. 196)

55. In this context, we may make it clear by borrowing the inimitable words of Justice Krishna Iyer, "Independence of the judiciary is not genuflexion, nor is it opposition of Government". Vide Mainstream – November 22, 1980 and at one point of time Justice Krishna Iyer characterised this concept as a "Constitutional Religion".

56. Indisputably, this concept of independence of judiciary which is inextricably linked and connected with the constitutional process related to the functioning of judiciary is a "fixed-star" in our constitutional consultation and its voice centres around the philosophy of the Constitution. The basic postulate of this concept is to have a more effective judicial system with its full vigour and vitality so as to secure and strengthen the imperative confidence of the people in the administration of justice. It is only with the object of successfully achieving this principle and salvaging much of the problems concerning the present judicial system, it is inter alia, contended that in the matter of appointment of Judges to the High Courts and Supreme Court 'primacy' to the opinion of the CJI which is only a facet of this concept, should be accorded so that the independence of judiciary is firmly secured and protected and the hyperbolic executive intrusion to impose its own selectee on the superior judiciary is effectively controlled and curbed."

And from the same judgment, reference was made to the following observations of Kuldip Singh, J.:

"335. Then the question which comes up for consideration is, can there be an independent judiciary when the power of appointment of judges vests in the executive? To say yes, would be illogical. The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. 'Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the Framers of the Constitution could have

never intended to give this power to the executive. Even otherwise the Governments - Central or the State - are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication before the Apex Court. The executive – in one form or the other - is the largest single litigant before the courts. In this view of the matter the judiciary being the mediator - between the people and the executive - the Framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the executive. This Court in S.P. Gupta v. Union of India, 1981 Supp SCC 87 proceeded on the assumption that the independence of judiciary is the basic feature of the Constitution but failed to appreciate that the interpretation, it gave, was not in conformity with broader facets of the two concepts - 'independence of judiciary' and 'judicial review' - which are interlinked."

Based on the above conclusions, it was submitted, that "independence of the judiciary" could be maintained, only if appointments of Judges to the higher judiciary, were made by according primacy to the opinion of the Chief Justice, based on the decision of a collegium of Judges. Only then, the executive and legislative intrusion, could be effectively controlled and curbed.

9. Learned counsel, then ventured to make a reference to the frequently quoted speech of Dr. B.R. Ambedkar (in the Constituent Assembly on 24.5.1949). It was submitted, that the above speech was duly considered in the Second Judges case, wherein this Court concluded as under:

"389. Having held that the primacy in the matter of appointment of Judges to the superior courts vests with the judiciary, the crucial question which arises for consideration is whether the Chief Justice of India, under the Constitution, acts as a "persona designata" or as the leader - spokesman for the judiciary.
390. The constitutional scheme does not give primacy to any individual. Article 124(2) provides consultation with the Chief Justice of India, Judges of the Supreme Court and Judges of the High Courts. Likewise

Article 217(1) talks of Chief Justice of India and the Chief Justice of the High Court. Plurality of consultations has been clearly indicated by the Framers of the Constitution. On first reading one gets the impression as if the Judges of the Supreme Court and High Courts have not been included in the process of consultation under Article 217(1) but on a closer scrutiny of the constitutional scheme one finds that this was not the intention of the Framers of the Constitution. There is no justification, whatsoever, for excluding the puisne Judges of the Supreme Court and of the High Court from the "consultee zone" under Article 217(1) of the Constitution.

391. According to Mr Nariman it would not be a strained construction to construe the expressions "Chief Justice of India" and "Chief Justice of the High Courts" in the sense of the collectivity of Judges, the Supreme Court as represented by the Chief Justice of India and all the High Courts (of the States concerned) as represented by the Chief Justice of the High Court. A bare reading of Articles 124(2) and 217(1) makes it clear that the Framers of the Constitution did not intend to leave the final word, in the matter of appointment of Judges to the superior Courts, in the hands of any individual howsoever high he is placed in the constitutional hierarchy. Collective wisdom of the consultees is the sine qua non for such appointments. Dr B.R. Ambedkar in his speech dated May 24, 1949 in the Constituent Assembly explaining the scope of the draft articles pertaining to the appointment of Judges to the Supreme Court …

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392. Dr Ambedkar did not see any difficulty in the smooth operation of the constitutional provisions concerning the appointment of Judges to the superior Courts. Having entrusted the work to high constitutional functionaries the Framers of the Constitution felt assured that such appointments would always be made by consensus. It is the functioning of the Constitution during the past more than four decades which has brought the necessity of considering the question of primacy in the matter of such appointments. Once we hold that the primacy lies with the judiciary, then it is the judiciary as collectivity which has the primal say and not any individual, not even the Chief Justice of India. If we interpret the expression "the Chief Justice of India" as a "persona designata" then it would amount "to allow the Chief Justice practically veto upon the appointment of Judges" which the Framers of the Constitution in the words of Dr Ambedkar never intended to do. We are, therefore, of the view that the expressions "the Chief Justice of India" and the "Chief Justice of the High Court" in Articles 124(2) and 217(1) of the Constitution mean the said judicial functionaries as representatives of their respective courts."

In conjunction with the observations extracted hereinabove, the Court's attention was also invited to the following further conclusions:

"466. It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Constitution; and an adjunct of this principle is the absence of absolute power in one individual in any sphere of constitutional activity. The possibility of intrusion of arbitrariness has to be kept in view, and eschewed, in constitutional interpretation and, therefore, the meaning of the opinion of the Chief Justice of India, in the context of primacy, must be ascertained. A homogenous mixture, which accords with the constitutional purpose and its ethos, indicates that it is the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' which is given greater significance or primacy in the matter of appointments. In other words, the view of the Chief Justice of India is to be expressed in ,the consultative process as truly reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation. In actual practice, this is how the Chief Justice of India does, and is expected to function so that the final opinion expressed by him is not merely his individual opinion, but the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function.

467. In view of the primacy of judiciary in this process, the question next, is of the modality for achieving this purpose. The indication in the constitutional provisions is found from the reference to the office of the Chief Justice of India, which has been named for achieving this object in a pragmatic manner. The opinion of the judiciary 'symbolised by the view of the Chief Justice of India', is to be obtained by consultation with the Chief Justice of India; and it is this opinion which has primacy.

468. The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any individual, be he the Chief Justice of India or the Prime Minister."

10. It was the emphatic contention of the learned counsel, that the conclusions recorded by this Court in the Second Judges case, had been accepted by the executive and the legislature. It was acknowledged, that in the matter of appointment of Judges to the higher judiciary, primacy would vest with the judiciary, and further that, the opinion of the judiciary would have an element of plurality. This assertion was sought to be further established, by placing reliance on the Third Judges case. It was submitted, that the conclusions of the majority judgment, in the Second Judges case, were reproduced in paragraph 9 of the Third Judges case, and thereupon, this Court recorded the statement of the then Attorney General, that through the Presidential Reference, the Union of India was not seeking, a review or reconsideration, of the judgment in the Second Judges case. And that, the Union of India had accepted the above majority judgment, as binding. In this context, paragraphs 10 to 12 of the Third Judges case, which were relied upon, are being reproduced below:

"10. We have heard the learned Attorney General, learned counsel for the interveners and some of the High Courts and the Advocates General of some States.

11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case (1993) 4 SCC 441 and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.

12. The majority view in the Second Judges case (1993) 4 SCC 441 is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other Judges who are traditionally associated with this function". The

opinion of the Chief Justice of India "so given has primacy in the matter of all appointments". For an appointment to be made, it has to be "in conformity with the final opinion of the Chief Justice of India formed in the manner indicated". It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon."

11. Learned counsel invited the Court's attention, to the third conclusion drawn in Madras Bar Association v. Union of India[35], which is placed below:

"136.(iii) The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted."

Learned counsel then asserted, that the "basic structure" of the Constitution would stand violated if, in amending the Constitution and/or enacting legislation, Parliament does not ensure, that the body newly created, conformed with the salient characteristics and the standards of the body sought to be substituted. It was asserted, that the salient features of the existing process of appointment of Judges to the higher judiciary, which had stood the test of time, could validly and constitutionally be replaced, but while substituting the prevailing procedure, the salient characteristics which existed earlier, had to be preserved. By placing reliance on Articles 124 and 217, it was asserted, that the above provisions, as originally enacted, were explained by decisions of this Court, starting from 1974 in Samsher Singh v. State of Punjab[11], followed by the Sankalchand Himatlal Sheth case[5] in 1977, and

[35] (2014) 10 SCC 1

the Second Judges case in 1993, and finally endorsed in 1998 by the Third Judges case. It was submitted, that four Constitution Benches of the Supreme Court, had only affirmed the practice followed by the executive since 1950 (when the people of this country, agreed to be governed by the Constitution). It was pointed out, that the process of appointment of Judges to the higher judiciary, had continued to remain a participatory consultative process, wherein the initiation of the proposal for appointment of a Judge to the Supreme Court, was by the Chief Justice of India; and in the case of appointment of Judges to High Courts, by the Chief Justice of the concerned High Court. And that, for transfer of a Judge/Chief Justice of a High Court, to another High Court, the proposal was initiated by the Chief Justice of India. It was contended, that in the process of taking a decision on the above matters (of appointment and transfer), the opinion of the judiciary was symbolized through the Chief Justice of India, and the same was based on the decision of a collegium of Judges, since 1993 – when the Second Judges case was decided. The only exception to the above rule, according to learned counsel, was when the executive, based on stated strong cogent reasons (disclosed to the Chief Justice of India), felt otherwise. However, if the stated reasons, as were disclosed to the Chief Justice of India, were not accepted, the decision of a collegium of Judges on reiteration, would result in the proposed appointment/transfer. This, according to learned counsel, constituted the earlier procedure under Articles 124 and 217. The aforesaid procedure, was considered as

sufficient, to preserve the "independence of the judiciary".

12. According to learned counsel, it needed to be determined, whether the NJAC now set up, had the same or similar characteristics, in the matter of appointments/transfers, which would preserve the "independence of the judiciary"? Answering the query, learned counsel was emphatic, that the primacy of the judiciary, had been totally eroded through the impugned constitutional amendment. For the above, learned counsel invited our attention to Article 124A inserted by the Constitution (99th Amendment) Act. It was submitted, that the NJAC contemplated under Article 124A would comprise of six Members, namely, the Chief Justice of India, two senior Judges of the Supreme Court (next to the Chief Justice), the Union Minister in charge of Law and Justice, and two "eminent persons". It was submitted, that the judges component, which had the primacy (and in a manner of understanding – unanimity), under the erstwhile procedure, had now been reduced to half-strength, in the selecting body – the NJAC. It was pointed out, that the Chief Justice of India, would now have an equivalent voting right, as the other Members of the NJAC. It was submitted, that even though the Chief Justice of India would be the Chairman of the NJAC, he has no casting vote, in the event of a tie. It was submitted, that under the substituted procedure, even if the Chief Justice of India, and the two other senior Judges of the Supreme Court (next to the Chief Justice of India), supported the appointment/transfer of an individual, the same could be negatived, by any two Members of the NJAC. Even by the two "eminent persons" who

may have no direct or indirect nexus with the process of administration of justice. It was therefore submitted, that the primacy vested with the Chief Justice of India had been fully and completely eroded.

13. With reference to the subject of primacy of the judiciary, it was asserted, that under the system sought to be substituted, the proposal for appointment of Judges to the Supreme Court, could only have been initiated by the Chief Justice of India. And likewise, the proposal for transfer of a Judge or the Chief Justice of a High Court, could only have been initiated by the Chief Justice of India. And likewise, the proposal for appointment of a Judge to a High Court, could only have been initiated by the Chief Justice of the concerned High Court. In order to demonstrate the changed position, learned counsel placed reliance on Article 124B introduced by the Constitution (99th Amendment) Act, whereunder, the authority to initiate the process, had now been vested with the NJAC. Under the new dispensation, the NJAC alone would recommend persons for appointment as Judges to the higher judiciary. It was also apparent, according to learned counsel, that the NJAC has now been bestowed with the exclusive responsibility to recommend transfers of Chief Justices and Judges of High Courts. Having described the aforesaid alteration as a total subversion of the prevailing procedure, which had stood the test of time, and had secured the independence of the process of appointment and transfer of Judges of the higher judiciary, it was pointed out, that the Parliament had not disclosed the reasons, why the primacy of the Chief Justice of India and the other senior

Judges, had to be dispensed with. Or for that matter, why the prevailing procedure needed to be altered. It was further the contention of learned counsel, that the non-disclosure of reasons, must inevitably lead to the inference, that there were no such reasons.

14. Dr. Rajeev Dhavan, learned senior counsel, also advanced submissions, with reference to the "basic structure", and the scope of amending the provisions of the Constitution. Dwelling upon the power of Parliament to amend the Constitution, it was submitted, that this Court in Kesavananda Bharati v. State of Kerala[10], had declared, that the "basic structure" of the Constitution, was not susceptible or amenable to amendment. Inviting our attention to Article 368, it was submitted, that the power vested with the Parliament to amend the Constitution, contemplated the extension of the constituent power, which was exercised by the Constituent Assembly, while framing the Constitution. It was pointed out, that in exercise of the above power, the Parliament had been permitted to discharge the same role as the Constituent Assembly. The provisions of the Constitution, it was asserted, could be amended, to keep pace with developments in the civil society, so long as the amendment was not in violation of the "basic structure" of the Constitution. It was submitted, that it was not enough, in the facts and circumstances of the present case, to determine the validity of the constitutional amendment in question, by limiting the examination to a determination, whether or not the "independence of the judiciary" stood breached, on a plain reading of the provisions sought to be amended. It

was asserted, that it was imperative to take into consideration, judgments rendered by this Court, on the subject. It was asserted, that this Court was liable to examine the declared position of law, in the First, Second and Third Judges cases, insofar as the present controversy was concerned. According to learned counsel, if the enactments under challenge, were found to be in breach of the "basic structure" of the Constitution, as declared in the above judgments, the impugned constitutional amendment, as also, the legislation under reference, would undoubtedly be constitutionally invalid.

15. In the above context, learned counsel pointed out, that with reference to an amendment to the fundamental right(s), enshrined in Part III of the Constitution, guidelines were laid down by this Court in M. Nagaraj v. Union of India[36], as also, in the Kihoto Hollohan case[34]. It was submitted, that the change through the impugned amendment to the Constitution, (and by the NJAC Act) was not a peripheral change, but was a substantial one, which was also seemingly irreversible. And therefore, according to learned counsel, its validity would have to be determined, on the basis of the width and the identity tests. It was submitted, that the width and the identity tests were different from the tests applicable for determining the validity of ordinary parliamentary legislation, or a constitutional amendment relating to fundamental rights. The manner of working out the width and the identity tests, it was

[36] (2006) 8 SCC 212

submitted, had been laid down in the M. Nagaraj case[36], wherein this Court held:

"9. On behalf of the respondents, the following arguments were advanced. The power of amendment under Article 368 is a "constituent" power and not a "constituted power"; that, that there are no implied limitations on the constituent power under Article 368; that, the power under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure. In such process of amendment, if it destroys the basic feature of the Constitution, the amendment will be unconstitutional. The Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provision of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and, therefore, it is open to amendment under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment under Article 368. Such change of the law so declared by the Supreme Court will not merely for that reason alone violate the basic structure of the Constitution or amount to usurpation of judicial power. This is how the Constitution becomes dynamic. Law has to change. It requires amendments to the Constitution according to the needs of time and needs of society. It is an ongoing process of judicial and constituent powers, both contributing to change of law with the final say in the judiciary to pronounce on the validity of such change of law effected by the constituent power by examining whether such amendments violate the basic structure of the Constitution. On every occasion when a constitutional matter comes before the Court, the meaning of the provisions of the Constitution will call for interpretation, but every interpretation of the article does not become a basic feature of the Constitution. That, there are no implied limitations on the power of Parliament under Article 368 when it seeks to amend the Constitution. However, an amendment will be invalid, if it interferes with or undermines the basic structure. The validity of the amendment is not to be decided on the touchstone of Article 13 but only on the basis of violation of the basic features of the Constitution."

16. It was submitted, that whilst the Parliament had the power to amend the Constitution; the legislature (– or the executive), had no power to either interpret the Constitution, or to determine the validity of an amendment to the provisions of the Constitution. The power to determine

the validity of a constitutional amendment, according to learned counsel, exclusively rests with the higher judiciary. Every amendment had to be tested on the touchstone of "basic structure" – as declared by the judiciary. It was submitted, that the aforesaid power vested with the judiciary, could not be withdrawn or revoked. This, according to learned counsel, constituted the fundamental judicial power, and was no less significant/weighty than the legislative power of Parliament. The importance of the power of judicial review vested with the higher judiciary (to examine the validity of executive and legislative actions), bestowed superiority to the judiciary over the other two pillars of governance. This position, it was pointed out, was critical to balance the power surrendered by the civil society, in favour of the political and the executive sovereignty.

17. In order to determine the validity of the submissions advanced on behalf of the petitioners, we were informed, that the interpretation placed by the Supreme Court on Articles 124 and 217 (as they existed, prior to the impugned amendment), would have to be kept in mind. It was submitted, that the term "consultation" with reference to Article 124, had been understood as conferring primacy with the judiciary. Therefore, while examining the impugned constitutional amendment to Article 124, it was imperative for this Court, to understand the term "consultation" in Article 124, and to read it as, conferring primacy in the matter of appointment of Judges, with the judiciary. Under Article 124, according to learned counsel, the President was not required to merely "consult" the

Chief Justice of India, but the executive was to accede to the view expressed by the Chief Justice of India. Insofar as the term "Chief Justice of India" is concerned, it was submitted, that the same had also been understood to mean, not the individual opinion of the Chief Justice of India, but the opinion of the judiciary symbolized through the Chief Justice of India. Accordingly, it was emphasized, that the individual opinion of the Chief Justice (with reference to Articles 124 and 217) was understood as the institutional opinion of the judiciary. Accordingly, whilst examining the impugned constitutional amendment, under the width and the identity test(s), the above declared legal position, had to be kept in mind while determining, whether or not the impugned constitutional amendment, and the impugned legislative enactment, had breached the "basic structure" of the Constitution.

18. It was contended, that the judgment in the Second Judges case, should be accepted as the touchstone, by which the validity of the impugned constitutional amendment (and the NJAC Act), must be examined. It was submitted, that the power exercised by the Parliament under Article 368, in giving effect to the impugned constitutional amendment (and by enacting the NJAC Act), will have to be tested in a manner, that will allow an organic adaptation to the changing times, and at the same time ensure, that the "basic structure" of the Constitution was not violated. Relying on the M. Nagaraj case[36], the Court's attention was drawn to the following observations:

"18. The key issue, which arises for determination in this case is–whether by virtue of the impugned constitutional amendments, the power of Parliament is so enlarged so as to obliterate any or all of the constitutional limitations and requirements?

Standards of judicial review of constitutional amendments
19. The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather .than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."

Learned senior counsel, also drew the Court's attention to similar observations recorded in the Second Judges case.

19. Learned counsel was emphatic, that the impugned constitutional amendment (and the provisions of the NJAC Act), if approved, would remain in place for ten..., twenty..., thirty or even forty years, and therefore, need to be viewed closely and objectively. The provisions will have to be interpreted in a manner, that the "independence of the judiciary" would not be compromised. It was submitted, that if the impugned provisions were to be declared as constitutionally valid, there would be no means hereafter, to restore the "independence of the judiciary".

20. According to learned counsel, the question was of the purity of the justice delivery system. The question was about the maintenance of judicial standards. All these questions emerged from the fountainhead, namely, the manner of appointment of Judges to the higher judiciary.

The provisions of Article 124, it was pointed out, as it existed prior to the impugned amendment, had provided for a system of trusteeship, wherein institutional predominance of the judiciary was the hallmark. It was submitted, that the aforesaid trusteeship should not be permitted to be shared by those, whose rival claims arose for consideration before Courts of law. The judicial responsibility in the matter of appointment of Judges, according to learned counsel, being the most important trusteeship, could not be permitted to be shared, with either the executive or the legislature.

21. Referring to the amendment itself, it was contended, that merely changing the basis of the legislation, would not be the correct test to evaluate the actions of the Parliament, in the present controversy. It was likewise submitted, that reasonableness and proportionality were also not the correct test(s) to be applied. According to learned counsel, in order to determine the validity of the impugned constitutional amendment (and the NJAC Act), the Union of India and the ratifying States will have to bear the onus of satisfactorily establishing, that the amended provisions, could under no circumstances, be used (actually misused) to subvert the "independence of the judiciary". Placing reliance on the M. Nagaraj case[36], the Court's attention was invited to the following observations:

"22. The question which arises before us is regarding the nature of the standards of judicial review required to be applied in judging the validity of the constitutional amendments in the context of the doctrine of basic structure. The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine

has essentially developed from the German Constitution. This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings.

23. .....In S.R. Bommai (1994) 3 SCC 1 the Court clearly based its conclusion not so much on violation of particular constitutional provisions but on this generalised ground i.e. evidence of a pattern of action directed against the principle of secularism. Therefore, it is important to note that the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as "essential features" or part of the "basic structure" of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.

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25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

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30. Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities, and because of the good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance.

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35. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For

example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged."

22. Referring to the position expressed by this Court, learned counsel submitted, that the overarching principle for this Court, was to first keep in its mind, the exact nature of the amendment contemplated through the Constitution (99th Amendment) Act. And the second step was, to determine how fundamental the amended provision was. For this, reliance was again placed on the M. Nagaraj case[36], and our attention was drawn to the following conclusions:

"102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness,

inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is— whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this .Court in Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684..., Ajit Singh Januja v. State of Punjab, (1996) 2 SCC 715..., Ajit Singh (II) v. State of Punjab, (1999) 7 SCC 209... and Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217... were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets— "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality."

Yet again referring to the width and the identity tests, learned counsel emphasized, that it was imperative for this Court, in the facts and circumstances of the present case, to examine whether the power of amendment exercised by the Parliament, was so wide as to make it

excessive. For the above, reference was made to the Madras Bar Association case[35], wherein this Court recorded the following conclusions:

"134.(i) Parliament has the power to enact legislation and to vest adjudicatory functions earlier vested in the High Court with an alternative court/tribunal. Exercise of such power by Parliament would not per se violate the "basic structure" of the Constitution.
135.(ii) Recognised constitutional conventions pertaining to the Westminster model do not debar the legislating authority from enacting legislation to vest adjudicatory functions earlier vested in a superior court with an alternative court/tribunal. Exercise of such power by Parliament would per se not violate any constitutional convention.
136.(iii) The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted.
137.(iv) Constitutional conventions pertaining to the Constitutions styled on the Westminster model will also stand breached, if while enacting legislation, pertaining to transfer of judicial power, conventions and salient characteristics of the court sought to be replaced are not incorporated in the court/tribunal sought to be created.
138.(v) The prayer made in Writ Petition (C) No. 621 of 2007 is declined. Company Secretaries are held ineligible for representing a party to an appeal before NTT.
139.(vi) Examined on the touchstone of Conclusions (iii) and (iv) (contained in paras 136 and 137, above) Sections 5, 6, 7, 8 and 13 of the NTT Act (to the extent indicated hereinabove), are held to be unconstitutional. Since the aforesaid provisions constitute the edifice of the NTT Act, and without these provisions the remaining provisions are rendered ineffective and inconsequential, the entire enactment is declared unconstitutional."

Based on the above, it was asserted, that this Court had now clearly laid down, that on issues pertaining to the transfer of judicial power, the salient characteristics, standards and conventions of judicial power, could not be breached. It was also submitted, that evaluated by the aforesaid standards, it would clearly emerge, that the "independence of the judiciary" had been seriously compromised, through the impugned constitutional amendment (and the NJAC Act).

23. It was the submission of Mr. Ram Jethmalani, learned Senior Advocate, that the defect in the judgment rendered by this Court in the First Judges case, was that, Article 50 of the Constitution had not been appropriately highlighted, for consideration. It was submitted, that importance of Article 50 read with Articles 12 and 36, came to be examined in the Second Judges case, wherein the majority view, was as follows:

"80. From the above deliberation, it is clear that Article 50 was referred to in various decisions by the eminent Judges of this Court while discussing the principle of independence of the judiciary. We may cite Article 36 which falls under Part IV (Directive Principles of State Policy) and which reads thus:

."36. In this Part, unless the context otherwise requires, 'the State' has the same meaning as in Part III."

81. According to this article, the definition of the expression "the State" in Article 12 shall apply throughout Part IV, wherever that word is used. Therefore, it follows that the expression "the State" used in Article 50 has to be construed in the distributive sense as including the Government and Parliament of India and the Government and the legislature of each State and all local or other authorities within the territory of India or under the control of the Government of India. When the concept of separation of the judiciary from the executive is assayed and assessed that concept cannot be confined only to the subordinate judiciary, totally discarding the higher judiciary. If such a narrow and pedantic or syllogistic approach is made and a constricted construction is given, it would lead to an anomalous position that the Constitution does not emphasise the separation of higher judiciary from the executive. Indeed, the distinguished Judges of this Court, as pointed out earlier, in various decisions have referred to Article 50 while discussing the concept of independence of higher or superior judiciary and thereby highlighted and laid stress on the basic principle and values underlying Article 50 in safeguarding the independence of the judiciary.

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85. Regrettably, there are some intractable problems concerned with judicial administration starting from the initial stage of selection of candidates to man the Supreme Court and the High Courts leading to the present malaise. Therefore, it has become inevitable that effective steps have to be taken to improve or retrieve the situation. After taking note of these problems and realising the devastating consequences that may

flow, one cannot be a silent spectator or an old inveterate optimist, looking upon the other constitutional functionaries, particularly the executive, in the fond hope of getting invigorative solutions to make the justice delivery system more effective and resilient to meet the contemporary needs of the society, which hopes, as experience shows, have never been successful. Therefore, faced with such a piquant situation, it has become imperative for us to solve these problems within the constitutional fabric by interpreting the various provisions of the Constitution relating to the functioning of the judiciary in the light of the letter and spirit of the Constitution.

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141. Mr Ram Jethmalani, learned senior counsel expressed his grievance that the principles laid down in Chandra Mohan case (1967) 1 SCR 77, 83… were not appreciated by the learned Judges while dealing with Samsher Singh v. State of Punjab, (1974) 2 SCC 831 who in his submission, have ignored the principle of harmonious construction which was articulated in K.M. Nanavati v. State of Bombay (1961) 1 SCR 497… According to him, the judgment in Gupta case 1981 Supp SCC 87 may be regarded as per incuriam. He articulates that the expression 'consultation' is itself flexible and in a certain context capable of bearing the meaning of 'consent' or 'concurrence'.

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154. The controversy that arises for scrutiny from the arguments addressed boils down with regard to the construction of the word 'consultation'.

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170. Thus, it is seen that the consensus of opinion is that consultation with the CJI is a mandatory condition precedent to the order of transfer made by the President so that non-consultation with the CJI shall render the order unconstitutional i.e. void.

171. The above view of the mandatory character of the requirement of consultation taken in Sankalchand has been followed and reiterated by some of the Judges in Gupta case. Fazal Ali, J. has held in Gupta case: (SCC p. 483, para 569)

"(3) If the consultation with the CJI has not been done before transferring a Judge, the transfer becomes unconstitutional."

Venkataramiah, J. in Gupta case has also expressed the same view.

172. In the light of the above view expressed in Union of India v. Sankalchand Himatlal Sheth, (1977) SCC 4 193… and some of the Judges in Gupta case 1981 Supp SCC 87… it can be simply held that consultation with the CJI under the first proviso to Article 124(2) as well as under Article 217 is a mandatory condition, the violation of which would be contrary to the constitutional mandate.

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181. It cannot be gainsaid that the CJI being the head of the Indian Judiciary and paterfamilias of the judicial fraternity has to keep a vigilant watch in protecting the integrity and guarding the independence of the judiciary and he in that capacity evaluates the merit of the candidate with regard to his/her professional attainments, legal ability etc. and offers his opinion. Therefore, there cannot be any justification in scanning that opinion of the CJI by applying a superimposition test under the guise of overguarding the judiciary.

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183. One should not lose sight of the important fact that appointment to the judicial office cannot be equated with the appointment to the executive or other services. In a recent judgment in All India Judges' Association v. Union of India (1993) 4 SCC 288... rendered by a three-Judge Bench presided over by M.N. Venkatachaliah, C.J. and consisting of A.M. Ahmadi and P.B. Sawant, JJ., the following observations are made: (SCC pp. 295 e-h, 296 a and c-d, 297 b, paras 7 and 9)

"The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the Council of Ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the ministers, the legislators and the judges, and not the members of the their staff who implement or assist in implementing their decisions. The Council of Ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, .the legislators are different from the legislative staff. So also the judges from the judicial staff. The parity is between the political executive, the legislators and the judges and not between the judges and the administrative executive. In some democracies like the USA, members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of other services. The members of the other services, therefore, cannot be placed on a par with the members of the judiciary, either constitutionally or functionally."

Whereupon, this Court recorded its conclusions. The relevant conclusions are extracted hereunder:

"(1) The 'consultation' with the CJI by the President is relatable to the judiciary and not to any other service.

(2) In the process of various constitutional appointments, 'consultation' is required only to the judicial office in contrast to the other high-ranking constitutional offices. The prior 'consultation' envisaged in the first proviso to Article 124(2) and Article 217(1) in respect of judicial offices is a reservation or limitation on the power of the President to appoint the Judges to the superior courts.

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(4) The context in which the expression "shall always be consulted" used in the first proviso of Article 124(2) and the expression "shall be appointed ... after consultation" deployed in Article 217(1) denote the mandatory character of 'consultation', which has to be and is of a binding character.

(5) Articles 124 and 217 do not speak in specific terms requiring the President to consult the executive as such, but the executive comes into play in the process of appointment of Judges to the higher echelons of judicial service by the operation of Articles 74 and 163 of the Constitution. In other words, in the case of appointment of Judges, the President is not obliged to consult the executive as there is no specific provision for such consultation.

(6) The President is constitutionally obliged to consult the CJI alone in the case of appointment of a Judge to the Supreme Court as .per the mandatory proviso to Article 124(2) and in the case of appointment of a Judge to the High Court, the President is obliged to consult the CJI and the Governor of the State and in addition the Chief Justice of the High Court concerned, in case the appointment relates to a Judge other than the Chief Justice of that High Court. Therefore, to place the opinion of the CJI on a par with the other constitutional functionaries is not in consonance with the spirit of the Constitution, but against the very nature of the subject-matter concerning the judiciary and in opposition to the context in which 'consultation' is required. After the observation of Bhagwati, J. in Gupta case that the 'consultation' must be full and effective there is no conceivable reason to hold that such 'consultation' need not be given primary consideration.

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196. In the background of the above factual and legal position, the meaning of the word 'consultation' cannot be confined to its ordinary lexical definition. Its contents greatly vary according to the circumstances and context in which the word is used as in our Constitution.

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207. No one can deny that the State in the present day has become the major litigant and the superior courts particularly the Supreme Court, have become centres for turbulent controversies, some of which with a flavour of political repercussions and the Courts have to face tempest and

storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to continue, the independence of judiciary in the long run will sink without any trace. By going through various Law Commission Reports (particularly Fourteenth, Eightieth and One Hundred and Twenty-first), Reports of the Seminars and articles of eminent jurists etc., we understand that a radical change in the method of appointment of Judges to the superior judiciary by curbing the executive's power has been accentuated but the desired result has not been achieved even though by now nearly 46 years since the attainment of independence and more than 42 years since the advent of the formation of our constitutional system have elapsed. However, it is a proud privilege that the celebrated birth of our judicial system, its independence, mode of dispensation of justice by Judges of eminence holding nationalistic views stronger than other Judges in any other nations, and the resultant triumph of the Indian judiciary are highly commendable. But it does not mean that the present system should continue for ever, and by allowing the executive to enjoy the absolute primacy in the matter of appointment of Judges as its 'royal privilege'.

208. The polemics of the learned Attorney-General and Mr Parasaran for sustaining the view expressed in Gupta case 1981 Supp SCC 87... though so distinguished for the strength of their ratiocination, is found to be not acceptable and falls through for all the reasons aforementioned because of the inherent weakness of the doctrine which they have attempted to defend."

Insofar as the minority judgment authored by A.M. Ahmadi, J., (as he then was) is concerned, it is only relevant to highlight the first conclusion recorded in paragraph 313, which is reproduced hereunder:

"313. We conclude:

(*i*) The concept of judicial independence is deeply ingrained in our constitutional scheme and Article 50 illuminates it. The degree of independence is near total after a person is appointed and inducted in the judicial family. ....."

24. Insofar as the instant aspect of the matter is concerned, learned counsel invited our attention to the preamble of the NJAC Act, which is reproduced below:

"An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto."

The statement of objects and reasons is also being extracted hereunder:

"Statement of Objects and Reasons

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2. The Supreme Court in the matter of the Supreme Court Advocates-on-Record Association Vs. Union of India in the year 1993, and in its Advisory Opinion in the year 1998 in the Third Judges case, had interpreted clause (2) of article 124 and clause (1) of article 217 of the Constitution with respect to the meaning of "consultation" as "concurrence". Consequently, a Memorandum of Procedure for appointment of Judges to the Supreme Court and High Courts was formulated, and is being followed for appointment.

3. After review of the relevant constitutional provisions, the pronouncements of the Supreme Court and consultations with eminent Jurists, it is felt that a broad based National Judicial Appointments Commission should be established for making recommendations for appointment of Judges of the Supreme Court and High Courts. The said Commission would provide a meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable, while also introducing transparency in the selection process.

4. The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is an enabling constitutional amendment for amending relevant provisions of the Constitution and for setting up a National Judicial Appointments Commission. The proposed Bill seeks to insert new articles 124A, 124B and 124C after article 124 of the Constitution. The said Bill also provides for the composition and the functions of the proposed National Judicial Appointments Commission. Further, it provides that Parliament may, by law, regulate the procedure for appointment of Judges and empower the National Judicial Appointments Commission to lay down procedure by regulation for the discharge of its functions, manner of selection of persons for appointment and such other matters as may be considered necessary.

5. The proposed Bill seeks to broad base the method of appointment of Judges in the Supreme Court and High Courts, enables participation of judiciary, executive and eminent persons and ensures greater transparency, accountability and objectivity in the appointment of the Judges in the Supreme Court and High Courts.

6. The Bill seeks to achieve the above objectives.

New Delhi; Ravi Shankar Prasad

The 8th August, 2014."

Based on the non-disclosure of reasons, why the existing procedure was perceived as unsuitable, it was contended, that the only object sought to be achieved was, to dilute the primacy, earlier vested with the Chief Justice of India (based on a decision of a collegium of Judges), provided for under Articles 124 and 217, as originally enacted. This had been done away, it was pointed out, by substituting the Chief Justice of India, with the NJAC.

25. The primary submission advanced at the hands of Mr. Fali S. Nariman, Senior Advocate, was with reference to the violation of the "basic structure", not only through the Constitution (99th Amendment) Act, but also, by enacting the NJAC Act. It was pointed out, that since the commencement of the Constitution, whenever changes were recommended in respect of the appointment of Judges, the issue which remained the focus of attention was, the primacy of the Chief Justice of India. Primacy, it was contended, had been recognized as the decisive voice of the judiciary, based on a collective decision of a collegium of Judges, representing its collegiate wisdom. It was submitted, that the Chief Justice of India, as an individual, as well as, Chief Justices of High Courts, as individuals, could not be considered as *persona designate*. It was pointed out, that the judgment rendered in the Second Judges case, had not become irrelevant. This Court, in the above judgment, provided for the preservation of the "independence of the judiciary". The aforesaid judgment, as also, the later judgment in the Third Judges case,

re-established and reaffirmed, that the Chief Justice of India, represented through a body of Judges, had primacy. According to learned counsel, the individual Chief Justice of India, could not and did not, represent the collective opinion of the Judges. It was asserted, that the Constitution (99th Amendment) Act, and the NJAC Act, had done away with, the responsibility vested with the Chief Justice of India, represented through a collegium of Judges (under Articles 124 and 217 – as originally enacted). Accordingly, it was submitted, that till the system adopted for selection and appointment of Judges, established and affirmed, the unimpeachable primacy of the judiciary, "independence of the judiciary" could not be deemed to have been preserved.

26. Insofar as the issue in hand is concerned, it was the pointed contention of the learned counsel, that the decision rendered by this Court in Sardari Lal v. Union of India[37], came to be overruled in the Samsher Singh case[11]. Referring to the judgment in the Samsher Singh case[11], he invited this Court's attention to the following observations recorded therein:

"147. In J.P. Mitter v. Chief Justice, Calcutta AIR 1965 SC 961 this Court had to consider the decision of the Government of India on the age of a Judge of the Calcutta High Court and, in that context, had to ascertain the true scope and effect of Article 217(3) which clothes the President with exclusive jurisdiction to determine the age of a Judge finally. In that case the Ministry of Home Affairs went through the exercise prescribed in Article 217(3). "The then Home Minister wrote to the Chief Minister, West Bengal, that he had consulted the Chief Justice of India, and he agreed with the advice given to him by the Chief Justice, and so he had decided that the date of birth of the appellant was....It is this decision which was, in due course communicated to the appellant". When the said decision

[37] AIR 1971 SC 1547

was attacked as one reached by the Home Minister only and not by the President personally, the Court observed:

"The alternative stand which the appellant took was that the Executive was not entitled to determine his age, and it must be remembered that this stand was taken before Article 217(3) was inserted in the Constitution; the appellant was undoubtedly justified in contending that the Executive was not competent to determine the question about his age because that is a matter which would have to be tried normally, in judicial proceedings instituted before High Courts of competent jurisdiction. There is considerable force in the plea which the appellant took at the initial stages of this controversy that if the Executive is allowed to determine the age of a sitting Judge of a High Court, that would seriously affect the independence of the Judiciary itself."

Based on this reasoning, the Court quashed the order, the ratio of the case being that the President himself should decide the age of the Judge, uninfluenced by the Executive, i.e. by the Minister in charge of the portfolio dealing with justice.

148. This decision was reiterated in Union of India v. Jyoti Prakash Mitter (1971) 1 SCC 396. Although an argument was made that the President was guided in that case by the Minister of Home Affairs and by the Prime Minister, it was repelled by the Court which, on the facts, found the decision to be that of the President himself and not of the Prime Minister or the Home Minister.

149. In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article-making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."

27. It was pointed out, that the decision in the Samsher Singh case[11], came to be rendered well before the decision in the First Judges case, wherein this Court felt, that Judges could be fearless only if, institutional immunity was assured, and institutional autonomy was guaranteed. The view expressed in the Samsher Singh case[11] in 1974 was, that the final authority in the matter of appointment of Judges to the higher judiciary, rested with the Chief Justice of India. It was pointed out, that the above position had held the field, ever since. It was submitted, that "independence of the judiciary" has always meant and included independence in the matter of appointment of Judges to the higher judiciary.

28. Mr. Arvind P. Datar, learned Senior Advocate contended, that the NJAC had been created by an amendment to the Constitution. It therefore was a creature of the Constitution. Power had been vested with the NJAC to make recommendations of persons for appointment as Judges to the higher judiciary, including the power to transfer Chief Justices and Judges of High Courts, from one High Court to another. The above constitutional authority, it was submitted, must be regulated by a constitutional scheme, which must flow from the provisions of the Constitution itself. Therefore, it was asserted, that the manner of functioning of the NJAC must be contained in the Constitution itself. It was submitted, that the method of functioning of the NJAC, could not be left to the Parliament, to be regulated by ordinary law. In order to support his aforestated contention, reliance was placed on entries 77 and 78,

contained in the Union List of the Seventh Schedule. It was submitted, that the power to frame legislation, with reference to entries 77 and 78 was not absolute, inasmuch as, Article 245 authorized the Parliament, to legislate on subjects falling within its realm, subject to the substantive provisions contained in the Constitution. For the above reason, it was asserted, that the activities of the NJAC could not be made subject to, or subservient to, the power vested in the Parliament, under entries 77 and 78.

29. It was contended by Mr. Ram Jethmalani, learned Senior Advocate, that there was sufficient circumstantial evidence to demonstrate, that the present political establishment felt, that the judiciary was an obstacle for the implementation of its policies. It was contended, that the entire effort, was to subdue the judiciary, by inducting into the selection process, those who could be politically influenced. In order to project, the concerted effort of the political dispensation, in subverting the "independence of the judiciary", learned counsel, in the first instance, pointed out, that the first Bill to constitute a National Judicial Commission [the Constitution (67th Amendment) Bill, 1990] was introduced in the Lok Sabha on 18.5.1990. The statement of its "Objects and Reasons", which was relied upon, is extracted below:

"The Government of India have in the recent past announced their intention to set up a high level judicial commission, to be called the National Judicial Commission for the appointment of Judges of the Supreme Court and of the High Courts and the transfer of Judges of the High Courts so as to obviate the criticisms of arbitrariness on the part of the Executive in such appointments and transfers and also to make such appointments without any delay. The Law Commission of India in their

One Hundred and Twenty-first Report also emphasised the need for a change in the system.

2. The National Judicial Commission to make recommendations with respect to the appointment of Judges of the Supreme Court will consist of the Chief Justice of India and two other Judges of the Supreme Court next in seniority to the Chief Justice of India. The Commission to make recommendations with respect to the appointment of the Judges of the High Courts will consist of the Chief Justice of India, one senior-most Judge of the Supreme Court, the Chief Minister of the State concerned, Chief Justice of the concerned High Court and one senior-most Judge of that High Court.

3. The Bill seeks to achieve the above object.

NEW DELHI;
The 11th May, 1990;"

The proposed National Judicial Commission in the above Bill, was to be made a component of Part XIIIA of the Constitution, by including therein Article 307A. The Chief Justice of India, and the next two senior most Judges of the Supreme Court, were proposed to comprise of the contemplated Commission, for making appointments of Judges to the Supreme Court, Chief Justices and Judges to High Courts, and for transfer of High Court Judges from one High Court to another. The above Commission, omitted any executive and legislative participation. The proposed composition of the Commission, for appointing High Court Judges, included the Chief Justice of India, the Chief Minister or the Governor of the concerned State, the senior most Judge of the Supreme Court, the Chief Justice of the concerned High Court, and the senior most Judge of that Court. The above Bill also provided for, an independent and separate secretarial staff for the contemplated Commission. It was submitted, that the above amendment to the Constitution, was on account of the disillusionment and incredulity with

the legal position, expounded by this Court in the First Judges case. It was submitted, that the necessity to give effect to the proposed Constitution (67th Amendment) Bill, 1990, stood obviated when this Court rendered its judgment in the Second Judges case. All this, according to learned counsel for the petitioners, has been forgotten and ignored.

30. Historically, the next stage, was when the Constitution (98th Amendment) Bill, 2003 was placed before the Parliament for its consideration. In the above Bill, the executive participation in the process of selection and appointment of Judges to the higher judiciary, was introduced by making the Union Minister of Law and Justice, an *ex officio* Member of the Commission. Two eminent citizens (either eminent jurists, or eminent lawyers, or legal academicians of high repute) would also be Members of the Commission. One of them was to be appointed by the President in consultation with the Chief Justice of India, and the other, in consultation with the Prime Minister. Yet another effort was made (by the previous U.P.A. Government), in the same direction, through the Constitution (120th Amendment) Bill, 2013, on similar lines as the 2003 Bill. It was sought to be pointed out, that there was a consensus amongst all the parties, that the aforesaid Bill should be approved. And that, learned counsel personally, as a Member of the Rajya Sabha, had strongly contested the above move. Learned counsel invited this Court's attention to the objections raised by him, during the course of the debate before the Rajya Sabha. He emphasized, that he had

submitted to the Parliament, that the Constitution Amendment Bill, needed to be referred to the Select Committee of the Parliament, as the same in his opinion was unconstitutional. An extract of the debate was also brought to our notice (by substituting the vernacular part thereof, with its English translation), it is being reproduced hereunder:

"My suggestion is: Let the Judicial Appointments Commission Bill go to the Standing Committee. The rest of the business we should pass today. Thank you.
Shri Ram Jethmalali: Madam, thank you; better late than never.
Sir, I wish to make two preliminary suggestions. If there is an assurance that the Constitution (Amendment) Bill as well as the subsidiary Bill will both be referred to a Select Committee of Parliament, I do not propose to address this House at all. But, I do not consider it suitable or proper that only the second Bill should be referred to a Select Committee. Both should be sent. And, I will give my reasons.
Sir, the second suggestion that I have to make is this. My main contention, which I am going to make, is that the Constitution (Amendment) Bill is wholly unconstitutional and, if passed, it will undoubtedly be set aside by the Supreme Court, because it interferes with the basic feature of the Constitution. Such amendments of the Constitution are outside the jurisdiction of this House. The amendment process prescribed by the Constitution requires 2/3rd majority and so on and so forth. That applies only to those amendments of the Constitution which do not touch what are called the basic features of the Constitution as understood in the Kesavananda Bharati case. This Constitutional amendment, certainly, interferes with a basic feature of the Indian Constitution and it will not be sustained ever. But, if it is said that even if you pass it, it will not be brought into force until a Reference is made to the Supreme Court and the Supreme Court answers the question of the validity of this Constitution amendment in the affirmative. If that is done, I, again, need not speak. But, Sir, since I don't expect both these reasonable suggestions to be accepted, I intend to speak and speak my mind.

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Kapil is my great friend and is one of the Ministers in the Government whose work as the Law Minister I keep supervising and I am happy the manner in which he conducts his Ministry. But, Sir, I must declare today that my conscience, understanding and my duty towards the people of this country, which I regard as my paramount obligation, do not permit me to submit to this kind of legislation. Both the Bills, according to me are evil. The evil, first of all, consists in the misleading Statement of Objects-and-Reasons. You ought to have said with

complete honesty that what you are trying to demolish is the Collegium System, which seems to be the object, and which is apparent to anyone. Some of the persons who have spoken have spoken on the assumption that that is the purpose of this particular piece of legislation.

Sir, the first point that I propose to make is that the 1993 judgment of Nine Judges is a judgment based upon the discovery of the basic feature of the Constitution, and upon devising a system to sustain that basic feature. Madam, I have myself appeared in that litigation and I claim that I had a tremendous contribution to make to the success of that judgment. In a sense, I claim to be the founder of the Collegium System. But that does not mean that I am an unmixed admirer of the Collegium System. The Collegium System has, doubtless, some faults. But the Collegium System came into existence on the basis of one main argument. That one main argument that we advance, and advance with great vigour and force, is that there is one article of the Constitution, article 50 of the Constitution, which is the shortest article in the Constitution, consisting of only one sentence. That article says that the Government shall strive to keep the Judiciary separate from the Executive.

Sir, we argued before the Supreme Court that this article does not mean that Judges and Ministers should not socially meet. This does not mean that they should live in separate towns, or that they should not live even in adjoining bungalows. The purpose of this article is to ensure that in the appointment of Judges, the Executive has no role to play, except the advisory role. In other words, the doctrine of primacy of the Executive in the appointment process was irksome to us because the whole nation of India has been the victim of the Judges appointed in the earlier system. I have been a refugee from my own country during the Emergency. Why was it? It was because four Supreme Court Judges – I am not talking of the fifth who earned the New York Times praise that the Indian nation will have to build a monument to his memory; I am talking of the other four who – disgraced the Judiciary, disgraced the Supreme Court and were parties to the destruction of Indian democracy and the demolition and the debasement of the whole Constitution of India. Sir, of which system were they the product? They were the product of that system which, in 1981, was ultimately supported by the Gupta Judgment but, after some time, there were people, intellectuals, who spoke up that this system would not work; the system requires change. Sir, the Indian democracy has been saved not by intellectuals; Indian democracy at its most crucial hour has been saved by the poor illiterates of this country.

In times of crises, it is only the brave hearted who matter. On those which one had pride remained tongue tied (Two sentences translated).

That is the tragedy of our country. Sir, the intellectuals of this country have continuously failed, and I regret to say that they are failing even today. Collegium may be the creation of the Judiciary, it is the creation of judicial interpretation, again, of the Constitution, but whatever be the faults of the Collegium, the Collegium today represents some system

which is consistent with the basic features of the Constitution, namely, the supremacy of the Judiciary and its freedom from any influence of the Executive in the appointment process.

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Sir, I am speaking for those who are not irrevocably committed to voting for this amendment. There are some people who must have kept their minds still open. I am appealing to those minds today only. Those who are irrevocably committed are committed to the destruction of Indian democracy.

Sir, the key passage in the judgment of the Supreme Court of 1993 is the passage which I wish to share with the House. The question of primacy to the opinion of the Chief Justice of India in the matters of appointment and transfer and their justifiability should be considered in the context of the independence of the Judiciary as a part of the basic structure of the Constitution to secure the rule of law essential for preservation of the democratic system. The broad scheme of separation of powers adopted in the Constitution together with the Directive Principles of separation of the Judiciary from the Executive, even at the lowest strata, provides some insight to the true meaning of the relevant provisions of the Constitution relating to the composition of the Judiciary. The construction of these provisions must accord with these fundamental concepts in the Constitutional scheme to preserve the vitality and promote the growth of the essential of retaining the Constitution as a vibrant organism".

Sir, the Constitution cannot survive, human freedom cannot survive, citizens' human rights cannot survive, no development can take place unless, of course, the judges are independent first of the Executive power because don't forget that every citizen has a grievance against the corrupt members of the Executive, or, errant bureaucracy, public officers misusing power, indulging in corruption, making wrong and illegal orders. The citizen goes to the court, knocks the door of the court and says, "Please give me a mandamus against this corrupt official, against this corrupt Minister". And, Sir, the judges are supposed to decide upon the claims of the poorest who go to the Supreme Court... ... (Interruptions)... ...and to the judges. It may be, and I am conscious... ... (Interruptions)... Sir, this is not a laughing matter. Please listen, and then decide for yourself. ...

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Sir, first of all, let me say this now that the whole judgement of nine Judges is based upon this principle that in the appointment process, the Executive can never have primacy. This is principle number one. It has now become the basic feature of India's Constitution. My grievance today against this Constitution (Amendment) Bill is that you are slowly, slowly now creating a new method by which ultimately you will revert to the system which existed prior to 1993. In other words, the same system would produce those four Judges who destroyed the Indian democracy, human rights and freedom. Sir, kindly see, why. The Constitution

Amendment looks very innocent. All that it says is that we shall have a new article 124(a) in the Constitution and article 124(a) merely says that there shall be a Judicial Appointments Commission. It lays down that the Judicial Appointments Commission will have these functions. It leaves at that. But, kindly see that after the first sentence, every thing is left to a Parliamentary will. After saying that there will be a Judicial Appointments Commission, every thing will be left, according to the second part of 124(a), to a parliamentary legislation which is capable of being removed if the ruling party has one Member majority in both Houses of Parliament. Not only that, I understand that Parliament is not likely to do it, but it can do it and by a majority of one in both Houses, you can demolish the whole thing and substitute it with a Judicial Commission which will consist of only the Law Minister.

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So, Sir, my first objection is that this Bill is a Bill which is intended to deal with the basic structure of the Constitution and, therefore, this Bill is void. (Time-bell) Second, if a Constitutional Amendment is not good enough for this purpose, surely, an ordinary piece of legislation cannot do it, which ordinary piece of legislation can be removed only by a majority of one in each House. It can be removed like the 30th July Food Security Ordinance and you can pass an Ordinance on that day and say that the whole Act is repealed and now the system will be that Judges will be appointed for the next six months by only the Law Minister of India. If there was Mr. Kapil Sibal, ...(Interruptions)... If Mr. Kapil Sibal becomes the Law Minister for ever, Sir, I will allow this Bill to go. (Time-bell) But I am not prepared to accept it for the future Law Ministers. ...(Interruptions)... Sir, let me take two more minutes and tell all those Members that this Bill is not intended to ensure the judicial character. This Bill has nothing to do with the improvement of the judicial character. So long as the Judges are also human, there will be some Judges who will go wrong, who may go wrong. But a great Bar can control them. ...."

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Sir, I hope, people will avoid this kind of a tragedy in the life of this country. You are today digging the grave of the Constitution of India and the freedom of this country. ...(Interruptions)... That's all I wished to say. ...(Interruptions)..."

It was submitted, that in the Rajya Sabha 131 votes were cast in affirmation of the proposed Bill, as against the solitary vote of the learned counsel, against the same on 5.9.2013. It was however pointed out, that the effort did not bear fruit, on account of the intervening declaration for elections to the Parliament.

31. Learned counsel thereafter, invited our attention to the statement of "Objects and Reasons" for the promulgation of the Constitution (121st Amendment) Bill, 2014. The Bill which eventually gave rise to the impugned Constitution (99th Amendment) Act, was taken up for consideration by the Lok Sabha on 13.8.2014, and was passed without much debate. It was submitted, that on the following day i.e., 14.8.2014, the same was placed before the Rajya Sabha, and was again passed, without much discussion. It was pointed out, that an issue, as serious as the one in hand, which could have serious repercussions on the "independence of the judiciary", was sought to be rushed through.

32. It was submitted, that the "Objects and Reasons" of the Constitution (99th Amendment) Act were painfully lacking, in the expression of details, which had necessitated the proposed/impugned constitutional amendment. It was submitted, that it was imperative to have brought to the notice of the Parliament, that the Supreme Court had declared, that the "rule of law", the "separation of powers" and the "independence of the judiciary", were "salient and basic features" of the Constitution. And that, the same could not be abrogated, through a constitutional amendment. And further that, the Supreme Court had expressly provided for the primacy of the Chief Justice of India, based on a decision of a collegium of Judges, with reference to the appointments and transfers of Judges of the higher judiciary.

33. It was submitted by Mr. Ram Jethmalani, that the impugned constitutional amendment, so as to introduce Article 124A, ought to be

described as a fraud on the Constitution itself. It was pointed out, that the first effort of introducing Article 124A was made by the previous Government, through the Constitution (120th Amendment) Bill, 2013. In the above Bill, Article 124A alone (as against Articles 124A to 124C, presently enacted) was introduced. It was submitted, that the Rajya Sabha passed the above Bill on 5.9.2013, when 131 Members of the Rajya Sabha supported the Bill (with only one Member opposing it). Learned counsel submitted, that he alone had opposed the Bill. It was asserted, that the above fraud was sought to be perpetuated, through the passing of the Constitution (121st Amendment) Bill, 2014, by the Lok Sabha on 13.8.2014, and by the Rajya Sabha on 14.8.2014. It was pointed out, that Parliamentarians from different political parties had joined hands. It was submitted, that as a Parliamentarian, he was in a position to assert, that the merits and demerits of the impugned amendment to the Constitution, were not debated, when the Bill was passed, because of the universal bias entertained by the legislature, against the judiciary. It was submitted, that prejudice and intolerance had arisen, because of the fact that the judiciary often interfered with, and often effaced legislative action(s), as also, executive decision(s).

34. Learned senior counsel also asserted, that the Constitution (99th Amendment) Act, was wholly *ultra vires,* as it seriously infringed the "basic structure/feature" of the Constitution i.e., the "independence of the judiciary". It was submitted, that the veracity of the above constitutional amendment, had to be examined in the light of Article 50.

According to learned counsel, the politicization of the process of selection and appointment of Judges to the higher judiciary, would lead to a dilution of the "independence of the judiciary". It was submitted, that the inclusion of the Union Minister in charge of Law and Justice, as an *ex officio* Member of the NJAC, had the effect of politicization of the process of appointment of Judges to the higher judiciary. It was pointed out, that the inclusion of the Union Minister in charge of Law and Justice within the framework of the NJAC, meant the introduction of the Government of the day, into the selection process. It was asserted, that the Union Minister's inclusion, meant surrendering one-sixth of the power of appointment, to the Government. It was submitted, that in order to understand the true effect of the inclusion of the Union Minister, into the process of selection and appointment of Judges to the higher judiciary, one had to keep in mind the tremendous amount of patronage, which the Union Minister for Law and Justice carries, and as such, it would be within the inference of the Union Minister in charge of Law and Justice, to make the process fallible, by extending his power of patronage to support or oppose candidates, who may be suitable or unsuitable, to the Government of the day. Even though the Union Minister had been assigned only one vote, it was submitted, that he could paralyse the whole system, on the basis of the authority he exercised. To drive home his contention, learned counsel made a reference to the introduction of the book "Choosing Hammurabi – Debates on Judicial Appointments",

edited by Santosh Paul. In the introduction to the book, the thoughts of H.L. Mencken are expressed in the following words:

"But when politicians talk thus, or act thus without talking, it is precisely the time to watch them most carefully. Their usual plan is to invade the constitution stealthily, and then wait to see what happens. If nothing happens they go on more boldly; if there is a protest they reply hotly that the constitution is worn out and absurd, and that progress is impossible under the dead hand. This is the time to watch them especially. They are up to no good to anyone save themselves. They are trying to whittle away the common rights of the rest of us. Their one and only object, now and always, is to get more power in to their hands that it may be used freely for their advantage, and to the damage of everyone else. Beware of all politicians at all times, but beware of them most sharply when they talk of reforming and improving the constitution."

35. Learned Senior Advocate also contended, that the inclusion of two "eminent persons" in the six-Member NJAC, as provided for, under Article 124A(1) of the Constitution (99th Amendment) Act, was also clearly unconstitutional. It was contended, that there necessarily had to be, an indication of the positive qualifications required to be possessed by the two "eminent persons", to be nominated to the NJAC. Additionally, it was necessary to stipulate disqualifications. Illustratively, it was pointed out, that an individual having a conflict of interest, should be disqualified. And such conflict would be apparent, when the individual had a political role. A politician has to serve his constituency, he has to nourish and sustain his vote bank, and above all, he has to conform with the agenda of his political party. Likewise, a person with ongoing litigation, irrespective of the nature of such litigation, would render himself ineligible for serving as an "eminent person" within the framework of the NJAC, because of his conflict of interest.

36. With reference to the inclusion of two "eminent persons" in the NJAC, Mr. Arvind P. Datar, learned Senior Advocate, invited our attention to Article 124A, whereunder, the above two "eminent persons" are to be nominated by a committee comprising of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of People, or, where there is no such Leader of Opposition, then, leader of the single largest opposition party in the House of the People. Learned counsel submitted, that neither Article 124A, nor any other provision, and not even the provisions of the NJAC Act, indicate the qualifications, of the two "eminent persons", who have been included amongst the six-Member NJAC. It was sought to be asserted, that in approximately 70 Statutes and Rules, the expression "eminent person" has been employed. Out of the 70 Statutes, in 67, the field in which such persons must be eminent, has been clearly expressed. Only in three statutes, the term "eminent person" was used without any further qualification. It was asserted, that the term "eminent person" had been left vague and undefined, in Article 124A. It was submitted, that the vagueness of the term "eminent person" was itself, good enough to justify the striking down of the provision. It was emphasized, that the determinative role assigned to the two "eminent persons", included amongst the six-Member NJAC, was so important, that the same could not be left to the imagination of the nominating committee, which comprised of just men "…with all the failings, all the sentiments and all prejudices which we as common people have…" (relying on the words of Dr. B.R. Ambedkar).

37. Referring to the second proviso under Section 5(2), as well as, Section 6(6) of the NJAC Act, it was submitted, that a recommendation for appointment of a Judge, could not be carried out, if the two "eminent persons" did not accede to the same. In case they choose to disagree with the other Members of the NJAC, the proposed recommendation could not be given effect to, even though the other four Members of the NJAC including all the three representatives of the Supreme Court approved of the same. It was pointed out, that the two "eminent persons", therefore would have a decisive say. It was further submitted, that the impact of the determination of the two "eminent persons", would be such, as would negate the primacy hitherto before vested in the Chief Justice of India. It was pointed out, that a positive recommendation by the Chief Justice of India, supported by two other senior Judges of the Supreme Court (next to the Chief Justice of India), could be frustrated by an opposition at the hands of the two "eminent persons". The above implied veto power, according to the learned counsel, could lead to structured bargaining, so as to persuade the other Members of the NJAC, to accede to the names of undesirable nominees (just to avoid a stalemate of sorts). It was submitted, that such a composition had been adversely commented upon by this Court in Union of India v. R. Gandhi[38]. In the judgment, the provision, which was subject matter of consideration, was Section 10-FX. Under the above provision, the Selection Committee for appointing the Chairperson and Members of the Appellate Tribunal, and the President

[38] (2010) 11 SCC 1

and Members of the Tribunal was to be comprised of the Chief Justice of India (or his nominee), besides four Secretaries from different Ministries of the Union Government. This Court recorded its conclusions with reference to the aforesaid provision in paragraph 120(viii), which is being extracted hereunder:

"120(viii) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10-FX, the Selection Committee should broadly be on the following lines:
(a) Chief Justice of India or his nominee – Chairperson (with a casting vote);
(b) A Senior Judge of the Supreme Court or Chief Justice of High Court – Member;
(c) Secretary in the Ministry of Finance and Company Affairs –Member; and
(d) Secretary in the Ministry of Law and Justice – Member."

It was submitted, that the purpose sought to be achieved, was not exclusivity, but primacy. It is further submitted, that if primacy was considered to be important for selection of Members to be appointed to a tribunal, primacy assumed a far greater significance, when the issue under consideration was appointment and transfer of Judges of the higher judiciary. It was accordingly contended, that the manner in which the composition of the NJAC had been worked out in Article 124A, and the manner in which the NJAC is to function with reference to the provisions of the NJAC Act, left no room for any doubt, that the same was in clear violation of the law laid down by this Court, and therefore, liable to be set aside.

38. Learned counsel on the above facts, contested not only the constitutional validity of clauses (c) and (d) of Article 124A(1), but also emphatically assailed the first proviso under Article 124A(1)(d), which postulates, that one of the "eminent persons" should belong to the Scheduled Castes, Scheduled Tribes, Other Backward Classes, Minorities or Women. It was submitted, that these sort of populistic measures, ought not to be thought of, while examining a matter as important as the higher judiciary. It was submitted, that it was not understandable, what the choice of including a person from one of the aforesaid categories was aimed at. In the opinion of learned counsel, the above proviso was farcical, and therefore, totally unacceptable. While members of a particular community may be relevant for protecting the interest of their community, yet it could not be conceived, why such a measure should be adopted, for such an important constitutional responsibility. In the opinion of the learned counsel, the inclusion of such a Member in the NJAC, was bound to lead to compromises.

39. It was also the contention of Mr. Arvind P. Datar, that Article 124C introduced by the Constitution (99th Amendment) Act, was wholly unnecessary. It was pointed out, that in the absence of Article 124C, the NJAC would have had the inherent power to regulate its own functioning. It was submitted, that Article 124C was a serious intrusion into the above inherent power. Now that, the Parliament had been authorized to regulate the procedure for appointments by framing laws, it would also result in the transfer of control over the appointment process (–of Judges

to the higher judiciary), to the Parliament. It was submitted, that there could not be any legislative control, with reference to appointment of Judges to the higher judiciary. Such legislative control, according to learned counsel, would breach "independence of the judiciary". It was submitted, that the Parliament having exercised its authority in that behalf, by framing the NJAC Act, and having provided therein, the ultimate control with the Parliament, must be deemed to have crossed the line, and transgressed into forbidden territory, exclusively reserved for the judiciary. Learned counsel contended, that the duties and responsibilities vested in a constitutional authority, could only be circumscribed by the Constitution, and not by the Parliament through legislation. It was submitted, that the NJAC was a creature of the Constitution, as the NJAC flows out of Article 124A. Likewise, the Parliament, was also a creature of the Constitution. It was submitted, that one entity which was the creation of the Constitution, could not regulate the other, owing its existence to the Constitution.

40. It was pointed out by Mr. Ram Jethmalani, learned Senior Advocate, that the statement of "Objects and Reasons", as were projected for the instant legislation, indicated *inter alia,* that the NJAC would provide "a meaningful role to the judiciary". It was submitted, that what was meant by the aforesaid affirmation, was not comprehendible to him. It was further highlighted, that it also asserted in the "Objects and Reasons", that "the executive and the eminent persons to present their viewpoints and make the participants accountable", was likewise

unintelligible to him. It was submitted, that a perusal of the Constitution (99th Amendment) Act (as also, the NJAC Act) would not reveal, how the Members of the NJAC were to be made responsible. It was further submitted, that the statement of "Objects and Reasons" also indicate, that the manner of appointment of Judges to the higher judiciary, would introduce transparency in the selection process. It was contended, that the enactments under reference, amounted to commission of a fraud by Parliament, on the people of the country. As it was not possible to understand, how and who was to be made accountable – the executive, – the "eminent persons", – the judiciary itself. It was accordingly sought to be asserted, that the Parliament seemed to be asserting one thing, while it was doing something else. Learned counsel also placed reliance on Shreya Singhal v. Union of India[39], wherefrom the following observations were brought to our notice:

"50. Counsel for the Petitioners argued that the language used in Section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a particular communication will fall."

Based on the above submissions, it was asserted, that the statement of "Objects and Reasons", could not have been more vague, ambiguous, and fanciful than the ones in the matter at hand.

41. Mr. Anil B. Divan, Senior Advocate, while appearing for the petitioner in the petition filed by the Bar Association of India (Writ Petition (C) No.108 of 2015), first and foremost pointed out, that the Bar

[39] 2015 (4) SCALE 1

Association of India represents the High Court Bar Association, Kolkata (West Bengal), The Awadh Bar Association, Lucknow (Uttar Pradesh), the Madras Bar Association, Chennai (Tamil Nadu), the Supreme Court Bar Association, New Delhi, the Gujarat High Court Advocates' Association, Gandhinagar (Gujarat), the Advocates' Association, Chennai (Tamil Nadu), the Andhra Pradesh High Court Advocates' Association, Hyderabad (Andhra Pradesh), the Delhi High Court Bar Association, New Delhi, the Bar Association Mumbai (Maharashtra), the Gauhati High Court Bar Association, Guwahati (Assam), the Punjab & Haryana High Court Bar Association, Chandigarh (Punjab & Haryana), the Bombay Incorporated Law Society, Mumbai (Maharashtra), the Madhya Pradesh High Court Bar Association, Jabalpur (Madhya Pradesh), the Advocates' Association Bangalore (Karnataka), the Central Excise, Customs (Gold) Control Bar Association, New Delhi, the Advocates' Association, Allahabad (Uttar Pradesh), the Karnataka Advocates' Federation, Bangalore (Karnataka), the Allahabad High Court Bar Association (Uttar Pradesh), the Goa High Court Bar Association, Panaji (Goa), the Society of India Law of Firms, New Delhi, the Chhattisgarh High Court Bar Association, Bilaspur (Chhattisgarh), the Nagpur High Court Bar Association, Nagpur (Maharashtra), the Madurai Bench of Madras High Court Bar Association, Madurai (Tamil Nadu), the Jharkhand High Court Bar Association, Ranchi (Jharkhand), the Bar Association of National Capital Region, New Delhi, and the Gulbarga High Court Bar Association, Gulbarga (Karnataka). It was submitted, that all the aforementioned Bar

Associations were unanimous in their challenge, to the Constitution (99th Amendment) Act, and the NJAC Act. It was submitted, that the challenge to the former was based on the fact that it violated the "basic structure" of the Constitution, and the challenge to the latter, was based on its being *ultra vires* the provisions of the Constitution.

42. Learned counsel had adopted a stance, which was different from the one adopted by others. The submissions advanced by the learned senior counsel, were premised on the fact, that under the constitutional power of judicial review, the higher judiciary not only enforced fundamental rights, but also restricted the legislature and the executive, within the confines of their jurisdiction(s). It was pointed out, that it was the above power, which was the source of tension and friction between the judiciary on the one hand, and the two other pillars of governance i.e., the legislature and the executive, on the other. This friction, it was pointed out, was caused on account of the fact, that while discharging its responsibility of judicial review, executive backed actions of the legislature, were sometimes invalidated, resulting in the belief, that the judiciary was influencing and dominating the other two pillars of governance. Illustratively, it was pointed out, that in the beginning of independent governance of the country, judicial review led to the setting aside of legislations, pertaining to land reforms and zamindari abolition. This had led to the adoption of inserting legislations in the Ninth Schedule of the Constitution, so as to exclude them from the purview of judicial review.

43. It was submitted, that the first manifestation of a confrontation between the judiciary and the other two wings of governance, were indicated in the observations recorded in State of Madras v. V.G. Row[40], wherein, as far back as in 1952, the Supreme Court observed, that its conclusions were recorded, not out of any desire to a tilt at the legislative authority in a crusader's spirit, but in discharge of the duty plainly laid upon the Courts, by the Constitution.

44. It was submitted, that the legislations placed in the Ninth Schedule of the Constitution, from the original 13 items (relating to land reforms and zamindari abolition), multiplied at a brisk rate, and currently numbered about 284. And many of them, had hardly anything to do with land reforms. It was contended, that the decision rendered by this Court in I.C. Golak Nath v. State of Punjab[41], was a judicial reaction to the uninhibited insertions in the Ninth Schedule, leading to completely eclipsing fundamental rights. It therefore came to be held in the I.C. Golak Nath case[41], that Parliament by way of constitutional amendment(s) could not take away or abridge fundamental rights.

45. To project his contention, pertaining to tension and friction between the judiciary and the other two wings of governance, it was submitted, that from 1950 to 1973, there was virtually no attempt by the political-executive, to undermine or influence or dominate over the judiciary. It was pointed out, that during the aforesaid period, when Jawaharlal Nehru (upto 27th May, 1964), Gulzari Lal Nanda (upto 9th

[40] (1952) SCR 597
[41] AIR 1967 SC 1643

June, 1964), Lal Bahadur Shastri (upto 11th January,1966), Gulzari Lal Nanda (upto 24th January, 1966) and Indira Gandhi (upto 1972) were running the executive and political governance in India, in their capacity as Prime Minister, had not taken any steps to dominate over the judiciary. Thereafter, two facts could not be digested by the political-executive leadership. The first, the abolition of the Privy Purses by an executive fiat, which was invalidated by the Supreme Court in Madhavrao Scindia Bahadur v. Union of India[42]. And the second, the fundamental rights case, namely, the Kesavananda Bharati case[10], wherein the Supreme Court by a majority of 7:6, had propounded the doctrine of "basic structure" of the Constitution, which limited the amending power of the Parliament, under Article 368. As a sequel to the above judgments, the executive attempted to intimidate the judiciary, by the first supersession in the Supreme Court on 25.4.1973. Thereafter, internal emergency was declared on 25.06.1975, which continued till 21.03.1977. It was submitted, that during the emergency, by way of constitutional amendment(s), the power of judicial review vested in the higher judiciary, was sought to be undermined. It was submitted, that the intrusion during the emergency came to be remedied when the Janata Party came to power on 22.03.1977, through the 43rd and 44th Constitutional Amendments, which restored judicial review, to the original position provided for by the Constituent Assembly.

46. It was submitted, that in the recent past also, the exercise of the

[42] (1971) 1 SCC 85

power of judicial review had been inconvenient for the political-executive, as it resulted in exposing a series of scams. In this behalf, reference was made to two judgments rendered by this Court, i.e., Centre for Public Interest Litigation v. Union of India[43], and Manohar Lal Sharma v. Principal Secretary[44]. It was submitted, that the executive and the legislature can never appreciate that the power of judicial review has been exercised by the higher judiciary, as a matter of public trust. As a sequel to the above two judgments, it was pointed out, that an amount of approximately Rupees two lakh crores (Rs. 20,00,00,00,00,000/-) was gained by the public exchequer, for just a few coal block allocations (for which reliance was placed on an article which had appeared in the Indian Express dated 10.3.2015). And an additional amount of Rupees one lakh ten thousand crores (Rs.11,00,00,00,00,000/-) was gained by the public exchequer from the spectrum auction (for which reliance was placed on an article in the Financial Express dated 25.03.2015). It was submitted, that the embarrassment faced by the political-executive, has over shadowed the monumental gains to the nation. It was contended, that the Constitution (99th Amendment) Act, and the NJAC Act, were truthfully a political-executive device, to rein in the power of judicial review, to avoid such discomfiture.

47. It was also contended, that while adjudicating upon the present controversy, it was imperative for this Court, to take into consideration the existing socio-political conditions, the ground realities pertaining to

[43] (2012) 3 SCC 1
[44] (2014) 2 SCC 532

the awareness of the civil society, and the relevant surrounding circumstances. These components, according to learned counsel, were described as relevant considerations, for a meaningful judicial verdict in the V.G. Row case[40]. Referring to Shashikant Laxman Kale v. Union of India[45], it was contended, that for determining the purpose or the object of the legislation, it was permissible for a Court to look into the circumstances which had prevailed at the time when the law was passed, and events which had necessitated the passing of the legislation. Referring to the judgment rendered by this Court, in Re: the Special Courts Bill, 1978[46], learned counsel placed emphatic reliance on the following:

"106. The greatest trauma of our times, for a developing country of urgent yet tantalising imperatives, is the dismal, yet die-hard, poverty of the masses and the democratic, yet graft-riven, way of life of power-wielders. Together they blend to produce gross abuse geared to personal aggrandizement, suppression of exposure and a host of other horrendous, yet hidden, crimes by the summit executives, pro tem, the para-political manipulators and the abetting bureaucrats. And the rule of law hangs limp or barks but never bites. An anonymous poet sardonically projected the social dimension of this systemic deficiency:

The law locks up both man and woman
Who steals the goose from off the common,
But lets the greater felon loose
Who steals the common from the goose.

107. The impact of 'summit' crimes in the Third World setting is more terrible than the Watergate syndrome as perceptive social scientists have unmasked. Corruption and repression-cousins in such situations-hijack developmental processes. And, in the long run, lagging national progress means ebbing people's confidence in constitutional means to social justice. And so, to track down and give short shrift to these heavy-weight criminaloids who often mislead the people by public moral weight-lifting and multipoint manifestoes is an urgent legislative mission partially undertaken by the Bill under discussion. To punish such super-offenders in top positions, sealing off legalistic escape routes and dilatory strategies

[45] (1990) 4 SCC 366
[46] (1979) 1 SCC 380

and bringing them to justice with high speed and early finality, is a desideratum voiced in vain by Commissions and Committees in the past and is a dimension of the dynamics of the Rule of Law. This Bill, hopefully but partially, breaks new ground contrary to people's resigned cynicism that all high-powered investigations, reports and recommendations end in legislative and judicative futility, that all these valiant exercises are but sound and fury signifying nothing, that 'business as usual' is the signature tune of public business, heretofore, here and hereafter. So this social justice measure has my broad assent in moral principle and in constitutional classification, subject to the serious infirmities from which it suffers as the learned Chief Justice has tersely sketched. Whether this remedy will effectively cure the malady of criminal summitry is for the future to tell.

108. All this serves as a backdrop. Let me unfold in fuller argumentation my thesis that the Bill, good so far as it goes, is bad so far as it does not go-saved though by a pragmatic exception I will presently explain. Where the proposed law excludes the pre-and post-emergency crime-doers in the higher brackets and picks out only 'Emergency' offenders, its benign purpose perhaps becomes a crypto cover up of like criminals before and after. An 'ephemeral' measure to meet a perennial menace is neither a logical step nor national fulfilment. The classification, if I may anticipate my conclusion, is on the brink of constitutional break-down at that point and becomes almost vulnerable to the attack of Article 14.

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114. The crucial test is 'All power is a trust', its holders are 'accountable for its exercise', for 'from the people, and for the people, all springs, and all must exist'. By this high and only standard the Bill must fail morally if it exempts non-Emergency criminals about whom prior Commission Reports, now asleep in official pigeon holes, bear witness and future Commission Reports (who knows?) may, in time, testify. In this larger perspective, Emergency is not a substantial differentia and the Bill nearly recognises this by ante-dating the operation to February 27, 1975 when there was no 'Emergency'. Why ante-date if the 'emergency' was the critical criterion?

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117. Let us take a close look at the 'Emergency', the vices it bred and the nexus they have to speedier justice, substantial enough to qualify for reasonable sub-classification. Information flowing from the proceedings and reports of a bunch of high-powered judicial commissions shows that during that hushed spell, many suffered shocking treatment. In the words of the Preamble, civil liberties were withdrawn to a great extent, important fundamental rights of the people were suspended, strict censorship on the press was placed and judicial powers were curtailed to a large extent.

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128. Let us view the problem slightly differently. Even if liberty had not been curtailed, press not gagged or writ jurisdiction not cut down,

criminal trials and appeals and revisions would have taken their own interminable delays. It is the forensic delay that has to be axed and that has little to do with the vices of the Emergency. Such crimes were exposed by judicial commissions before, involving Chief Ministers and Cabinet Ministers at both levels and no criminal action followed except now and that of a select group. It was lack of will-not Emergency-that was the villain of the piece in non-prosecution of cases revealed by several Commissions like the Commission of Enquiry appointed by the Government of Orissa in 1967 (Mr. Justice Khanna), the Commission of Enquiry appointed by the Government of J&K in 1965 (Mr. Justice Rajagopala Ayyangar), the Mudholkar Commission against 14 ex-United Front Ministers appointed by the Government of Bihar in 1968 and the T.L. Venkatarama Aiyar Commission of Inquiry appointed by the Government of Bihar, 1970-to mention but some. We need hardly say that there is no law of limitation for criminal prosecutions. Somehow, a few manage to be above the law and the many remain below the law. How? – I hesitate to state."

Last of all, reliance was placed on the decision of this Court in Subramanian Swamy v. Director, Central Bureau of Investigation[47], wherein this Court extensively referred to the conditions regarding corruption which prevailed in the country. For the above purpose, it took into consideration the view expressed by the N.N. Vohra Committee Report, bringing out the nexus between the criminal syndicates and mafia.

48. Reliance was, then placed on the efforts made by the executive on the death of the first Chief Justice of India (after the promulgation of the Constitution), when Patanjali Sastri, J., who was the senior most Judge, was sought to be overlooked. Relying on recorded texts in this behalf, by Granville Austin, George H. Gadbois Jr. and M.C. Chagla, it was submitted, that all the six Judges, at that time, had threatened to resign,

[47] (2014) 8 SCC 682

if the senior most Judge was overlooked for appointment as Chief Justice of India.

49. Referring to the first occasion, when the convention was broken, by appointing A.N. Ray, J., as the Chief Justice of India, it was submitted, that the supersession led to public protest, including speeches by former Judges, former Attorneys General, legal luminaries and members of the Bar, throughout the country. M. Hidayatullah, CJ., in a public speech, complimented the three Judges, who were superseded, for having resigned from their office, immediately on the appointment of A.N. Ray, as Chief Justice of India. In the speech delivered by M. Hidayatullah, CJ., he made a reference about rumors being afloat, that the senior most Judge after him, namely, J.C. Shah, J., would not succeed him as the Chief Justice of India. And that, an outsider was being brought to the Supreme Court, as its Chief Justice. His speech highlighted the fact, that all except one sitting Judge of the Supreme Court had agreed to resign in the event of supersession of J.C. Shah, J.. He had also pointed out, in his speech, that if the decision was taken by the executive, even a day before his retirement, he too would join his colleagues in resigning from his position as the Chief Justice of India. It was accordingly submitted, that the constitutional convention, that the senior most Judge of the Supreme Court would be appointed as the Chief Justice of India, was truly and faithfully recognized as an impregnable convention. To support the aforesaid contention, it was also pointed out, that even in situations wherein the senior most puisne Judge would have a very short tenure,

the convention had remained unbroken, despite the inefficacy of making such appointments. In this behalf, the Court's attention was drawn to the fact that J.C. Shah, CJ. (had a tenure of 35 days), K.N. Singh, CJ. (had a tenure of 18 days) and S. Rajendra Babu, CJ. (had a tenure of 29 days).

50. It was also the contention of the learned senior counsel, that the executive is an important litigant and stakeholder before the higher judiciary, and as such, the executive ought to have no role, whatsoever, in the matter of appointments/transfers of Judges to the higher judiciary. In this behalf, learned counsel placed reliance on a number of judgments rendered by this Court, wherein the participation of the executive in the higher judiciary, had been held to be unconstitutional, in the matter of appointments of Judges and other Members of tribunals, vested with quasi judicial functions. It was submitted, that the inclusion of the Union Minister in charge of Law and Justice in the NJAC, was a clear breach of the judgments rendered by this Court. Additionally, it was pointed out, that two "eminent persons", who were to be essential components of the NJAC, were to be selected by a Committee, wherein the dominating voice was that of the political leadership. It was pointed out, that in the three-Member Committee authorised to nominate "eminent persons" included the Prime Minister and the Leader of the Opposition in the Lok Sabha, besides the Chief Justice of India. It was therefore submitted, that in the six-Member NJAC, three Members would have political-executive lineage. This aspect of the matter, according to

the learned counsel, would have a devastating affect. It would negate primacy of the higher judiciary, and the same would result in undermining the "independence of the judiciary". Based on the above foundation, learned senior counsel raised a number of contentions. Firstly, it was submitted, that through the impugned constitutional amendment and the NJAC Act, the constitutional convention in this country, that the senior most Judge of the Supreme Court would be appointed as the Chief Justice of India, had been breached. It was submitted, that the above convention had achieved the status of a constitutional axiom – a constitutional principle. To substantiate the above contention, it was submitted, that right from 26.01.1950, the senior most puisne Judge of the Supreme Court has always been appointed as the Chief Justice of India except on two occasions. Firstly, the above convention was breached, when A.N. Ray, J., was appointed as Chief Justice of India on 25.4.1973, by superseding three senior most Judges. It was submitted, that the aforesaid supersession was made on the day following the Supreme Court delivered the judgment in the Kesavananda Bharati case[10]. Secondly, the supersession took place during the internal emergency declared by Prime Minister, Indira Gandhi. At that juncture, M.H. Beg, J., was appointed as Chief Justice of India on 29.1.1977, by superseding his senior H.R. Khanna, J.. It was contended, that the aforesaid two instances should be considered as aberrations, in the convention pertaining to appointment of Chief Justice of India.

51. Mr. Arvind P. Datar also assailed the constitutional validity of Article 124C, introduced by the Constitution (99th Amendment) Act. It was submitted, that the Parliament was delegated with the authority to "regulate the procedure for the appointment of the Chief Justice of India and other Judges of the Supreme Court, and the Chief Justices and other Judges of the High Courts". And the NJAC was empowered to lay down, by regulation, "the procedure of discharging its own functions, the manner of selection of persons for appointment, and such other matters, as may be considered necessary by it". It was the contention of the learned counsel, that the delegation of power contemplated under Article 124C, amounted to vesting the NJAC, with what was earlier vested with the Chief Justice of India. In this behalf, reference was also made to Sections 11, 12 and 13 of the NJAC Act. The power to make rules, has been vested with the Central Government under Section 11, and the power to make regulations has been entrusted to the NJAC under Section 12. The aforementioned rules and regulations, as drawn by the Central Government/NJAC, are required to be placed before the Parliament under Section 13, and only thereafter, the rules and regulations were to be effective (or not to have any effect, or to have effect as modified). It was submitted, that the entrustment of the procedure of appointment of Judges to the higher judiciary, and also, the action of assigning the manner in which the NJAC would discharge its functions (of selecting Judges to the higher judiciary), with either the executive or the legislature, was unthinkable, if "independence of the judiciary" was to be

maintained. It was pointed out, that the intent behind Article 124C, in the manner it had been framed, stood clearly exposed, by the aforesaid provisions of the NJAC Act.

52. Reference was also made to Section 12 of the NJAC Act, to highlight, that the NJAC had been authorized to notify in the Official Gazette, regulations framed by it, with the overriding condition, that the regulations so framed by the NJAC were to be consistent with the provisions of the NJAC Act, as also, the rules made thereunder (i.e., under Section 11 of the NJAC Act). Having so empowered the NJAC (under Sections 11 and 12 referred to above), and having delineated in Section 12(2), the broad outlines with reference to which the regulations could be framed, it was submitted, that the power to delegate the authority to frame regulations clearly stood exhausted. In that, the Parliament had no jurisdiction thereafter, to interfere in the matter of framing regulations. In fact, according to the learned counsel, consequent upon the empowerment of the NJAC to frame regulations, the Parliament was rendered *functus officio,* on the issue of framing regulations. According to learned counsel, the above also established, the inference drawn in the foregoing paragraph.

53. It was also the contention of the learned counsel, that the NJAC constituted, by way of the Constitution (99th Amendment) Act, would be sustainable, so long as it did not violate the "basic structure" of the Constitution. It was emphasized, that one of the recognized features of the "basic structure" of the Constitution was, the "independence of the

judiciary". The procedure which the NJAC could adopt for discharging its functions, and the procedure it was liable to follow while holding its meetings, and the ambit and scope with reference to which the NJAC was authorized to frame its regulations, had to be left to the exclusive independent will of an independent NJAC. That, according to learned counsel, would have ensured the "independence of the NJAC". It was accordingly contended, that Article 124C breached the "independence of the judiciary", and also, undermined the independence of the NJAC.

54. The next contention advanced at the hands of the learned counsel, was with reference to clause (2) of Article 124A, whereby judicial review was barred, with reference to actions or proceedings of the NJAC, on the ground of the existence of a vacancy or defect in the constitution of the NJAC. Learned counsel then invited this Court's attention to the exclusion of the power of judicial review, contemplated under Articles 323A(2)(d) and 323B(3)(d), wherein the power of judicial review was similarly excluded. It was submitted, that this Court struck down a similar provision in the aforesaid Articles, holding that the same were violative of the "basic structure" of the Constitution. In this behalf, learned counsel placed reliance on the decision of this Court in the Kihoto Hollohan case[34], and referred to the following observations recorded therein:

"129. The unanimous opinion according to the majority as well as the minority is that Paragraph 7 of the Tenth Schedule enacts a provision for complete exclusion of judicial review including the jurisdiction of the Supreme Court under Article 136 and of the High Courts under Articles 226 and 227 of the Constitution and, therefore, it makes in terms and in

effect a change in Articles 136, 226 and 227 of the Constitution which attracts the proviso to clause (2) of Article 368 of the Constitution; and, therefore, ratification by the specified number of State legislatures before the Bill was presented to the President for his assent was necessary, in accordance therewith. The majority view is that in the absence of such ratification by the State legislatures, it is Paragraph 7 alone of the Tenth Schedule which is unconstitutional; and it being severable from the remaining part of the Tenth Schedule, Paragraph 7 alone is liable to be struck down rendering the Speakers' decision under Paragraph 6 that .of a judicial tribunal amenable to judicial review by the Supreme Court and the High Courts under Articles 136, 226 and 227. The minority opinion is that the effect of invalidity of Paragraph 7 of the Tenth Schedule is to invalidate the entire Constitution (Fifty-second Amendment) Act, 1985 which inserted the Tenth Schedule since the President's assent to the Bill without prior ratification by the State legislatures is non est. The minority view also is that Paragraph 7 is not severable from the remaining part of the Tenth Schedule and the Speaker not being an independent adjudicatory authority for this purpose as contemplated by a basic feature of democracy, the remaining part of the Tenth Schedule is in excess of the amending powers being violative of a basic feature of the Constitution. In the minority opinion, we have held that the entire Constitution (Fifty-second Amendment) Act, 1985 is unconstitutional and an abortive attempt to make the constitutional amendment indicated therein."

Reliance was also placed on the following conclusions recorded by this Court in Dr. Kashinath G. Jalmi v. The Speaker[48].

"43. In Kihoto Hollohan there was no difference between the majority and minority opinions on the nature of finality attaching to the Speaker's order of disqualification made under para 6 of the Tenth Schedule, and also that para 7 therein was unconstitutional in view of the non-compliance of the proviso to clause 2 of Article 368 of the Constitution, by which judicial review was sought to be excluded. The main difference in the two opinions was, that according to the majority opinion this defect resulted in the constitution standing amended from the inception with insertion of the Tenth Schedule minus para 7 therein, while according to the minority the entire exercise of constitutional amendment was futile and an abortive attempt to amend the constitution, since Para 7 was not severable. According to the minority view, all decisions rendered by the several Speakers under the Tenth Schedule were, therefore, nullity and liable to be ignored. According to the majority view, para 7 of the Tenth Schedule being unconstitutional and severable, the Tenth Schedule minus para 7 was validly enacted and,

[48] AIR 1993 SC 1873

therefore, the orders made by the Speaker under the Tenth Schedule were not nullity but subject to judicial review. On the basis of the majority opinion, this Court has exercised the power of judicial review over the orders of disqualification made by the speakers from the very inception of the Tenth Schedule, and the exercise of judicial review has not been confined merely to the orders of disqualification made after 12th November, 1991 when the judgment in Kihoto Hollohan (1992 (1) SCC 309...) was rendered. Venkatachaliah, J. (as he then was) wrote the majority opinion and, thereafter, on this premise, exercised the power of judicial review over orders of disqualification made prior to 12.11.1991. The basic fallacy in the submission made on behalf of the respondents that para 7 must be treated as existing till 12th November, 1991 is that on that view there would be no power of judicial review against an order of disqualification made by the Speaker prior to 12th November, 1991 since para 7 in express terms totally excludes judicial review."

It was, therefore, the vehement contention of the learned counsel, that clause (2) of Article 124A should be struck down, as being violative of the "basic structure" of the Constitution.

55. Mr. Fali S. Nariman, learned senior counsel, also raised a purely technical plea. It was his contention, that 121st Constitution Amendment Bill, now the Constitution (99th Amendment) Act, was introduced in the Lok Sabha on 11th of August, 2014 and was passed by the Lok Sabha on 13th of August, 2014. It was further submitted, that the 121st Constitution Amendment Bill was discussed and passed by Rajya Sabha on 14.8.2014. Thereupon, the said Amendment Bill, which envisaged a constitutional amendment, was sent to the State Legislatures for ratification. Consequent upon its having been ratified by 16 State Legislatures, it was placed before the President for his assent. It was pointed out, that the President accorded his assent on 31.12.2014, whereupon, it became the Constitution (99th Amendment) Act. Learned

counsel then invited our attention to Section 1 of the Constitution (99th Amendment) Act, which reads as under:

"1(1) This Act may be called the Constitution (Ninety-ninth Amendment) Act, 2014.
(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint."

Based on the aforesaid provision, it was contended, that in spite of having received the assent of the President on 31.12.2014, the Constitution (99th Amendment) Act, would not come into force automatically. And that, the same would come into force in terms of the mandate contained in Section 1(2), - "… on such date as the Central Government may, by notification in the Official Gazette, appoint." It was submitted, that the Central Government notified the Constitution (99th Amendment) Act, in the Gazette of India Extraordinary on 13.4.2015. Based on the aforesaid factual position, the Constitution (99th Amendment) Act, came into force with effect from 13.4.2015.

56. In conjunction with the factual position noticed in the foregoing paragraph, learned counsel pointed out, that the NJAC Bill, was also introduced in the Lok Sabha on 11.8.2014. The Lok Sabha passed the Bill on 13.8.2014, whereupon, it was passed by the Rajya Sabha on 14.8.2014. Thereafter, the NJAC Bill received the assent of the President on 31.12.2014, and became the NJAC Act. It was contended, that the enactment of the NJAC Act was based/founded on the Constitution (99th Amendment) Act. It was submitted, that since the Constitution (99th Amendment) Act, was brought into force on 13.4.2015, the consideration

of the NJAC Bill and the passing of the NJAC Act prior to the coming into force of the Constitution (99th Amendment) Act, would render it stillborn and therefore nugatory. The Court's attention was also invited to the fact, that the aforesaid legal infirmity, was noticed and raised during the course of the parliamentary debate pertaining to the NJAC Bill, before the Rajya Sabha. Learned counsel invited this Court's attention to the following questions and answers, which are recorded on pages 442 to 533 with reference to the debates in the Rajya Sabha on 13.8.2014, and at pages 229 to 375 on 14.8.2014 (Volume 232 No.26 and 27), as under:

"that Mr. Sitaram Yechury, Member of Parliament, (Rajya Sabha) raised a constitutional objection (on August 13, 2014) to the NJAC Bill saying:
".....till the Constitution Amendment (121st Bill) comes into effect, the Legislature, I would like to humbly submit, does not have the right to enact a Bill for the creation of a Judicial Commission for appointments." (page 488)
".....I am only asking you to seriously consider we are creating a situation where this proposal for creation of a Judicial Appointments Commission will become *ultra vires* of the Indian Constitution because our right to bring about a Bill to enact such a provision comes only after the Constitution Amendment Bill becomes effective." (page 489)
".....Therefore, you please consider what I am saying with seriousness. I want also the law Minister to consider it. Let it not be struck down later as *ultra vires*. So, let us give it a proper consideration." (Page-490)
- The Leader of the Opposition (Shri Ghulam Nabi Azad) then said:
"The leader of the opposition (Shri Ghulam Nabi Azad): Sir, I just want to say that Mr. Yechury has given a totally different dimension to the entire thing. It is quite an eye opener for all of us that the entire legislation will become *ultr vires*. So, my suggestion is that before my colleague, Mr. Anand Sharma, speaks, I would request one thing. Of course, we have great lawyers from all sides here but I think one of the oldest luminaries in the legal profession is Mr. Parasaran. Before we all decide what to do, can we request him to throw light on what Mr. Yechury has said? (Page-490)
- Mr. K. Parasaran (Nominated Member) then gave his views saying:
Shri K. Parasarn (contd.)...Before ratification, if you take up the Bill and pass the Bill, today, it will be unconstitutional and *ultra vires*. Because the power to make enactment, as we see, is only in the Articles. The Article 368 gives the power to ....

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Mr. Deputy Chairman: What I want to know is this. You have mentioned that there are two provisions. Number one, if it is amended in a particular way, it can directly go to the President. If the amendment involves Chapter IV, part 5, or Chapter V, etc., etc., it has to be ratified by half in the Assemblies. Okay. I accept both of them. But do any of these objections object us from considering this Bill now? That is my question.

Shri K. Parasaran: No. We don't have the legislative competence. (Page-492)

- The Minister of Law and Justice then said:

".....This Bill will become effective after ratification but the separate Bill is for guidance to the Legislatures as to how the entire structure has come into existence. Therefore, it is not unconstitutional. We have got summary power under Article 246 read with Entries 77 and 78, which is not a limited power. It is a plenary power, exhaustive power. This Parliament can pass any law with regard to composition and organization of the Supreme Court; this Parliament can pass any law with regard to High Court composition. That is not a limited power. ....." (Page-495)

Mr. Deputy Chairman: Yes, I will come ....(interruptions)....

Now, Mr. Minister, the point is that you yourself admit that only after 50 per cent of the Assemblies have endorsed it by a Resolution can your Bill come into force, and after the President has given assent. And then, you are saying that the Bill was passed along with this only as a guideline, so that Members of the Assemblies know what you are going to do.

Shri Ravi Shankar Prasad: But it would become effective after assent. That is all.

Mr. Deputy Chairman: That's what I am saying. It will become effective after six months.

Now, I would like to know one thing from Mr. Parasaran. Article 246, according to him, (the Minister) gives absolute powers to Parliament to pass a legislation. Is there any provision in the Constitution, which prevents passing of such a Bill before the Constitutional Amendment is endorsed by the President? Is there any such provision? ...(interruptions) .... I will come to you. Yes, Mr. Parasaran. (Page-495)

- In response Mr. K. Parasaran then said:

"Shri K. Parasaran: Sir, I would explain this. Now, we are concerned with Article 124 and a legislation under Article 246 read with the relevant entries in the Seventh Schedule, pointed out by the Hon. Minister. Now, the Supreme Court has interpreted Article 124. We cannot pass an Act contrary to that judgment and, therefore, the need for amendment to the constitution. If the Constitution is not amended, then we lack the legislative competence. There is no good of going to Article 246 and reading the entries. Had we the legislative competence, under Article 246 read with the entries.... (Emphasis supplied) page 495.

Mr. Deputy Chairman: Then, how do you explain Article 246?

Shri K. Parasaran: Suppose the Constitutional Amendment is passed, then can this Bill be introduced and discussed as it is? As a hypothetical case, if this Amendment Bill is not passed, can we introduce this Bill and pass it? We will not be able to do it." (Emphasis supplied) (Page-496)."

57. In other words, it was the contention of the learned counsel, that the NJAC Bill was passed by both Houses of Parliament, when Parliament had no power, authority or jurisdiction to consider such a Bill, in the teeth of Articles 124(2) and 217(1), as enacted in the original Constitution. It was submitted, that the passing of the said Bill, was in itself unconstitutional, *ultra vires* and void, because the amended provisions contained in the Constitution (99th Amendment) Act, had not come into play. It was submitted, that the passing by the Lok Sabha, as also, by the Rajya Sabha of the 121st Constitution Amendment Bill on 13/14.8.2014, and the ratification thereof by 16 State Legislatures, as also, the assent given thereto by the President on 31.12.2014, would not bestow validity on the NJAC Act. This, for the simple reason, that the Constitution (99th Amendment) Act, was brought into force only on 13.4.2015. In the above view of the matter, according to the learned counsel, till 13.4.2015, Articles 124(2) and 217(1) of the Constitution of India were liable to be read, as they were originally enacted. In the aforesaid context, it was submitted, that the NJAC Act could not have been passed, till the unamended provisions of the Constitution were in force. And that, the mere assent of the President to the NJAC Act on 31.12.2014, could not infuse validity thereon.

58. In order to substantiate the aforesaid contention, learned counsel placed reliance on A.K. Roy v. Union of India[49], and invited our attention to the following:

"45 The argument arising out of the provisions of Article 368(2) may be considered first. It provides that when a Bill whereby the Constitution is amended is passed by the requisite majority, it shall be presented to the President who shall give his assent to the Bill, "and thereupon the Constitution shall stand amended in accordance with the terms of the Bill." This provision shows that a constitutional amendment cannot have any effect unless the President gives his assent to it and secondly, that nothing more than the President's assent to an amendment duly passed by the Parliament is required, in order that the Constitution should stand amended in accordance with the terms of the Bill. It must follow from this that the Constitution stood amended in accordance with the terms of the 44th Amendment Act when the President gave his assent to that Act on April 30, 1979. We must then turn to that Act for seeing how and in what manner the Constitution stood thus amended. The 44th Amendment Act itself prescribes by Section 1(2) a pre-condition which must be satisfied before any of its provisions can come into force. That pre-condition is the issuance by the Central Government of a notification in the official gazette, appointing the date from which the Act or any particular provision thereof will come into force, with power to appoint different dates for different provisions. Thus, according to the very terms of the 44th Amendment, none of its provisions can come into force unless and until the Central Government issues a notification as contemplated by Section 1(2).

46. There is no internal contradiction between the provisions of Article 368(2) and those of Section 1(2) of the 44th Amendment Act. Article 368(2) lays down a rule of general application as to the date from which the Constitution would stand amended in accordance with the Bill assented to by the President. Section 1(2) of the Amendment Act specifies the manner in which that Act or any of its provisions may be brought into force. The distinction is between the Constitution standing amended in accordance with the terms of the Bill assented to by the President and the date of the coming into force of the Amendment thus introduced into the Constitution. For determining the date with effect from which the Constitution stands amended in accordance with the terms of the Bill, one has to turn to the date on which the President gave, or was obliged to give, his assent to the Amendment. For determining the date with effect from which the Constitution, as amended, came or will come into force, one has to turn to the notification, if any, issued by the Central Government under Section 1(2) of the Amendment Act.

[49] (1982) 1 SCC 271

47. The Amendment Act may provide that the amendment introduced by it shall come into force immediately upon the President giving his assent to the Bill or it may provide that the amendment shall come into force on a future date. Indeed, no objection can be taken to the constituent body itself appointing a specific future date with effect from which the Amendment Act will come into force; and if that be so, different dates can be appointed by it for bringing into force different provisions of the Amendment Act. The point of the matter is that the Constitution standing amended in accordance with the terms of the Bill and the amendment thus introduced into the Constitution coming into force are two distinct things. Just as a law duly passed by the legislature can have no effect unless it comes or is brought into force, similarly, an amendment of the Constitution can have no effect unless it comes or is brought into force. The fact that the constituent body may itself specify a future date or dates with effect from which the Amendment Act or any of its provisions will come into force shows that there is no antithesis between Article 368(2) of the Constitution and Section 1(2) of the 44th Amendment Act. The expression of legislative or constituent will as regards the date of enforcement of the law or Constitution is an integral part thereof. That is why it is difficult to accept the submission that, contrary to the expression of the constituent will, the amendments introduced by the 44th Amendment Act came into force on April 30, 1979 when the President gave his assent to that Act. The true position is that the amendments introduced by the 44th Amendment Act did not become a part of the Constitution on April 30, 1979. They will acquire that status only when the Central Government brings them into force by issuing a notification under Section 1(2) of the Amendment Act."

59. It was also the contention of Mr. Fali S. Nariman, that just as a constitutional amendment was liable to be declared as *ultra vires,* if it violated and/or abrogated, the "core" or the "basic structure" of the Constitution; even a simple legislative enactment, which violated the "basic structure" of the Constitution, was liable to be declared as unconstitutional. For the instant proposition, learned counsel referred to the Madras Bar Association case[35], and placed reliance on the following observations recorded therein:

"109. Even though we have declined to accept the contention advanced on behalf of the Petitioners, premised on the "basic structure" theory, we feel it is still essential for us, to deal with the submission advanced on

behalf of the respondents in response. We may first record the contention advanced on behalf of the respondents. It was contended, that a legislation (not being an amendment to the Constitution), enacted in consonance of the provisions of the Constitution, on a subject within the realm of the legislature concerned, cannot be assailed on the ground that it violates the "basic structure" of the Constitution. For the present controversy, the respondents had placed reliance on Articles 245 and 246 of the Constitution, as also, on entries 77 to 79, 82 to 84, 95 and 97 of the Union List of the Seventh Schedule, and on entries 11-A and 46 of the Concurrent List of the Seventh Schedule. Based thereon it was asserted, that Parliament was competent to enact the NTT Act. For examining the instant contention, let us presume it is so. Having accepted the above, our consideration is as follows. The Constitution regulates the manner of governance in substantially minute detail. It is the fountainhead distributing power, for such governance. The Constitution vests the power of legislation at the Centre, with the Lok Sabha and the Rajya Sabha, and in the States with the State Legislative Assemblies (and in some States, the State Legislative Councils, as well). The instant legislative power is regulated by "Part XI" of the Constitution. The submission advanced at the hands of the learned counsel for the respondents, insofar as the instant aspect of the matter is concerned, is premised on the assertion that the NTT Act has been enacted strictly in consonance with the procedure depicted in "Part XI" of the Constitution. It is also the contention of the learned counsel for the respondents, that the said power has been exercised strictly in consonance with the subject on which the Parliament is authorized to legislate. Whilst dealing with the instant submission advanced at the hands of the learned counsel for the respondents, all that needs to be stated is, that the legislative power conferred under "Part XI" of the Constitution has one overall exception, which undoubtedly is, that the "basic structure" of the Constitution, cannot be infringed, no matter what. On the instant aspect some relevant judgments rendered by Constitutional Benches of this Court, have been cited hereinabove. It seems to us, that there is a fine difference in what the petitioners contend, and what the respondents seek to project. The submission advanced at the hands of the learned counsel for the petitioners does not pertain to lack of jurisdiction or inappropriate exercise of jurisdiction. The submission advanced at the hands of the learned counsel for the petitioners pointedly is, that it is impermissible to legislate in a manner as would violate the "basic structure" of the Constitution. This Court has repeatedly held that an amendment to the provisions of the Constitution would not be sustainable if it violated the "basic structure" of the Constitution, even though the amendment had been carried out by following the procedure contemplated under "Part XI" of the Constitution. This leads to the determination that the "basic structure" is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed

procedure, and was within the domain of the enacting legislature, any infringement to the "basic structure" would be unacceptable. Such submissions advanced at the hands of the learned counsel for the respondents are, therefore, liable to be disallowed, and are accordingly declined."

60. Mr. Arvind P. Datar, learned senior counsel, assailed the constitutional validity of various provisions of the NJAC Act, by advancing the same submissions, as were relied upon by him while assailing the constitutional validity of Articles 124A, 124B and 124C. For reasons of brevity, the aforestated submissions noticed with reference to individual provisions of the NJAC Act are not being repeated again.

61. A challenge was also raised, to the different provisions of the NJAC Act. First and foremost, a challenge was raised to the manner of selection of the Chief Justice of India. Section 5(1) of the NJAC Act, it was submitted, provides that the NJAC would recommend the senior most Judge of the Supreme Court, for being appointed as Chief Justice of India, subject to the condition, that he was considered "fit" to hold the office. It was contended, that the procedure to regulate the appointment of the Chief Justice of India, was to be determined by Parliament, by law under Article 124C. It was contended, that the term "fit", expressed in Section 5 of the NJAC Act, had not been elaborately described. And as such, fitness would have to be determined on the subjective satisfaction of the Members of the NJAC. It was submitted, that even though the learned Attorney General had expressed, during the course of hearing, that fitness meant "…mental and physical fitness alone…", it was always open to the Parliament to purposefully define fitness, in a manner as

would sub-serve the will of the executive. It was submitted, that even an ordinance could be issued without the necessity, of following the procedure, of enacting law. It was asserted, that the criterion of fitness could be defined and redefined. It was submitted, that it was a constitutional convention, that the senior most Judge of the Supreme Court would always be appointed as Chief Justice of India. And that, the aforesaid convention had remained unbroken, even though in some cases the tenure of the appointee, had been short, and as such, may not have enured to the advantage, of the judicial organization as a whole. Experience had shown, according to learned counsel, that adhering to the practice of appointing the senior most Judge as the Chief Justice of India, had resulted in institutional harmony amongst Judges, which was extremely important for the health of the judiciary, and also, for the "independence of the judiciary". It was submitted, that it would be just and appropriate, at the present juncture, to understand the width of the power, so as to prevent any likelihood of its misuse in future. It was submitted, that various ways and means could be devised to supersede Judges, and also, to bring in favourites. Past experience had shown, that the executive had abused its authority, when it departed from the above rule in April 1973, by superseding J.M. Shelat, J., the senior most Judge and even the next two Judges in the order of seniority after him, namely, K.S. Hegde and A.N. Grover, and appointed the fourth senior most Judge A.N Ray, as the Chief Justice of India. Again in January 1977 on the retirement of A.N. Ray, CJ., the senior most Judge H.R. Khanna, was

ignored, and the next senior most Judge, M.H. Beg, was appointed as the Chief Justice of India. Such control in the hands of the executive would cause immense inroads, in the decision making process. And could result in, Judges trying to placate and appease the executive, for personal gains and rewards.

62. The submission noticed above was sought to be illustrated through the following instance. It was pointed out, that it would be genuine and legitimate for the Parliament to enact, that a person would be considered fit for appointment as Chief Justice of India, only if he had a minimum remaining tenure of at least two years. Such an enactment would have a devastating effect, even though it would appear to be innocuously legitimate. It was contended, that out of the 41 Chief Justices of India appointed till date, only 12 Chief Justices of India, had a tenure of more than two years. Such action, at the hands of the Parliament, was bound to cause discontentment to those, who had a legitimate expectation to hold the office of Chief Justice of India. It was submitted, that similar instances can be multiplied with dimensional alterations by prescribing different parameters. It was submitted, that the Parliament should never be allowed the right to create uncertainty, in the matter of selection and appointment of the Chief Justice of India, because the office of the Chief Justice of India was pivotal, as it shouldered extremely serious and onerous responsibilities. The exercise of the above authority, it was pointed out, could/would seriously affect the "independence of the judiciary". In the above context, reference was also made, to the opinion

expressed by renowned persons, having vast experience in the judicial institution, effectively bringing out the veracity of the contention advanced. Reference in this regard was made to the observations of M.C. Chagla, in his book, "Roses in December – An Autobiography", wherein he examined the impact of supersession on Judges, who by virtue of the existing convention, were in line to be the Chief Justice of India, but were overlooked by preferring a junior. Reference was also made to the opinion expressed by H.R. Khanna, J., (in his book – "Neither Roses Nor Thorns"). Finally, the Court's attention was drawn to the view expressed by H.M. Seervai (in "Constitutional Law of India – A Critical Commentary'). It was submitted, that leaving the issue of determination of fitness with the Parliament, was liable to fan the ambitions of Judges, and would make them loyal to those who could satisfy their ambitions. It was therefore the contention of the learned counsel, that Section 5, which created an ambiguity in the matter of appointment of the Chief Justice of India, and could be abused to imperil "independence of the judiciary", was liable to be declared as unconstitutional.

63. It was also the contention of the learned counsel for the petitioners, that on the issue of selection and appointment of Judges to the higher judiciary, the NJAC was liable to take into consideration ability, merit and suitability (as may be specified by regulations). It was submitted, that the above criteria could be provided through regulations framed under Section 12(2)(a), (b) and (c). It was pointed out, that the regulations framed for determining the suitability of a Judge (with reference to ability

and merit), would be synonymous with the conditions of eligibility. Inasmuch as, a candidate who did not satisfy the standards expressed in the regulations, would also not satisfy, the prescribed conditions of appointment. It was asserted, that it would be a misnomer to treat the same to be a matter of mere procedure. Thus viewed, it was contended, that the provisions of the NJAC Act, which laid down (or provided for the laying down) substantive conditions for appointment, was clearly beyond the purview of Article 124C, inasmuch as, under the above provision, Parliament alone had been authorised by law, to regulate the procedure for appointment of Judges of the Supreme Court, or to empower the NJAC to lay the same down by regulations, *inter alia* the manner of selection of persons for appointment, as Judges of the Supreme Court. It was submitted, that the NJAC Act, especially in terms of Section 5(2), had travelled far beyond the jurisdictional parameters contemplated under Article 124C.

64. It was also contended, that while recommending names for appointment of a Judge to the Supreme Court, seniority in the cadre of Judges, was liable to be taken into consideration, in addition to ability and merit. It was submitted, that the instant mandate contained in the first proviso under Section 5(2) of the NJAC Act, clearly breached the "federal structure" of governance, which undoubtedly required regional representation in the Supreme Court. Since the "federal structure" contemplated in the Constitution was also one of the "basic structures"

envisioned by the framers of the Constitution, the same could not have been overlooked.

65. Besides the above, the Court's attention was invited to the second proviso, under Section 5(2) of the NJAC Act, which mandates that the NJAC would not make a favourable recommendation, if any two Members thereof, opposed the candidature of an individual. It was contended, that placing the power of veto, in the hands of any two Members of the NJAC, would violate the recommendatory power expressed in Article 124B. In this behalf, it was contended, that the second proviso under Section 5(2), would enable two eminent persons (– lay persons, if the submission advanced by the learned Attorney General is to be accepted) to defeat a unanimous opinion of the Chief Justice of India and the two senior most Judges of the Supreme Court. And thereby negate the primacy vested in the judiciary, in the matter of appointment of Judges to the higher judiciary.

66. It was submitted, that the above power of veto exercisable by two lay persons, or alternatively one lay person, in conjunction with the Union Minister in charge of Law and Justice, would cause a serious breach in the "independence of the judiciary". Most importantly, it was contended, that neither the impugned constitutional amendment, nor the provisions of the NJAC Act, provide for any quorum for holding the meetings of the NJAC. And as such (quite contrary to the contentions advanced at the hands of the learned Attorney General), it was contended, that a meeting of the NJAC could not be held, without the

presence of the all Members of the NJAC. In order to support his above contention, he illustratively placed reliance on the Constitution (122nd Amendment) Bill, 2014 [brought before the Parliament, by the same ruling political party, which had successfully amended the Constitution by tabling the Constitution (121st Amendment) Bill, 2014]. The objective sought to be achieved through the Constitution (122nd Amendment) Bill, 2014, was to insert Article 279A. The proposed Article 279A intended to create the Goods and Services Tax Council. Sub-Article (7) of Article 279A postulated, that "… One-half of the total number of Members of the Goods and Services Tax Council…" would constitute the quorum for its meetings. And furthermore, that "… Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting …". Having laid down the above parameters, in the Bill which followed the Bill that led to the promulgation of the Constitution (99th Amendment) Act, it was submitted, that the omission of providing for a quorum for the functioning of the NJAC, and the omission to quantify the strength required for valid decision making, was not innocent. And that, it vitiated the provision itself.

III. RESPONDENTS' RESPONSE, ON MERITS:

67. The learned Attorney General commenced his response on merits by asserting, that there was no provision in the Constitution of India,

either when it was originally drafted, or at any stage thereafter, which contemplated, that Judges would appoint Judges to the higher judiciary. It was accordingly asserted, that the appointment of Judges by Judges was foreign to the provisions of the Constitution. It was pointed out, that there were certain political upheavals, which had undermined the "independence of the judiciary", including executive overreach, in the matter of appointment and transfer of Judges of the higher judiciary, starting with supersession of senior Judges of the Supreme Court in 1973, followed by, the mass transfer of Judges of the higher judiciary during the emergency in 1976, and thereafter, the second supersession of a senior Judge of the Supreme Court in 1977. It was acknowledged, that there was continuous interference by the executive, in the matter of appointment of Judges to the higher judiciary during the 1980's. Despite thereof, whilst adjudicating upon the controversy in the First Judges case rendered in 1981, this Court, it was pointed out, had remained unimpressed, and reiterated the primacy of the executive, in the matter of appointment of Judges to the higher judiciary.

68. It was pointed out, that the issue for reconsideration of the decision rendered in the First Judges case arose in Subhash Sharma v. Union of India[4], wherein the questions considered were, whether the opinion of the Chief Justice of India, in regard to the appointment of Judges to the Supreme Court and High Courts, as well as, transfer of High Court Judges, was entitled to primacy, and also, whether the matter of fixation of the judge-strength in High Courts, was justiciable? It was asserted,

that the aforesaid two questions were placed for determination by a Constitution Bench of nine Judges (keeping in view the fact that the First Judges case, was decided by a seven-Judge Bench). It was asserted, that the decision rendered by this Court in the Second Judges case, was on the *suo motu* exercise of jurisdiction by this Court, wherein this Court examined matters far beyond the scope of the reference order. It was contended, that the Second Judges case was rendered, without the participation of all the stakeholders, inasmuch as, the controversy was raised at the behest of practicing advocates and associations of lawyers, and there was no other stakeholder involved during its hearing.

69. It was asserted, that the judiciary had no jurisdiction to assume to itself, the role of appointment of Judges to the higher judiciary. It was pointed out, that it is the Parliament alone, which represents the citizenry and the people of this country, and has the exclusive jurisdiction to legislate on matters. Accordingly, it was asserted, that the decisions in the Second and Third Judges cases, must be viewed as legislation without any jurisdictional authority.

70. It was pointed out, that the issue relating to the amendment of the Constitution, pertaining to the subject of appointment of Judges to the higher judiciary, through a Judicial Commission commenced with the Constitution (67th Amendment) Bill, 1990. The Bill however lapsed. On the same subject, the Constitution (82nd Amendment) Bill, 1997 was introduced. The 1997 Bill, however, could not be passed. This was followed by the Constitution (98th Amendment) Bill, 2003 which was

introduced when the present Government was in power. In 2003 itself, a National Commission was set up to review the working of the Constitution, followed by the Second Administrative Reforms Commission in 2007. Interspersed with the aforesaid events, were a number of Law Commission's Reports. The intention of the Parliament, since the introduction of the Bill in 1990, it was submitted, was aimed at setting up a National Judicial Commission, for appointment and transfer of Judges of the higher judiciary. It was pointed out, that no positive achievement was made in the above direction, for well over two decades. Mr. Justice M.N. Venkatachaliah, who headed the National Commission to review the working of the Constitution, had also recommended a five-Member National Judicial Commission, whereby, a wide consultative process was sought to be introduced, in the selection and appointment of Judges. It was submitted, that all along recommendations were made, for a participatory involvement of the executive, as well as the judiciary, in the matter of appointment of Judges to the higher judiciary. It was also pointed out, that the Constitution (98th Amendment) Bill, 2003 proposed a seven-Member National Judicial Commission. Thereafter, the Administrative Reforms Commission, proposed a eight-Member National Judicial Commission, to be headed by the Vice-President, and comprising of the Prime Minister, the Speaker, the Chief Justice of India, the Law Minister and two leaders of the Opposition. The aforesaid recommendation, was made by a Commission headed by Veerappa Moily, the then Union Law Minister. The present Constitution (99th

Amendment) Act, 2014, whereby Article 124 has been amended and Articles 124A to 124C have been inserted in the Constitution, contemplates a six-Member National Judicial Commission. It was submitted, that there was no justification in finding anything wrong, in the composition of the NJAC. To point out the safeguards against entry of undesirable persons into the higher judiciary, it was emphasized, that only if five of the six Members of the NJAC recommended a candidate, he could be appointed to the higher judiciary. It was submitted, that the aforestated safeguards, postulated in the amended provisions, would not only ensure transparency, but would also render a broad based consideration.

71. As a counter, to the submissions advanced on behalf of the petitioners, it was asserted, that the Parliament's power to amend the Constitution was plenary, subject to only one restriction, namely, that the Parliament could not alter the "basic structure" of the Constitution. And as such, a constitutional amendment must be presumed to be constitutionally valid (unless shown otherwise). For the instant proposition, reliance was placed on Charanjit Lal Chowdhury v. Union of India[50], Ram Krishna Dalmia v. Justice S.R. Tendolkar[51], the Kesavananda Bharati case[10], (specifically the view expressed by K.S. Hegde and A.K. Mukherjea, JJ.), B. Banerjee v. Anita Pan[52], and Government of Andhra Pradesh v. P. Laxmi Devi[53].

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[50] AIR 1951 SC 41
[51] AIR 1958 SC 538
[52] (1975) 1 SCC 166
[53] (2008) 4 SCC 720

72. It was asserted, that the Parliament was best equipped to assess the needs of the people, and to deal with the changing times. For this, reliance was placed on Mohd. Hanif Quareshi v. State of Bihar[54], State of West Bengal v. Anwar Ali Sarkar[55]. It was contended, that while enacting the Constitution (99th Amendment) Act, and the NJAC Act, the Parliament had discharged a responsibility, which it owed to the citizens of this country, by providing for a meaningful process for the selection and appointment of Judges to the higher judiciary.

73. Referring to the decisions rendered by this Court in the Second and Third Judges cases, it was asserted, that the way he saw it, there was only one decipherable difference introduced in the process of selection contemplated through the NJAC. Under the system introduced, the judiciary could not "insist" on the appointment of an individual. But the judiciary continued to retain the veto power, to stop the appointment of an individual considered unworthy of appointment. According to him, the nomination of a candidate, for appointment to the higher judiciary, under the above judgments, could also not fructify, if any two members of the collegium, expressed an opinion against the nominated candidate. It was pointed out, that the above position had been retained in the impugned provisions. According to the learned Attorney General, the only difference in the impugned provisions was, that the right of the judiciary to "insist" on the appointment of a nominee, was no longer available to the judiciary. Under the collegium system, a recommendation made for

[54] AIR 1958 SC 731
[55] 1952 SCR 284

appointment to the higher judiciary, could be returned by the executive for reconsideration. However, if the recommendation was reiterated, the executive had no choice, but to appoint the recommended nominee. It was pointed out, that the instant right to "insist" on the appointment of a Judge, had now been vested in the NJAC. It was vehemently contended, that the denial to "insist", on the appointment of a particular nominee, would surely not undermine the "independence of the judiciary". The "independence of the judiciary", according to the learned Attorney General, would be well preserved, if the right to "reject" a nominee was preserved with the judiciary, which had been done.

74. Based on the aforesaid submission, it was asserted, that the process initiated by the Parliament in 1990 (for the introduction of a Commission, for appointment of Judges to the higher judiciary), had taken twenty-four years to fructify. The composition of the NJAC introduced through the Constitution (99th Amendment) Act, according to him, meets with all constitutional requirements, as the same is neither in breach of the rule of "separation of powers", nor that of "the independence of the judiciary". It was contended, that the impugned provisions preserve the "basic structure" of the Constitution.

75. It was submitted, that the assailed provisions had only introduced rightful checks and balances, which are inherent components of an effective constitutional arrangement. The learned Attorney General also cautioned this Court, by asserting, that it was neither within the domain of the petitioners, nor of this Court, to suggest an alternative

combination of Members for the NJAC, or an alternative procedure, which would regulate its functioning more effectively. Insofar as the present petitions are concerned, it was asserted, that the challenge raised therein, could only be accepted, if it was shown, that the Parliament while exercising its plenary power to amend the Constitution, had violated the "basic structure" of the Constitution.

76. It was submitted, that it was not the case of any of the petitioners before this Court, either that the Parliament was not competent to amend Article 124, or that the procedure prescribed therefor under Article 368 had not been followed. In the above view of the matter, it was submitted, that the only scope for examination with reference to the present constitutional amendment was, whether while making the aforestated constitutional amendment, the Parliament had breached, any of the "basic features" of the Constitution.

77(i). For demonstrating the validity of the impugned constitutional amendment, reliance in the first instance was placed on the Kesavananda Bharati case[10]. Reference was made to the observations of S.M. Sikri, CJ., to contend, that the extent of the amending power under Article 368 was duly adverted to. Reading the preamble to the Constitution, it was pointed out, that the fundamental importance expressed therein was, the freedom of the individual, and the inalienability of economic, social and political justice, as also, the importance of the Directive Principles (paragraph 282). In this behalf, it was also submitted, that the "fundamental features" of the Constitution,

as for instance, secularism, democracy and the freedom of the individual would always subsist in a welfare State (paragraph 283). Leading to the conclusion, that even fundamental rights could be amended in public interest, subject to the overriding condition, that the same could not be completely abrogated (paragraph 287). In this behalf, it was also pointed out, that the wisdom of the Parliament to amend the Constitution could not be the subject matter of judicial review (paragraph 288), leading to the overall conclusion, that by the process of amendment, it was open to the Parliament to adjust fundamental rights, in order to secure the accomplishment of the Directive Principles, while maintaining the freedom and dignity of every citizen (paragraph 289). Thus viewed, it was felt, that the rightful legal exposition would be, that even though every provision of the Constitution could be amended, the contemplated amendment should ensure, that the "basic foundation and structure" of the Constitution remained intact. In this behalf, an illustrative reference was made to the features, which constituted the "basic structure" of the Constitution. According to the learned Attorney General, they included, the supremacy of the Constitution, the republican and democratic form of Government, the secular character of the Constitution, the "separation of powers" between the legislature, the executive and the judiciary, and the federal character of the Constitution (paragraph 292). In addition to the above, it was asserted, that India having signed the Universal Declaration of Human Rights, had committed itself to retaining such of the fundamental rights, as were incorporated in the above declaration

(paragraph 299). In the above view, according to the Attorney General, the expression "amendment of this Constitution" would restrain the Parliament, from abrogating the fundamental rights absolutely, or from completely changing the "fundamental features" of the Constitution, so as to destroy its identity. And that, within the above limitation, the Parliament could amend every Article of the Constitution (paragraph 475). It was insisted, that the impugned provisions had not breached any of the above limitations.

(ii) Reference was then made to the common opinion expressed by J.M. Shelat and A.N. Grover, JJ., (in the Kesavananda Bharati case[10]) to assert, that one of the limitations with reference to the amendment to the Constitution was, that it could not be amended to such an extent, as would denude the Constitution of its identity (paragraph 537). It was submitted, that the power to amend, could not result in the abrogation of the Constitution, or lead to the framing of a new Constitution, or to alter or change the essential elements of the constitutional structure (paragraph 539). It was pointed out, that it was not proper, to give a narrow meaning to the power vested in the Parliament to amend the Constitution, and at the same time, to give it such a wide meaning, so as to enable the amending body, to change the structure and identity of the Constitution (paragraph 546). With reference to the power of judicial review, it was contended, that there was ample evidence in the Constitution itself, to indicate that a system of "checks and balances" was provided for, so that none of the pillars of governance would become

so predominant, as to disable the others, from exercising and discharging the functions entrusted to them. It was submitted, that judicial review, provided expressly through Articles 32 and 226, was an incident of the aforestated system of checks and balances (paragraph 577). Based on the historical background, the preamble, the entire scheme of the Constitution, and other relevant provisions thereof, including Article 368, it was submitted that it could be inferred, that the supremacy of the Constitution, the republican and democratic form of Government, sovereignty of the country, the secular and federal character of the Constitution, the demarcation of powers between the legislature, the executive and the judiciary, the dignity of the individual secured through the fundamental rights, and the mandate to build a welfare State (contained in Parts III and IV), and the unity and the integrity of the nation, could be regarded as the "basic elements" of the constitutional structure (paragraph 582). It was also asserted, that as a society grows, its requirements change, and accordingly, the Constitution and the laws have to be changed, to suit the emerging needs. And accordingly, the necessity to amend the Constitution, to adapt to the changing needs, arises. Likewise, in order to implement the Directive Principles, it could be necessary to abridge some of the fundamental rights vested in the citizens. The power to achieve the above objective needed, a broad and liberal interpretation of Article 368. Having so held, it was concluded, that even the fundamental rights could be amended (paragraph 634). Reference was made to the fact, that the founding fathers were aware,

that in a changing world, there would be nothing permanent, and therefore, they vested the power of amendment in the Parliament through Article 368, so as to keep the Constitution in tune with, the changing concepts of politics, economics and social ideas, and to so reshape the Constitution, as would meet the requirements of the time (paragraph 637). With reference to the above, it was contended, that the Parliament did not have the power to abrogate or emasculate the "basic elements" or "fundamental features" of the Constitution, such as the sovereignty of India, the democratic character of our polity, the unity of the country, and the essential elements of the individual freedoms secured to the citizens. Despite the above limitations, it was pointed out, that the amending power under Article 368 was wide enough, to amend every Article of the Constitution, so as to reshape the Constitution to fulfill the obligations imposed on the State (paragraph 666). And accordingly, it was pointed out, that while recording conclusions, this Court had observed, that the power to amend the Constitution under Article 368 was very wide, yet did not include the power to destroy, or emasculate the "basic elements" or the "fundamental features" of the Constitution (paragraph 744).

(iii). Reference was then made to the observations of H.R. Khanna, J. (in the Kesavananda Bharati case[10]). It was pointed out, that from 1950 to 1967 till this Court rendered the judgment in the I.C. Golak Nath case[41], the accepted position was, that the Parliament had the power to amend Part III of the Constitution, so as to take away or abridge the

fundamental rights. Having noticed the fact, that no attempt was made by the Parliament to take away or abridge the fundamental rights, relating to the liberty of a person, and the freedom of expression, it was recorded, that even in future it could not be done. Accordingly, with reference to Article 368, it was sought to be concluded, that the Parliament had the power to amend Part III of the Constitution, as long as the "basic structure" of the Constitution was retained (paragraph 1421). If the "basic structure" of the original Constitution was retained, inasmuch as had the original Constitution continued to subsist, even though some of its provisions were changed, the power of amendment would be considered to have been legitimately exercised (paragraph 1430). And therefore, the true effect of Article 368 would be, that the Constitution did not vest with the Parliament, the power or authority for drafting a new and radically changed Constitution, with a different structure and framework (paragraph 1433). Accordingly, subject to the retention of the "basic structure or framework" of the Constitution, the power vested with the Parliament to amend the Constitution was treated as plenary, and would include the power to add, alter or repeal different Articles of the Constitution, including those relating to fundamental rights. All the above measures were included in the Parliament's power of amendment, and the denial of such a broad and comprehensive power, would introduce rigidity in the Constitution, as would break the Constitution itself (paragraph 1434). As such, it was held, that the amending power conferred by Article 368, would include the power to

amend the fundamental rights, contained in Part III of the Constitution (paragraph 1435). In this behalf, it was asserted, that the issue, whether the amendment introduced would (or would not) be an improvement over the prevailing position, was not justiciable. It was asserted, whether the amendment would be an improvement or not, was for the Parliament alone to determine. And Courts, could not substitute the wisdom of the legislature, by their own foresight, prudence and understanding (paragraph 1436). It was asserted, that the amending power of the Parliament must contain the right to enact legislative provisions, for experiment and trial, so as to eventually achieve the best results (paragraph 1437). In the ultimate analysis, it was held, that the amendment of the Constitution had a wide and broad connotation, and would embrace within itself, the total repeal of some of the Articles, or their substitution by new Articles, which may not be consistent, or in conformity with other Articles. And a Court while judging the validity of an amendment, could only concern itself with the question, as to whether the constitutional requirements for making the amendment had been satisfied? And accordingly, an amendment, made in consonance with the procedure prescribed, could not be struck down, on the ground that it was a change for the worst (paragraph 1442). While examining the question, whether the right to property could be included in the "basic structure or framework" of the Constitution, the answer rendered was in the negative. It was held, that in exercising the power of judicial review, Courts could not be oblivious of the practical needs of the Government.

And that, the power of amendment could be exercised even for trial and error, inasmuch as opportunity had to be allowed for vindicating reasonable belief by experience (paragraph 1535). It was contended, that no generation had a monopoly to wisdom, nor the right to place fetters on future generations, nor to mould the machinery of Government, keeping in mind eternal good. The possibility, that the power of amendment may be abused, furnished no ground for denial of its existence. According to the Attorney General, it was therefore not correct to assume, that if the Parliament was held entitled to amend Part III of the Constitution, it would automatically and necessarily result in abrogation of the fundamental rights. Whilst concluding, that the right to property did not pertain to the "basic structure or framework" of the Constitution, it was held, that power of amendment under Article 368 did not include the power to abrogate the Constitution, or to alter the "basic structure or framework" of the Constitution. Despite having so concluded, it was held, that no part of the fundamental rights could claim immunity, from the power of amendment (paragraph 1537).

78. Reference was then made to the judgments rendered by this Court in Indira Nehru Gandhi v. Raj Narain[56], Waman Rao v. Union of India[57], and the M. Nagaraj case[36], to contend, that the "basic structure" of the Constitution was to be determined, on the basis of the features which existed in the text of the original enactment of the Constitution, on the date of its coming into force. It was therefore pointed out, that the

[56] (1975) Supp SCC 1
[57] (1981) 2 SCC 362

subsequent amendments to the Constitution, could not be taken into consideration, to determine the "basic features" of the Constitution.

79. Having laid down the aforestated foundation, the learned Attorney General submitted, that that reference could only be made to Articles 124 and 217, as they originally existed, when the Constitution was promulgated. If the original provisions were to be taken into consideration, according to the learned Attorney General, it would be apparent that the above Articles, expressed that the right to make appointments of Judges to the higher judiciary, being limited only to a "consultative" participation of the judiciary, was in the determinative domain of the executive. It was pointed out, that on the subject of appointment of Judges to the higher judiciary, the primacy of the Chief Justice of India, through the collegium process, was an innovation of the judiciary itself (in the Second Judges case). The above primacy, was alien to the provisions of the Constitution, as originally enacted. And as such, the amendment to Article 124, and the insertion of Articles 124A to 124C therein, could not be examined on the touchstone of material, which was in stark contrast with the plain reading of Articles 124 and 217 (as they were originally enacted). It was accordingly asserted, that the present challenge to the Constitution (99th Amendment) Act, would not fall within the defined parameters of the "basic structure" concept, elaborated extensively by him (as has been recorded by us, above). The prayers made by the petitioners on the instant ground were therefore, according to the learned Attorney General, liable to be rejected.

80. Having traveled thus far, it was pointed out, that it was important to understand the true purport and effect of the term "independence of the judiciary". In this behalf, in the first instance, the Court's attention was invited to, the First Judges case, wherein reference was made to the opinion expressed by E.S. Venkataramiah, J. (as he then was), who had taken the view, that it was difficult to hold, that merely because the power of appointment was with the executive, the "independence of the judiciary" would be compromised. In stating so, it was emphasized, that the true principle was, that after such appointment, the executive should have no scope, to interfere with the work of a Judge (paragraph 1033). Based thereon, it was asserted, that the independence of a Judge would not stand compromised, if after his appointment, the role of the executive, to deal with him, is totally excluded. Reference was then made to the opinion expressed by P.N. Bhagwati, J. (as he then was) (in the same judgment), to the effect, that the concept of "independence of the judiciary", was not limited only to independence from executive pressure/influence, but was relatable to many other pressures and prejudices. And in so recording, it was held, that "independence of the judiciary" included fearlessness of the other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belonged (paragraph 1037). Based thereon, it was asserted, that "independence of the judiciary", included independence from the influence of other Judges as well. And as such, it was concluded, that the composition of the NJAC was such, as would

ensure the independence of the Judges appointed to the higher judiciary, as contemplated in the First Judges case.

81. In conjunction with the issue of "independence of the judiciary", which flows out of the concept of "separation of powers", it was pointed out, that the scheme of the Constitution envisaged a system of checks and balances. Inasmuch as, each organ of governance while being allowed the freedom to discharge the duties assigned to it, was subjected to controls, at the hands of one of the other organs, or both of the other organs. Illustratively, it was sought to be contended, that all executive authority, is subject to scrutiny through judicial review (at the hands of the judiciary). Likewise, legislation enacted by the Parliament, or the State legislatures, is also subject to judicial review, (at the hands of the judiciary). Even though, the executive and the legislature have the freedom to function and discharge their individual responsibilities, without interference by the other organ(s) of governance, yet the judiciary has been vested with the responsibility to ensure, that the exercise of executive and legislative functions, is in consonance with law. Likewise, it was submitted, that in the matter of appointment of Judges, Articles 124 and 217 provided for executive control, under the scheme of checks and balances. It was submitted, that the instant scheme of checks and balances, was done away with, by the Second and Third Judges cases, in the matter of appointment of Judges to the higher judiciary. It was asserted, that the position of checks and balances has been restored by the Constitution (99th Amendment) Act, by reducing the role of the

executive, from the position which existed at the commencement of the Constitution. Referring to the decisions in the Kesavananada Bharati case[10], the Indira Nehru Gandhi case[56], the Sankalchand Himatlal Sheth case[5], Asif Hameed v. State of Jammu and Kashmir[58], State of Bihar v. Bihar Distillery Limited[59], and Bhim Singh v. Union of India[13], it was submitted, that this Court had recognized, that the concept of checks and balances, was inherent in the scheme of the Constitution. And that, even though the legislature, the executive and the judiciary were required to function within their own spheres demarcated through different Articles of the Constitution, yet their attributes could never be in absolute terms. It was submitted, that each wing of governance had to be accountable, and till the principle of accountability was preserved, the principle of "separation of powers" would not be achievable. It was therefore contended, that the concept of "independence of the judiciary", could not be gauged as an absolute end, overlooking the checks and balances, provided for in the scheme of the Constitution.

82. Having so asserted, it was contended, that in the matter of appointment of Judges to the higher judiciary, the most important and significant feature was, that no unworthy or doubtful appointment should go through, even though at times, the candidature of a seemingly good candidate, may not be accepted. It was asserted, that the NJAC had provided for a complete protection, in the sense noticed hereinabove, by providing in the procedure of appointment, that a negative view

[58] 1989 Supp (2) SCC 364
[59] (1997) 2 SCC 453

expressed by any of the two Members of the NJAC, would result in the rejection of the concerned candidate. Therefore, merely two Members of the NJAC, would be sufficient to veto a proposal for appointment. It was submitted, that since three Members of the NJAC were Judges of the Supreme Court, their participation in the NJAC would ensure, that "independence of the judiciary" remained completely safeguarded and secured. It was therefore contended, that not only the Constitution (99th Amendment) Act, but also the NJAC Act fully satisfied the independence criterion, postulated as a "basic structure" of the Constitution.

83. In order to reiterate the above position, it was asserted, that primacy in the matter of appointment of Judges to the higher judiciary, was not contemplated in the Constitution, as originally framed. In this behalf, reference was made to Articles 124 and 217. And in conjunction therewith, adverting to the debates on the subject, by Members of the Constituent Assembly. Thereupon, it was asserted, that the issue of primacy of the Chief Justice, based on a decision by a collegium of Judges, was a judicial innovation, which required reconsideration. Moreover, it was submitted, that the Second and Third Judges cases, were founded on the interpretation of Articles of the Constitution, which had since been amended, and as such, the very basis of the Second and Third Judges cases, no longer existed. Therefore, the legal position declared in the above judgments, could not constitute the basis, of the contentions advanced at the hands of the petitioners. Furthermore, even if the ratio recorded by this Court in the Second and Third Judges cases,

was still to be taken into consideration, conclusions (5), (6) and (7) recorded by J.S. Verma, J. (who had transcripted the majority view), show that the primacy of the judiciary was to ensure, that no appointment could be made to the higher judiciary, unless it had the approval of the collegium. It was submitted, that the instant aspect, which constituted the functional basis for ensuring "independence of the judiciary", had been preserved in the impugned constitutional amendment, and the NJAC Act. It was accordingly contended, that if the right to insist on the appointment of a candidate proposed by the judiciary, was taken away, from the Chief Justice of India (based on a decision of a collegium of Judges), the same would not result, in the emasculation of the "basic structure" of the Constitution. In other words, the same would not violate the "essential and fundamental features" of the Constitution, nor in the least, the "independence of the judiciary".

84. Based on the above submissions, the learned Attorney General invited the Court's attention to the primary contention advanced by the petitioners, namely, that even if all the three Judges of the Supreme Court who are now *ex officio* Members of the NJAC, collectively recommended a nominee, such recommendation could be annulled, by the non-Judge Members of the NJAC. Learned Attorney General submitted, that the above contention was limited to the right to "insist" on an appointment. And that, the right to "insist" did not flow from the conclusions recorded in the Second and Third Judges cases. And further,

that the same cannot, by itself, be taken as an incident to establish a breach of the "independence of the judiciary".

85. Insofar as the Second and Third Judges cases are concerned, it was submitted, that the same may have been the need of the hour, on account of the fact that in 1976, sixteen Judges were transferred (from the High Courts in which they were functioning), to other High Courts. In the Sankalchand Himatlal Sheth case[5], one of the transferred Judges challenged his transfer, *inter alia*, on the ground, that his non-consensual transfer was outside the purview of Article 222, as the same would adversely affect the "independence of the judiciary". Irrespective of the determination rendered, on the challenge raised in the Sankalchand Himatlal Sheth case[5], it was pointed out, the very same question came to be re-agitated in the First Judges case. It was held by the majority, while interpreting Article 222, that the consent of the Judge being transferred, need not be obtained. It was also pointed out, that ever since the inception of the Constitution, the office of the Chief Justice of India, was occupied by the senior most Judge of the Supreme Court. The above principle was departed from in April 1973, as the next senior most Judge – J.M. Shelat, was not elevated to the office of the Chief Justice of India. Even the next two senior most Judges, after him - K.S. Hegde and A.N. Grover, were also ignored. The instant supersession by appointing the fourth senior most Judge – A.N. Ray, as the Chief Justice of India, was seen as a threat to the "independence of the judiciary". Again in January 1977, on the retirement of A.N. Ray, CJ., the senior

most Judge immediately next to him – H.R. Khanna, was ignored and the second senior most Judge – M.H. Beg, was appointed, as the Chief Justice of India. In the above background, the action of the executive, came to be portrayed as a subversion of the "independence of the judiciary". It was in the above background, that this Court rendered the Second and Third Judges cases, but the implementation of the manner of appointment of Judges to the higher judiciary, in consonance therewith, had been subject to, overwhelming and all around criticism, including being adversely commented upon by J.S. Verma, CJ., the author of the majority view in the Second Judges case, after his retirement. In this behalf, the Court's attention was invited to his observations, extracted hereunder:

"My 1993 Judgment, which holds the field, was very much misunderstood and misused. It was in this context, that I said that the working of the judgment, now, for some time, is raising serious questions, which cannot be called unreasonable. Therefore, some kind of re-think is required. My Judgment says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise, between the Executive and the Judiciary, both taking part in it."

It was therefore contended, that in the changed scenario, this Court ought to have, at its own, introduced measures to negate the accusations leveled against the prevailing system, of appointment of Judges to the higher judiciary. Since no such remedial measures were adopted by the judiciary of its own, the legislature had brought about the Constitution (99th Amendment) Act, supplemented by the NJAC Act, to broad base the process of selection and appointment, of Judges to the higher judiciary, to make it transparent, and to render the participants accountable.

86. Having dealt with the constitutional aspect of the matter, the learned Attorney General invited the Court's attention, to the manner in which judicial appointments were being made in fifteen countries. It was submitted, that in nine countries Judges were appointed either through a Judicial Appointment Commission (Kenya, Pakistan, South Africa and U.K.), or Committee (Israel), or Councils (France, Italy, Nigeria and Sri Lanka). In four countries, Judges were appointed directly by the Governor General (Australia, Canada and New Zealand), or the President (Bangladesh). It was submitted, that in Germany appointment of Judges was made through a multistage process of nomination by the Minister of Justice, and confirmation by Parliamentary Committees, whereupon, the final order of appointment of the concerned individual, is issued by the President. In the United States of America, Judges were appointed through a process of nomination by the President, and confirmation by the Senate. It was submitted, that in all the fifteen countries referred to above, the executive was the final determinative/appointing authority. Insofar as the appointments made by the Judicial Appointments Commissions/Committees/Councils (referred to above) were concerned, out of nine countries with Commissions, in two countries (South Africa and Sri Lanka) the executive had overwhelming majority, in four countries (France, Israel, Kenya and U.K.) there was a balanced representation of stakeholders including the executive, in three countries (Italy, Nigeria and Pakistan) the number of Judges was in a majority. In the five countries without Commissions/ Committees/ Councils (Canada,

Australia, New Zealand, Bangladesh and the United States of America), the decision was taken by the executive, without any formal process of consultation with the judiciary. It was pointed out, that in Germany, the appointment process was conducted by the Parliament, and later confirmed by the President. It was pointed out, that the judiciary in all the countries referred to above, was totally independent. Based on the above submissions, it was contended, that the manner of selection and appointment of Judges, could not be linked to the concept of "independence of the judiciary". It was submitted, that the judicial functioning in the countries referred to above, having been accepted as more than satisfactory, there is no reason, that the system of appointment introduced in India, would be adversely impacted by a singular representative of the executive in the NJAC. It was therefore asserted, that the submissions advanced at the hands of the petitioners, were not acceptable, even with reference to the experience of other countries, governed through a constitutional framework (some of them, of the Westminster Model).

87. It was further asserted, that the absence of the absolute majority of Judges in the NJAC, could not lead to the inference, that the same was violative of the "basic structure" of the Constitution, so as to conclude, that it would impinge upon the "independence of the judiciary". It was asserted, that the representation of the judiciary in the NJAC, was larger than that of the other two organs of the governance, namely, the executive and the legislature. In any case, given the representation of the

judiciary in the NJAC, it was fully competent, to stall the appointment of a candidate to the higher judiciary, who was considered by the judicial representatives, as unsuitable. Any two, of the three representatives of the judiciary, were sufficient to veto any appointment supported by others.

88. It was further submitted, that the NJAC was broad based with representatives from the judiciary, the executive and the "two eminent persons", would not fall in the category of jurists, eminent legal academicians, or eminent lawyers. It was contended, that the intention to include "eminent persons", who had no legal background was to introduce, in the process of selection and appointment of Judges, lay persons in the same manner, as has been provided for in the Judicial Appointments Commission, in the United Kingdom.

89. It was also the contention of the learned Attorney General, that this would not be the first occasion, when such an exercise has been contemplated by parliamentary legislation. The Court's attention was drawn to the Consumer Protection Act, 1986, wherein the highest adjudicatory authority is, the National Consumer Disputes Redressal Commission. It was pointed out, that the above Redressal Commission, comprised of Members, with and without a judicial background. The President of the National Consumer Disputes Redressal Commission has to be a person, who has been a Judge of the Supreme Court. Illustratively, it was contended, where a matter is being adjudicated upon by a three-Member Bench, two of the Members may not be having any

judicial background. These two non-judicial Members, could overrule the view expressed by a person, who had been a former Judge in the higher judiciary. It was submitted, that situations of the above nature, do sometimes take place. Yet, such a composition for adjudicatory functioning, where the Members with a judicial background are in a minority, is legally and constitutionally valid. If judicial independence cannot be held to be compromised in the above situation, it was asserted, that it was difficult to understand how the same could be considered to be compromised in a situation, wherein the NJAC has three out of its six Members, belonging to the judicial fraternity.

90. It was sought to be suggested, that the primacy of the judiciary, in the matter of appointment of Judges to the higher judiciary, could not be treated as a part of the "basic structure" of the Constitution. Furthermore, the lack of absolute majority of Judges in the NJAC, would also not tantamount to the constitutional amendment being rendered violative of the "basic structure". In the above view of the matter, it was asserted, that the submissions advanced at the hands of the learned counsel representing the petitioners, on the aspect of violation of the "basic structure" of the Constitution, by undermining the "independence of the judiciary", were liable to be rejected.

91. With reference to the inclusion of two "eminent persons", in the six-Member NJAC, it was submitted, that the general public was the key stakeholder, in the adjudicatory process. And accordingly, it was imperative to ensure their participation in the selection/appointment of

Judges to the higher judiciary. Their participation, it was submitted, would ensure sufficient diversity, essential for rightful decision making. It was submitted, that in the model of the commission suggested by M.N. Venkatachaliah, CJ., the participation of one eminent person was provided. He was to be nominated by the President, in consultation with the Chief Justice of India. In the 2003 Bill, which was placed before the Parliament, the proposed Judicial Commission was to include one eminent person, to be nominated by the executive. The 2013 Bill, which was drafted by the previous political dispensation – the U.P.A. Government, the Judicial Commission proposed, was to have two eminent persons, to be selected by the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the Lok Sabha. The 2014 Bill, which was drafted by the present political dispensation – the N.D.A. Government, included two eminent persons, to be selected in just about the same manner as was contemplated under the 2013 Bill. The variation being, that one of the eminent persons was required to belong to the Scheduled Castes, or the Scheduled Tribes, or Other Backward Classes, or Minorities, or Women, thereby fulfilling the obvious social obligation. It was submitted, that their participation in the deliberations, for selection of Judges to the higher judiciary, could not be described as adversarial to the judicial community. Their participation would make the process of appointment, more broad based.

92. While responding to the submissions, advanced at the hands of the learned counsel for the petitioners, to the effect that the Constitution

(99th Amendment) Act, did not provide any guidelines, reflecting upon the eligibility of the "eminent persons", to be nominated to the NJAC, and as such, was liable to be struck down, it was submitted, that the term "eminent person" was in no way vague. It meant – a person who had achieved distinction in the field of his expertise. Reference was also made to the debates of the Constituent Assembly, while dealing with the term "distinguished jurist", contained in Article 124(3), it was pointed out, that the term "distinguished person" was not vague. In the present situation, it was submitted, that since the selection and nomination of "eminent persons", was to be in the hands of high constitutional functionaries (no less than the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the Lok Sabha), it was natural to assume, that the person(s) nominated, would be chosen, keeping in mind the obligation and the responsibility, that was required to be discharged. Reliance in this behalf, was placed on the Centre for Public Interest Litigation case[43], to assert, that it was sufficient to assume, that such a high profile committee, as the one in question, would exercise its powers objectively, and in a fair and reasonable manner. Based on the above, it was contended, that it was well settled, that mere conferment of wide discretionary powers, would not vitiate the provision itself.

93. Referring to the required qualities of a Judge recognized in the Indian context, as were enumerated in the "Bangalore Principles of Judicial Conduct", and thereupon accepted the world over, as revised at the Round Table Meeting of Chief Justices held at The Hague, in

November 2002, it was submitted, that the two "eminent persons" would be most suited, to assess such matters, with reference to the nominees under consideration. Whilst the primary responsibility of the Members from the judiciary would be principally relatable to, ascertaining the judicial acumen of the candidates concerned, the responsibility of the executive would be, to determine the character and integrity of the candidate, and the inputs, whether the candidate possessed the values, expected of a Judge of the higher judiciary, would be that of "eminent persons" in the NJAC. It was therefore asserted, that the two "eminent persons" would be "lay persons" having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualifications. It was submitted, that the instant broad based composition of the NJAC, was bound to be more suitable, than the prevailing system of appointment of Judges. Relying upon the R. Gandhi case[38], it was submitted, that it would not be proper to make appointments, by vesting the process of selection, with an isolated group, or a selection committee dominated by representatives of a singular group – the judiciary. In a matter of judicial appointments, it was submitted, the object ought to be, to pick up the best legally trained minds, coupled with a qualitative personality. For this, according to the Attorney General, a collective consultative process, would be the most suitable. It was pointed out, that "eminent persons", having no nexus to judicial activities, would introduce an element of detachment, and would help to bring in independent expertise, to evaluate non-legal

competencies, from an ordinary citizen's perspective, and thereby, represent all the stakeholders of the justice delivery system. It was contended, that the presence of "eminent persons" was necessary, to ensure the representative participation of the general public, in the selection and appointment of Judges to the higher judiciary. Their presence would also ensure, that the selection process was broad based, and reflected sufficient diversity and accountability, and in sync with the evolving process of selection and appointment of Judges, the world over.

94. The learned Attorney General, then addressed the issue of inclusion of the Union Minister in charge of Law and Justice, as an *ex officio* Member in the NJAC. Reference was first made to Articles 124 and 217, as they were originally enacted in the Constitution. It was submitted, that originally, the power of appointment of Judges to the higher judiciary, was exclusively vested with the President. In this behalf reliance was placed on Article 74, whereunder the President was obliged to act on the aid and advice of the Council of Ministers, headed by the Prime Minister. It was pointed out, that the above position, was so declared, by the First Judges case. And as such, from the date of commencement of the Constitution, the executive had the exclusive role, in the selection and appointment of Judges to the higher judiciary. It was asserted, that the position was changed, for the first time, in 1993 by the Second Judges case, wherein the term "consultation", with reference to the Chief Justice of India, was interpreted as "concurrence". Having been so interpreted, primacy in the matter of appointment of Judges to the

higher judiciary, came to be transferred from the executive, to the Chief Justice of India (based on a collective decision, by a collegium of Judges). Despite the above, the Union Minister in charge of Law and Justice, being a representative of the executive, continued to have a role in the selection process, though his involvement was substantially limited, as against the responsibility assigned to the executive under Articles 124 and 217, as originally enacted. It was pointed out, that by including the Union Minister in charge of Law and Justice, as a Member of the NJAC, the participatory role of the executive, in the matter of selection and appointment of Judges to the higher judiciary, had actually been diminished, as against the original position. Inasmuch as, the executive role in the NJAC, had been reduced to one out of the six Members of the Commission. In the above view of the matter, it was asserted, that it was unreasonable for the petitioners to grudge, the presence of the Union Minister in charge of Law and Justice, as a Member of the NJAC.

95. Insofar as the inclusion of the Union Minister in the NJAC is concerned, it was submitted, that there could be no escape from the fact, that the Minister in question, would be the connect between the judiciary and the Parliament. His functions would include, the responsibility to inform the Parliament, about the affairs of the judicial establishment. It was submitted, that his exclusion from the participatory process, would result in a lack of coordination between the two important pillars of governance. Furthermore, it was submitted that the Minister in question, as a member of the executive, will have access to, and will be able to,

provide the NJAC with all the relevant information, about the antecedents of a particular candidate, which the remaining Members of the NJAC are unlikely to have access to. This, according to the learned Attorney General, would ensure, that the persons best suited to the higher judiciary, would be selected. Moreover, it was submitted, that the executive was a key stakeholder in the justice delivery system, and as such, it was imperative for him to have, a role in the process of selection and appointment of Judges, to the higher judiciary.

96. The learned Attorney General allayed all fears, with reference to the presence of Union Minister, in the NJAC, by asserting that he would not be in a position to politicize the appointments, as he was just one of the six-Members of the NJAC. And that, the other Members would constitute an adequate check, even if the Minister in question, desired to favour a particular candidate, on political considerations. This submission was made by the learned Attorney General, keeping in mind the assumed fear, which the petitioners had expressed, on account of the political leanings of the Union Minister, with the governing political establishment. It was accordingly asserted, that the presence of one member of the executive, in a commission of six Members, would not impact the "independence of the judiciary", leading to the clear and unambiguous conclusion, that the presence of the Union Minister in charge of Law and Justice in the NJAC, would not violate the "basic structure" of the Constitution.

97. Referring to the judgment rendered by this Court, in the Madras Bar Association case[35], it was submitted that, for the tribunal in question, the participation of the executive in the selection of its Members, had been held to be unsustainable, because the executive was a stakeholder in each matter, that was to be adjudicated by the tribunal. It was submitted, that the above position did not prevail insofar as the higher judiciary was concerned, since the stakeholders before the higher judiciary were diverse. It was, therefore, submitted, that the validity of the NJAC could not be assailed, merely on the ground of presence of the Union Minister, as an *ex officio* Member of the NJAC.

98. The manner of appointment of Judges to the higher judiciary, through the NJAC, it was asserted, would have two major advantages. It would introduce transparency in the process of selection and appointments of Judges, which had hitherto before, been extremely secretive, with the civil society left wondering about, the standards and the criterion adopted, in determining the suitability of candidates. Secondly, the NJAC would diversify the selection process, which would further lead to accountability in the matter of appointments. It was submitted, that not only the litigating public, or the practicing advocates, but also the civil society, had the right to know. It was pointed out, that insofar as the legislative process was concerned, debates in the Parliament are now in the public domain. The rights of individuals, determined at the hands of the executive, have been transparent under the Right to Information Act, 2005. It was submitted that likewise, the

selection and appointment of Judges to the higher judiciary, must be known to the civil society, so as to introduce not only fairness, but also a degree of assurance, that the best out of those willing, were being appointed as Judges.

99. Referring to Article 124A(2) inserted through the Constitution (99th Amendment) Act, it was asserted, that a constitutional process could not be held up, due to the unavailability (and/or the disability) of one or more Members of the NJAC. So that a defect in the constitution of the NJAC, or any vacancy therein, would not impact the process of selection and appointment of Judges to the higher judiciary. Article 124A(2) provided, that the proceedings of the NJAC would not be questioned or invalidated on account of a vacancy or a defect in the composition of the NJAC. It was contended, that it was wrongful for the petitioners to frown on Article 124A(2), as there were a number of statutory enactments with similar provisions. In this behalf, the Court's attention was *inter alia* drawn to Section 4(2), of the Central Vigilance Commission Act 2003, Section 4(2), of the Lokpal and Lokayuktas Act 2013, Section 7, of the National Commission for Backward Classes Act 1993, Section 29A, of the Consumer Protection Act 1986, Section 7, of the Advocates Welfare Act 2001, Section 8, of the University Grants Commission Act 1956, Section 9, of the Protection of Human Rights Act 1993, Section 7, of the National Commission for Minorities Act 1993, Section 8, of the National Commission for Minority Educational Institutions Act 2004, Section 24, of the Persons with Disabilities (Equal Opportunities, Protection of Rights

and Full Participation) Act 1995, and a host of other legislative enactments of the same nature. Relying on the judgments in Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. Corporation of the City of Bangalore[60], Khadim Hussain v. State of U.P.[61], B.K. Srinivasan v. State of Karnataka[62], and People's Union for Civil Liberties v. Union of India[63], it was asserted, that on an examination of provisions of similar nature, this Court had repeatedly held, that modern legislative enactments ensured, that the defects of procedure, which do not lead to any substantial prejudice, are statutorily placed beyond the purview of challenge. It was accordingly asserted, that invalidity on account of a technical irregularity, being excluded from judicial review, the submissions advanced on behalf of the petitioners, on the constitutional validity of clause (2) of Article 124A, deserved an outright rejection.

100. It was the contention of the learned Attorney General, that the NJAC did not suffer from the vice of excessive delegation. It was sought to be reiterated, that the power of nomination of "eminent persons" was securely and rightfully left to the wisdom of the Prime Minister of India, the Chief Justice of India and the Leader of the Opposition in the Parliament. It was submitted, that the parameters expressed in Sections 5 and 6 of the NJAC Act, delineating the criterion for selection, by specifically providing, that ability, merit and suitability would expressly engage the attention of the NJAC, while selecting Judges for appointment

[60] (1961) 3 SCR 707
[61] (1976) 1 SCC 843
[62] (1987) 1 SCC 658
[63] (2005) 5 SCC 363

to the higher judiciary, clearly laid out the parameters for this selection and appointment process. It was submitted, that the modalities to determine ability, merit and suitability would be further detailed through rules and regulations. And that, factors such as, the minimum number of years of practice at the Bar, the number and nature of cases argued, academic publications in reputed journals, the minimum and maximum age, and the like, would be similarly provided for. All these clearly defined parameters, it was contended, would make the process of selection and appointment of Judges to the higher judiciary transparent, and would also ensure, that the candidates to be considered, were possessed of the minimum desired standards. It was submitted, that the Memorandum of Procedure for Appointment and Transfer of Chief Justices and Judges of the High Courts, as also, for elevation of Judges to the Supreme Court, were bereft of any such particulars, and the absence of any prescribed criterion, had resulted in the appointment of Judges, even to the Supreme Court, which should have ordinarily been avoided. The learned Attorney General made a reference to three instances, which according to him, were universally condemned, by one and all. One of the Judges appointed to this Court, according to him, was a non-performer as he had authored just a few judgments as a Judge of the High Courts of Delhi and Kerala, and far lesser judgments as the Chief Justice of the Uttarakhand and Karnataka High Courts, and less than ten judgments during his entire tenure as a Judge of the Supreme Court. The second Judge, according to him, was notoriously late in commencing Court

proceeding, a habit which had persisted with the said Judge even as a Judge of the Patna and Rajasthan High Courts, and thereafter, as the Chief Justice of the Jharkhand High Court, and also as a Judge of the Supreme Court. The third Judge, according to the learned Attorney General, was notoriously described as a tweeting Judge, because of his habit of tweeting his views, after he had retired. Learned counsel for the respondents, acknowledged having understood the identity of the Judges from their above description by the learned Attorney General, and also affirmed the factual position asserted in respect of the Judges mentioned. The learned Attorney General also handed over to us a compilation (in a sealed cover) about appointments of Judges made to different High Courts, despite the executive having expressed an adverse opinion. The compilation made reference to elevation of five Judges to High Courts (– two Judges to the Jammu and Kashmir High Court, one Judge to the Punjab and Haryana High Court, one Judge to the Patna High Court, and one Judge to the Calcutta High Court) and three Judges to the Supreme Court. It may be clarified that the objection with reference to the Supreme Court Judges was not related to their suitability, but for the reason that some High Courts were unrepresented in the Supreme Court. We would therefore understand the above position as covering the period from 1993 till date. But it was not his contention, that these elevations had proved to be wrongful. We may only notice, that two of the three Supreme Court Judges referred to, were in due course elevated to the high office of Chief Justice of India.

101. The learned Attorney General vehemently contested the assertion made by the learned counsel representing the petitioners, that the power to frame rules and regulations for the functioning of the NJAC was unguided, inasmuch as, neither the constitutional amendment nor the legislative enactment, provided for any parameters for framing the rules and regulations, pertaining to the criterion of suitability. In this behalf, it was submitted, that sufficient guidelines were ascertainable from Articles 124B and 124C. Besides the aforesaid, the Court's attention was drawn to Sections 5(2), 6(1) and 6(3) of the NJAC Act, wherein the parameters of suitability for appointment of Judges had been laid down. In this behalf, it was also asserted, that Article 124, as originally enacted, had laid down only basic eligibility conditions, for appointment of Judges to the higher judiciary, but no suitability criteria had been expressed. It was also asserted, that the procedure and conditions for appointment of Judges, were also not prescribed. As against the above, it was pointed out, that Articles 124B and 124C and Sections 5(2), 6(1) and 6(3) of the NJAC Act, clearly laid down conditions and guidelines for determining the suitability of a candidate for appointment as a Judge. On the basis of the aforementioned analysis, it was submitted, that neither the constitutional amendment was violative of the "basic structure", nor the NJAC Act, was constitutionally invalid. For the above reasons, it was asserted, that the challenge raised by the petitioners was liable to be rejected.

102. In response to the technical submission advanced by Mr. Fali S. Nariman, namely, that since the Constitution (99th Amendment) Act, was

brought into force, consequent upon the notification issued by the Central Government in the Official Gazette on 13.4.2015, the consideration of the NJAC Bill and the passing of the NJAC Act, prior to the coming into force of the Constitution (99th Amendment) Act, would render it null and void, the learned Attorney General invited our attention to Article 118, which authorizes, each House of Parliament, to make rules for regulating their procedure, in the matter of conducting their business. It was pointed out, that Rules of Procedure and the Conduct of Business of the Lok Sabha, had been duly enacted by the Lok Sabha. A relevant extract of the aforesaid rules was handed over to us. Rule 66 thereof, is being extracted hereunder:

"66. A Bill, which is dependent wholly or partly upon another Bill pending before the House, may be introduced in the House in anticipation of the passing of the Bill on which it is dependent:

Provided that the second Bill shall be taken up for consideration and passing in the House only after the first Bill has been passed by the Houses and assented to by the President."

Referring to the proviso under Rule 66, it was acknowledged that the rule read independently, fully justified the submissions of Mr. Fali S. Nariman. It was however pointed out, that it was open to the Parliament to seek a suspension of the above rule under Rule 388. Rule 388 is also extracted hereunder:

"388. Any member may, with the consent of the Speaker, move that any rule may be suspended in its application to a particular motion before the House and if the motion is carried the rule in question shall be suspended for the time being."

The learned Attorney General then handed over to us, the proceedings of the Lok Sabha dated 12.8.2014, *inter alia*, including the Constitution

(121st Amendment) Bill, and the NJAC Bill. He invited our attention to the fact, that while moving the motion, the then Union Minister in charge of Law and Justice had sought, and was accorded approval, for the suspension of the proviso to Rule 66 of the Rules of Procedure and Conduct of Business of the Lok Sabha. Relevant extract of the Motion depicting the suspension of Rule 388 is being reproduced hereunder:

> "Motion under Rule 388
>
> Shri Ravi Shankar Prasad moved the following motion:-
>
> "That this House do suspend the proviso to rule 66 of the Rules of Procedure and Conduct of Business in Lok Sabha in its application to the motions for taking into consideration and passing the National Judicial Appointments Commission Bill, 2014 in as much as it is dependent upon the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014."
>
> The motion was adopted.
>
> The motions for consideration of the Bills viz. (i) The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 (Insertion of new Articles 124A, 124B and 124C); and (ii) The National Judicial Appointments Commission Bill, 2014 were moved by Shri Ravi Shankar Prasad."

Premised on the strength of the Rules framed under Article 118, learned Attorney General, also placed reliance on Article 122, which is being reproduced below:

> "122. Courts not to inquire into proceedings of Parliament.— (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.
> (2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

Based on Article 122, it was submitted, that the Constitution itself contemplated, that the validity of the proceedings in the Parliament, could not be called in question, on the ground of alleged irregularity in

procedure. While reiterating, that the procedure laid down by the Parliament under Article 118, had been duly complied with, it was submitted, that even if that had not been done, as long as the power of Parliament to legislate was not questioned, no challenge could be premised on the procedural defects in enacting the NJAC Act. In this behalf, reference was also made to Article 246, so as to contend, that the competence of the Parliament to enact the NJAC Act was clearly and unambiguously vested with the Parliament. In support of the above contention, reliance was placed on in re: Hindu Women's Rights to Property Act, 1937[64], rendered by the Federal Court, wherein it had observed as under:

"One of the provisions included in Sch. 9 is that a bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common ground that the Hindu Women's Rights to Property Bill was agreed to without amendment by both Chambers of the Indian Legislature, and as soon as it received the Governor-General's assent, it became an Act (Sch. 9, para. 68 (2)). Not until then had this or any other Court jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor. General's assent. But it does not appear to the Court that the form, content or subject-matter of a bill at the time of its introduction into, or of its consideration by either Chamber of the Legislature is a matter with which a Court of law is concerned. The question whether either Chamber has the right to discuss a bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste its time by discussing a bill which, even if it receives the Governor-General's

[64] AIR 1941 FC 72

assent, would obviously be beyond the competence of the Legislature to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the bill after it has become an Act. In the opinion of this Court, therefore, it is immaterial that the powers of the Legislature changed during the passage of the bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is 14th April 1937, the date on which the Governor General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other."

Reliance was also placed on Pandit M.S.M. Sharma v. Dr. Shree Krishna

Sinha[65], wherefrom the following observations were brought to our notice:

"It now remains to consider the other subsidiary questions raised on behalf of the petitioner. It was contended that the procedure adopted inside the House of the Legislature was not regular and not strictly in accordance with law. There are two answers to this contention, firstly, that according to the previous decision of this Court, the petitioner has not the fundamental right claimed by him. He is, therefore, out of Court. Secondly, the validity of the proceedings inside the Legislature of a State cannot be called in question on the allegation that the procedure laid down by the law had not been strictly followed. Article 212 of the Constitution is a complete answer to this part of the contention raised on behalf of the petitioner. No Court can go into those questions which are within the special jurisdiction of the Legislature itself, which has the power to conduct its own business. Possibly, a third answer to this part of the contention raised on behalf of the petitioner is that it is yet premature to consider the question of procedure as the Committee is yet to conclude its proceedings. It must also be observed that once it has been held that the Legislature has the jurisdiction to control the publication of its proceedings and to go into the question whether there has been any breach of its privileges, the Legislature is vested with complete jurisdiction to carry on its proceedings in accordance with its rules of business. Even though it may not have strictly complied with the requirements of the procedural law laid down for conducting its business, that cannot be a ground for interference by this Court under Art. 32 of the Constitution. Courts have always recognised the basic difference between complete want of jurisdiction and improper or irregular exercise of jurisdiction. Mere non-compliance with rules of procedure cannot be a ground for issuing a writ under Art. 32 of the Constitution vide Janardan Reddy v. The State of Hyderabad, (1951) SCR 344."

[65] 1961 (1) SCR 96

Based on the aforesaid submissions, it was the vehement contention of the learned Attorney General, that there was no merit in the technical objections raised by the petitioners while assailing the provisions of the NJAC Act.

103. Mr. K.K. Venugopal, learned Senior Advocate, entered appearance on behalf of the State of Madhya Pradesh. While reiterating a few of the legal submissions canvassed by the learned Attorney General, he emphasized, that the judgments rendered by this Court, in the Second and Third Judges cases, turned the legal position, contemplated under the original Articles 124 and 217, on its head. It was submitted, that this Court has been required to entertain a public interest litigation, in an unprecedented exercise of judicial review, wherein it is sought to be asserted, that the "independence of the judiciary", had been encroached by the other two organs of governance. It was contended by learned counsel, that the instant assertion was based on a misconception, as primacy in the matter of appointment of Judges to the higher judiciary, was never vested with the judiciary. It was pointed out, that primacy in the matter of appointment of Judges to the higher judiciary, was vested with the executive under Articles 124 and 217, as originally enacted. Furthermore, this Court through its judgments culminating in the First Judges case, while correctly interpreting the aforesaid provisions of the Constitution, had rightly concluded, that the interaction between the executive and the Chief Justice of India (as well as, the other Judges of the higher judiciary) was merely "consultative", and that, the executive

was entirely responsible for discharging the responsibility of appointment of Judges including Chief Justices, to the higher judiciary. It was submitted, that the Second Judges case, by means of a judicial interpretation, vested primacy, in the matter of appointment of Judges to the higher judiciary, with the Chief Justice of India, and his collegium of Judges. It was pointed out, that after the rendering of the Second Judges case, appointments of Judges commenced to be made, in the manner expressed by the above Constitution Bench. It was asserted, that there had been, an all around severe criticism, of the process of appointment of Judges to the higher judiciary, as contemplated by the Second and Third Judges cases. It was contended, that the selection process was now limited to Judges selecting Judges, without any external participation. It was also asserted, that the exclusion of the executive from the role of selection and appointment of Judges was so extensive, that the executive has got no right to initiate any candidature, for appointment of Judges/Chief Justices to the higher judiciary. Such an interpretation of the provisions of the Constitution, it was pointed out, had not only resulted in reading the term "consultation" in Articles 124 and 217 as "concurrence", but has gone far beyond. It was sought to be asserted, that in the impugned amendment to the Constitution, the intent contained in the original Articles 124 and 217, has been retained. The amended provisions, it was pointed out, have been tilted in favour of the judiciary, and the participatory role, earlier vested in the executive, has been severely diluted. It was submitted, that even though no element of

primacy had been conferred on the judiciary by Article 124, as originally enacted, primacy has now been vested in the judiciary, inasmuch as, the NJAC has the largest number of membership from the judicial fraternity. It was highlighted, that the Union Minister in charge of Law and Justice, is the sole executive representative, in the selection process, contemplated under the amended provisions. It was therefore asserted, that it was a far cry, for anyone to advocate, that the role of the judiciary in the manner of appointment of Judges to the higher judiciary having been diluted, had impinged on its independence.

104. It was contended, that the author of the majority view in the Second Judges case (J.S. Verma, J., as he then was), had himself found fault with the manner of implementation of the judgments in the Second and Third Judges cases. It was submitted that Parliament, being the voice of the people, had taken into consideration, the criticism levelled by J.S. Verma, J. (besides others), to revise the process of appointment of Judges contemplated under the Second and Third Judges cases. Having so contended, learned counsel asserted, that if this Court felt that any of the provisions, with reference to selection and appointment of Judges to the higher judiciary, would not meet the standards and norms, which this Court felt sacrosanct, it was open to this Court to read down the appropriate provisions, in a manner as to round off the offending provisions, rather than quashing the impugned constitutional and legislative provisions in their entirety.

105. Mr. Ranjit Kumar, learned Solicitor General of India submitted, that the entire Constitution had to be read as a whole. In this behalf, it was contended, that each provision was an integral part of the Constitution, and as such, its interpretation had to be rendered holistically. For the instant proposition, reliance was placed on the Kihoto Hollohan case[34], T.M.A. Pai Foundation v. State of Karnataka[6], R.C. Poudyal v. Union of India[66], the M. Nagaraj case[36], and the Kesavananda Bharati case[10]. Based on the above judgments, it was asserted, that the term "President", as it existed in Articles 124 and 217, if interpreted holistically, would lead to the clear and unambiguous conclusion, that the President while discharging his responsibility with reference to appointment of Judges/Chief Justices to the higher judiciary, was bound by the aid and advice of the Council of Ministers, as contemplated under Article 74. It was contended, that the aforesaid import was rightfully examined and interpreted with reference to Article 124, in the First Judges case. But had been erroneously overlooked, in the subsequent judgments. Accordingly, it was asserted, that there could be no doubt whatsoever, while examining the impugned constitutional amendment, as also, the impugned legislative enactment, that Parliament had not breached any component of the "basic structure" of the Constitution.

106. It was also contended, that in case the challenge raised to the impugned constitutional amendment, was to be accepted by this Court, and the legal position declared by this Court, was to be given effect to,

[66] 1994 Supp (1) SCC 324

the repealed provisions would not stand revived, merely because the amendment/legislation which were being assailed, were held to be unconstitutional. Insofar as the instant aspect of the matter is concerned, learned Solicitor General raised two independent contentions.

107. Firstly, that the issue whether a constitutional amendment once struck down, would revive the original/substituted Article, was a matter which had already been referred to a nine-Judge Constitutional Bench. In order to support the aforesaid contention, and to project the picture in its entirety, reliance was placed on, Property Owners' Association v. State of Maharashtra[67], Property Owners' Association v. State of Maharashtra[68], and Property Owners' Association v. State of Maharashtra[69]. It was submitted, that the order passed by this Court, wherein the reference to a nine-Judge Constitution Bench had been made, was a case relating to the constitutionality of Article 31C. It was pointed out that Article 31C, as originally enacted provided, that "…notwithstanding anything contained in Article 13, no law giving effect to the policy of the State, towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it was inconsistent with, the rights conferred by Articles 14 and 19". It was submitted, that the latter part of Article 31C, which provided "…and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give

[67] (1996) 4 SCC 49
[68] (2001) 4 SCC 455
[69] (2013) 7 SCC 522

effect to such policy…" had been struck down by this Court in the Kesavananda Bharati case[10]. It was contended, that when the matter pertaining to the effect of the striking down of a constitutional amendment, had been referred to a nine-Judge Bench, it would be improper for this Court, sitting in its present composition, to determine the aforesaid issue.

108. The second contention advanced at the hands of the learned Solicitor General, was based on Sections 6, 7 and 8 of the General Clauses Act. It was contended, that an amendment which had deleted some part of the erstwhile Article 124 of the Constitution, and substituted in its place something different, as in the case of Article 124, by the Constitution (99th Amendment) Act, would not result in the revival of the original Article which was in place, prior to the constitutional amendment, even if the amendment itself was to be struck down. It was submitted, that if a substituted provision was declared as unconstitutional, for whatever ground or reason(s), the same would not automatically result in the revival of the repealed provision. In order to support the aforesaid contention, reliance was placed on Ameer-un-Nissa Begum v. Mahboob Begum[70], Firm A.T.B. Mehtab Majid & Co. v. State of Madras[71], B.N. Tewari v. Union of India[72], Koteswar Vittal Kamath v. K. Rangappa Baliga & Co.[73], Mulchand Odhavji v. Rajkot Borough

[70] AIR 1955 SC 352
[71] AIR 1963 SC 928
[72] AIR 1965 SC 1430
[73] (1969) 1 SCC 255

Municipality[74], Mohd. Shaukat Hussain Khan v. State of Andhra Pradesh[75], State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd.[76], India Tobacco Co. Ltd. v. Commercial Tax Officer, Bhavanipore[77], and Kolhapur Canesugar Works Ltd. v. Union of India[78]. It was submitted, that the general rule of construction was, that a repeal through a repealing enactment, would not revive anything repealed thereby. Reliance was also placed on, State of U.P. v. Hirendra Pal Singh[79], Joint Action Committee of Air Line Pilots' Association of India v. Director General of Civil Aviation[80], and State of Tamil Nadu v. K. Shyam Sunder[81], to contend, that the settled legal proposition was, whenever an Act was repealed, it must be considered as if it had never existed. It was pointed out, that consequent upon the instant repeal of the earlier provisions, the earlier provisions must be deemed to have been obliterated/abrogated/wiped out, wholly and completely. The instant contention was sought to be summarized by asserting, that if a substituted provision was to be struck down, the question of revival of the original provision (which had been substituted, by the struck down provision) would not arise, as the provision which had been substituted, stood abrogated, and therefore had ceased to exist in the statute itself. It was therefore submitted, that even if the challenge raised to the

[74] (1971) 3 SCC 53
[75] (1974) 2 SCC 376
[76] (1977) 1 SCC 643
[77] (1975) 3 SCC 512
[78] (2000) 2 SCC 536
[79] (2011) 5 SCC 305
[80] (2011) 5 SCC 435
[81] (2011) 8 SCC 737

impugned constitutional amendment was to be accepted by this Court, the originally enacted provisions of Articles 124 and 217 would not revive.

109. The learned Solicitor General additionally contended, that the present challenge at the hands of the petitioners should not be entertained, as it has been raised prematurely. It was submitted, that the challenge raised by the petitioners was based on assumptions and presumptions, without allowing the crystallization of the impugned amendment to the Constitution. It was asserted, that the position would crystalise only after rules and regulations were framed under the NJAC Act. It was submitted, that the question of "independence of the judiciary", with reference to the amendments made, could be determined only after the NJAC Act was made operational, by laying down the manner of its functioning. Since the pendency of the present litigation had delayed the implementation of the provisions of the amendment to the Constitution, as also to the NJAC Act, it would be improper for this Court, to accede to a challenge based on conjectures and surmises.

110. Mr. K. Parasaran, Senior Advocate, entered appearance on behalf of the State of Rajasthan. He submitted, that he would be supporting the validity of the impugned constitutional amendment, as also, the NJAC Act, and that, he endorsed all the submissions advanced on behalf of the Union of India. It was his contention, that Judges of the higher judiciary were already burdened with their judicial work, and as such, they should not be seriously worried about the task of appointment of Judges, which

by the impugned amendment, had been entrusted to the NJAC. In his view, the executive and the Parliament were accountable to the people, and therefore, they should be permitted to discharge the onerous responsibility, of appointing Judges to the higher judiciary. It was asserted, that the executive and the legislature would then be answerable, to the people of this country, for the appointments they would make.

111. On the issue of inclusion of two "eminent persons" in the six-Member NJAC, it was asserted, that the nomination of the "eminent persons" was to be made by the Prime Minister, the Chief Justice of India, and the Leader of the Opposition in the Lok Sabha. All these three individuals, being high ranking constitutional functionaries, should be trusted, to discharge the responsibility bestowed on them, in the interest of the "independence of the judiciary". It was submitted, that if constitutional functionaries, and the "eminent persons", could not be trusted, then the constitutional machinery itself would fail. It was pointed out, that this Court had repeatedly described, that the Constitution was organic in character, and it had an inbuilt mechanism for evolving, with the changing times. It was asserted, that the power vested with the Parliament, under Article 368 to amend the provisions of the Constitution, was a "constituent power", authorizing the Parliament to reshape the Constitution, to adapt with the changing environment. It was contended, that the above power vested in the Parliament could be exercised with the sole exception, that "the basic structure/features" of

the Constitution, as enunciated by the Supreme Court in the Kesavananda Bharati case[10], could not be altered/changed. According to the learned senior counsel, the Constitution (99th Amendment) Act was an exercise of the aforestated constituent power, and that, the amendment to the Constitution introduced thereby, did not in any manner, impinge upon the "independence of the judiciary".

112. Referring to Article 124A, it was asserted, that the NJAC was a six-Member Commission for identifying, selecting and appointing Judges to the higher judiciary. It could under no circumstances, be found wanting, with reference to the assertions made by the petitioners. It was pointed out, that the only executive representative thereon being the Union Minister in charge of Law and Justice, it could not be inferred, that the executive would exert such influence through him, as would undermine the independence of the five other Members of the Commission. It was submitted, that the largest representation of the Commission, was that of Judges of the Supreme Court, inasmuch as, the Chief Justice of India, and the two senior most Judges of the Supreme Court were *ex officio* Members of the NJAC.

113. With reference to the two "eminent persons" on the NJAC, it was his contention, that they could not be identified either with the executive or the legislature. For the nomination of the two "eminent persons", the Selection Committee comprises of one member of the executive, one member of the legislature, and one member of the judiciary. In the above view of the matter, it was asserted, that the contention, that the two

"eminent persons" in the Commission would support the executive/the legislature, was preposterous. It was therefore the submission of the learned senior counsel, that the "independence of the judiciary" could not be considered to have been undermined, keeping in mind the composition of the NJAC.

114. It was also contended, that the proceedings before the NJAC would be more transparent and broad based, and accordingly, more result oriented, and would ensure, that the best candidates would be selected for appointment as Judges to the higher judiciary.

115. It was asserted, that the NJAC provided for a consultative process with persons who were *ex-hypothesi*, well qualified to give proper advice in the matter of appointment of Judges to the higher judiciary. It was accordingly the assertion of learned counsel, that the determination rendered by this Court, in the Second and Third Judges cases, was not in consonance with the intent, with which Articles 124 and 217 were originally enacted. It was therefore submitted, that the subject of "independence of the judiciary", with reference to the impugned constitutional amendment, should not be determined by relying on the Second and Third Judges cases, but only on the basis of the plain reading of Articles 124 and 217, in conjunction with, the observations expressed by the Members of the Constituent Assembly while debating on the above provisions. It was submitted, that whilst the Union Minister in charge of Law and Justice, would be in an effective position to provide necessary inputs, with reference to the character and antecedents of the

candidate(s) concerned (in view of the governmental machinery available at his command), the two "eminent persons" would be in a position to participate in the selection process, by representing the general public, and thereby, the selection process would be infused with all around logical inputs, for a wholesome consideration.

116. It was submitted, that since any two Members of the NJAC, were competent to veto the candidature of a nominee, three representatives of the Supreme Court of India, would be clearly in a position to stall the appointment of unsuitable candidates. It was therefore contended, that the legislations enacted by the Parliament, duly ratified in terms of Article 368, should be permitted to become functional, with the constitution of the NJAC, and should further be permitted to discharge the responsibility of appointing Judges to the higher judiciary. It was submitted, that in case of any deficiency in the discharge of the said responsibility, this Court could *suo motu* negate the selection process, or exclude one or both of the "eminent persons" from the selection process, if they were found to be unsuitable or unworthy of discharging their responsibility. Or even if they could not establish their usefulness. It was submitted, that this Court should not throttle the contemplated process of selection and appointment of Judges to the higher judiciary, through the NJAC, without it's even having been tested.

117. Mr. T.R. Andhyarujina, Senior Advocate, entered appearance on behalf of the State of Maharashtra. It was his contention, while endorsing the submissions advanced on behalf of the Union of India, that the

impugned Constitution (99th Amendment) Act, was a rare event, inasmuch as, the Parliament unanimously passed the same, with all parties supporting the amendment. He asserted, that there was not a single vote against the amendment, even though it was conceded, that there was one Member of Parliament, who had abstained from voting. Besides the above, it was asserted, that even the State legislatures ratified the instant constitutional amendment, wherein the ruling party, as also, the parties in opposition, supported the amendment. Based on the above, it was contended, that the instant constitutional amendment, should be treated as the unanimous will of the people, belonging to all sections of the society, and therefore the same could well be treated, as the will of the nation, exercised by all stakeholders.

118. It was submitted, that the amendment under reference should not be viewed with suspicion. It was pointed out, that Articles 124 and 217 contemplated a dominating role for the executive. It was contended, that the judgment in the Second Judges case, vested primacy in the matter of appointment of Judges to the higher judiciary, with the Chief Justice of India and his collegium of Judges. This manner of selection and appointment of Judges to the higher judiciary, according to learned counsel, was unknown to the rest of the world, as in no other country, the appointment of Judges is made by Judges themselves. Indicating the defects of the collegium system, it was asserted, that the same lacked transparency, and was not broad based enough. Whilst acknowledging, the view expressed by J.S. Verma, CJ., that the manner of appointment

of Judges contemplated by the Second and Third Judges cases was very good, it was submitted, that J.S. Verma, CJ., himself was disillusioned with their implementation, as he felt, that there had been an utter failure on that front. Learned senior counsel submitted, that the questions that needed to be answered were, whether there was any fundamental illegality in the constitutional amendment? Or, whether the appointment of Judges contemplated through the NJAC violated the "basic structure" of the Constitution? And, whether the "independence of the judiciary" stood subverted by the impugned constitutional amendment? It was asserted, that it was wrong to assume, that the manner of appointment of Judges, had any impact on the "independence of the judiciary". In this behalf, it was pointed out, that the independence of Judges, did not depend on who appointed them. It was also pointed out, that independence of Judges depended upon their individual character. Learned counsel reiterated the position expounded by Dr. B.R. Ambedkar, during the Constituent Assembly debates. He submitted, that the concept of "independence of the judiciary" should not be determined with reference to the opinion expressed by this Court in the Second and Third Judges cases, but should be determined with reference to the debates in the Constituent Assembly, which led to the crystallization of Articles 124 and 217, as originally enacted.

119. Learned counsel placed reliance on Lord Cooke of Thorndon in his article titled "Making the Angels Weep", wherein he scathingly criticized the Second Judges case. Reference was also made to his article "Where

Angels Fear to Tread", with reference to the Third Judges case. The Court's attention was also drawn to the criticism of the Second and Third Judges cases, at the hands of H.M. Seervai, Fali S. Nariman and others, especially the criticism at the hands of Krishna Iyer and Ruma Pal, JJ., and later even the author of the majority judgment in the Second Judges case – J.S. Verma, CJ.. It was, accordingly, the contention of the learned senior counsel, that whilst determining the issue of "independence of the judiciary", reference should not be made to either of the above two judgments, but should be made to the plain language of Articles 124 and 217. Viewed in the above manner, it was asserted, that there would be no question of arriving at the conclusion, that the impugned constitutional amendment, violated the basic concepts of "separation of powers" and "independence of the judiciary".

120. Even though, there were no guidelines, for appointment of the two "eminent persons", emerging from the Constitution (99th Amendment) Act, and/or the NJAC Act, yet it was submitted, that it was obvious, that the "eminent persons" to be chosen, would be persons who were well versed in the working of courts. On the Court's asking, learned senior counsel suggested, that "eminent persons" for the purpose could only be picked out of eminent lawyers, eminent jurists, and even retired Judges, or the like. Insofar as the instant aspect of the matter is concerned, it is obvious that learned senior counsel had adopted a position, diametrically opposite to the one canvassed by the learned Attorney General. Another aspect, on which we found a little divergence in the submission of Mr.

T.R. Andhyarujina was, that in many countries the executive participation in the matter of appointment of Judges to the higher judiciary, was being brought down. And in some countries it was no longer in the hands of the executive. In this behalf, the clear contention advanced by the learned senior counsel was, that the world over, the process of appointment of Judges to the higher judiciary was evolving, so as to be vested in Commissions of the nature of the NJAC. And as such, it was wholly unjustified to fault the same, on the ground of "independence of the judiciary", when the world over Commissions were found to have been discharging the responsibility satisfactorily.

121. Mr. Tushar Mehta, Additional Solicitor General of India, entered appearance on behalf of the State of Gujarat. He adopted the submissions advanced by the learned Attorney General, as also, Mr. Ranjit Kumar, the learned Solicitor General. It was his submission, that the system innovated by this Court for appointment of Judges to the higher judiciary, comprising of the Chief Justice and his collegium of Judges, was a judicial innovation. It was pointed out, that since 1993 when the above system came into existence, it had been followed for appointment of Judges to the higher judiciary, till the impugned constitutional amendment came into force. It was asserted that, in the interregnum, some conspicuous events had taken place, depicting the requirement of a change in the method and manner of appointment of Judges to the higher judiciary. Learned counsel invited our attention to the various Bills which were introduced in the Parliament for the purpose

of setting up a Commission for appointments of Judges to the higher judiciary, as have already been narrated hereinbefore. It was pointed out, that several representations were received by the Government of the day, advocating the replacement of the "collegium system", with a broad based National Judicial Commission, to cater to the long standing aspiration of the citizens of the country. The resultant effect was, the passing of the Constitution (99th Amendment) Act, and the NJAC Act, by the Parliament. It was submitted, that the same came to be passed almost unanimously, with only one Member of Rajya Sabha abstaining. It was asserted, that this was a rare historical event after independence, when all political parties, having divergent political ideologies, voted in favour of the impugned constitutional amendment. In addition to the above, it was submitted, that as of now 28 State Assemblies had ratified the Bill. It was asserted, that the constitutional mechanism for appointment of Judges to the higher judiciary, had operated for a sufficient length of time, and learning from the experience emerging out of such operation, it was felt, that a broad based Commission should be constituted. It was contended, that the impugned constitutional amendment, satisfied all the parameters for testing the constitutional validity of an amendment. Learned Additional Solicitor General similarly opposed, the submissions advanced at the hands of the petitioners challenging the inclusion of the Union Minister in charge of Law and Justice, as a Member of the NJAC. He also found merit in the inclusion of two "eminent persons", in the NJAC. It was contended, that the term

"eminent persons", with reference to appointment of Judges to the higher judiciary, was by itself clear and unambiguous, and as and when, a nomination would be made, its authenticity would be understood. He distanced himself from the submission advanced by Mr. T.R. Andhyarujina, who represented the State of Maharashtra, while advancing submission about the identity of those who could be nominated as "eminent persons" to the NJAC. It was submitted, by placing reliance on Municipal Committee, Amritsar v. State of Punjab[82], K.A. Abbas v. Union of India[83], and the A.K. Roy case[49], that similar submissions advanced before this Court, with reference to vagueness and uncertainty of law, were consistently rejected by this Court. According to learned counsel, with reference to the alleged vagueness in the term "eminent persons", in case the nomination of an individual was assailed, a court of competent jurisdiction would construe it, as far as may be, in accordance with the intention of the legislature. It was asserted, that it could not be assumed, that there was a political danger, that if two wrong persons were nominated as "eminent persons" to the NJAC, they would be able to tilt the balance against the judicial component of the NJAC. It was submitted, that the appointment of the two "eminent persons" was in the safe hands, of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha. In the above view of the matter, the learned Additional Solicitor General, concluded with the prayer, that

[82] (1969) 1 SCC 475
[83] (1970) 2 SCC 780

the submissions advanced at the hands of the learned counsel for the petitioners deserved to be rejected.

122. Mr. Ravindra Srivastava, Senior Advocate, entered appearance on behalf of the State of Chhattisgarh. He had chosen to make submissions divided under eleven heads. However, keeping in view the fact, that detailed submissions had already been advanced by counsel who had entered appearance before him, he chose to limit the same. It was the primary contention of the learned senior counsel, that the impugned constitutional amendment, as also the NJAC Act, did not in any manner violate the "basic structure" of the Constitution. According to the learned senior counsel, the impugned constitutional amendment, furthers and strengthens the "basic structure" principle, of a free and independent judiciary. It was his submission, that the assertions made at the hands of the petitioners, to the effect that the impugned constitutional amendment, impinges upon the "basic structure" of the Constitution, and the "independence of the judiciary", were wholly misconceived. It was submitted, that this Court had not ever held, that the primacy of the judiciary through the Chief Justice of India, was an essential component of the "independence of the judiciary". It was asserted, that while considering the challenge raised by the petitioners to the impugned constitutional amendment, it would be wholly unjustified to approach the challenge by assuming, that the primacy of the judiciary through the Chief Justice of India, would alone satisfy the essential components of "separation of power" and "independence of the judiciary". It was

submitted, that the introduction of plurality, in the matter of appointment of Judges to the higher judiciary, was an instance of independence, rather than an instance of interference. With reference to the Members of the NJAC, it was submitted, that the same would ensure not only transparency, but also a broad based selection process, without any ulterior motives. It was asserted, that the adoption of the NJAC for selection of Judges to the higher judiciary, would result in the selection of the best out of those willing to be appointed. With reference to the participation of the Union Minister in charge of Law and Justice, as an *ex officio* Member of the NJAC, it was submitted, that the mere participation of one executive representative, would not make the process incompatible, with the concept of "independence of the judiciary". In this behalf, emphatic reliance was placed on the observations of E.S. Venkataramiah, J., from two paragraphs of the First Judges case, which are being extracted hereunder:

"1033. As a part of this very contention it is urged that the Executive should have no voice at all in the matter of appointment of Judges of the superior courts in India as the independence of the judiciary which is a basic feature of the Constitution would be in serious jeopardy if the executive can interfere with the process of their appointment. It is difficult to hold that merely because the power of appointment is with the executive, the independence of the judiciary would become impaired. The true principle is that after such appointment the executive should have no scope to interfere with the work of a Judge."

"1038. The foregoing gives a fairly reliable picture of the English system of appointments of Judges. It is thus seen that in England the Judges are appointed by the Executive. "Nevertheless, the judiciary is substantially insulated by virtue of rules of strict law, constitutional conventions, political practice and professional tradition, from political influence."

It was finally submitted by learned counsel, that a multi-member

constitutional body, was expected to act fairly and independently, and not in violation of the Constitution. It was contended, that plurality by itself was an adequate safeguard. Reliance in this behalf was placed on T.N. Seshan v. Union of India[84], so as to eventually conclude, that the constitutional amendment did not violate the "basic structure" of the Constitution, and that, it was in consonance with the concept of a free and independent judiciary, by further strengthening the "basic structure" of the Constitution.

123. Mr. Ajit Kumar Sinha, Senior Advocate, entered appearance on behalf of the State of Jharkhand. He asserted, that he should be taken as having adopted all the submissions addressed, on behalf of the Union of India. While commencing his submissions, he placed reliance on Article 124(4) and proviso (b) under Article 217(1) to contend, that Judges of the higher judiciary, could not be removed except by an order passed by the President, after an address by each House of Parliament, supported by a majority of the total membership of that House, and by a majority of not less than 2/3rd of the Members of the House present and voting, had been presented to the President, on the ground of proved misbehaviour or incapacity. In this behalf, learned senior counsel placed reliance on Section 16 of the General Clauses Act, 1897, which provides that the power to appoint includes the power to suspend or dismiss. Read in conjunction with Article 367, which mandates, that unless the context otherwise required, the provisions of the General Clauses Act

[84] (1995) 4 SCC 611

1897, would apply to the interpretation of the provisions of the Constitution, in the same manner as they applied to the interpretation of an Act of the legislature. Based on the aforesaid, it was sought to be asserted, that in the absence of any role of the judiciary in the matter of removal of a Judge belonging to the higher judiciary, the judiciary could not demand primacy in the matter of appointment of Judges of the higher judiciary, as an integral component of the "independence of the judiciary". It was submitted, on the issue of "independence of the judiciary", the question of manner of appointment was far less important, than the question of removal from the position of Judge. Adverting to the manner of removal of Judges of the higher judiciary, in accordance with the provisions referred to hereinabove, it was asserted, that in the matter of removal of a Judge from the higher judiciary, there was no judicial participation. It was solely the prerogative of the legislature. That being so, it was contended, that the submissions advanced at the behest of the petitioners, that primacy in the matter of appointment of Judges, should be vested in the judiciary, was nothing but a fallacy.

124. The second contention advanced by learned senior counsel was, that it should not be assumed as if the NJAC, would take away the power of appointment of Judges to the higher judiciary, from the judiciary. It was submitted, that three of the six Members of the NJAC belonged to the judiciary, and that, one of them, namely, the Chief Justice of India was to preside over the proceedings of the NJAC, as its Chairperson. Thus viewed, it was submitted, that it was wholly misconceived on the

part of the petitioners to contend, that the power of appointment of Judges, had been taken away from the judiciary, and vested with the executive. It was submitted, that there was nothing fundamentally illegal or unconstitutional in the manner of appointment of Judges to the higher judiciary, as contemplated by the impugned constitutional amendment. It was also contended, that the manner of appointment of Judges, contemplated through the NJAC, could not be perceived as violative of the "basic structure" of the Constitution, by the mere fact, that any two Members of the NJAC can veto a proposal of appointment of a Judge to the higher judiciary. And that, the above would result in the subversion of the "independence of the judiciary". In support of the aforestated submissions, it was highlighted, that the manner of appointment of Judges, which was postulated in the judgments rendered in the Second and Third Judges cases, do not lead to the inference, that if the manner of appointment as contemplated therein was altered, it would violate the "basic structure" of the Constitution.

125. Mr. Yatindra Singh, learned Senior Advocate, entered appearance as an intervener. He contended, that the preamble to the Constitution of India, Article 50 (which provides for separation of the judiciary from the executive), the oath of office of a Judge appointed to the higher judiciary, the security of his tenure including the fixed age of retirement, the protection of the emoluments payable to Judges including salary and leave, etc., the fact that the Judges appointed to the higher judiciary served in Courts of Record, having the power to punish for contempt, and

the provisions of the Judicial Officers Protection Act, 1850, and the Judges (Protection) Act, 1985, which grant immunity to them from civil as well as criminal proceedings, are incidents, which ensured "independence of the judiciary". It was submitted, that the manner of appointment of Judges to the higher judiciary, had nothing to do with "independence of the judiciary". It was pointed out, that insofar as the determination of the validity of the impugned constitutional amendment was concerned, it was not essential to make a reference to the judgments rendered by this Court in the Second and Third Judges cases. It was submitted, that the only question that needed to be determined insofar as the present controversy is concerned, was whether, the manner of appointment postulated through the NJAC, would interfere with "independence of Judges". In this behalf, it was firstly asserted, that neither the Second nor the Third Judges case had concluded, that the manner of appointment of Judges would constitute the "basic structure" of the Constitution. Nor that, the manner of appointment of Judges to the higher judiciary as postulated in the Second and Third Judges cases, if breached, would violate the "basic structure" of the Constitution. It was submitted, that the judgments rendered in the Second and Third Judges cases merely interpreted the law, as it then existed. It was asserted, that the above judgments did not delve into the question, whether any factor(s) or feature(s) considered, were components of the "basic structure" of the Constitution.

126. Learned senior counsel, also placed reliance on the manner of appointment of Judges in the United States of America, Australia, New Zealand, Canada, and Japan to contend, that in all these countries Judges appointed to the higher judiciary, were discharging their responsibilities independently, and as such, there was no reason or justification for this Court to infer, if the manner of appointment of Judges was altered from the position contemplated in the Second and Third Judges cases, to the one envisaged by the impugned constitutional amendment, it would affect the "independence of the Judges". It was submitted, that different countries in the world had adopted different processes of selection for appointment of Judges. Each country had achieved "independence of the judiciary", and as such, it was presumptuous to think that Judges appointed by Judges alone, can discharge their duties independently.

127. Learned senior counsel also pointed out, that the "collegium system" was not the only process of appointment of Judges, which could achieve the "independence of the judiciary". Had it been so, it would have been so concluded in the judgments rendered in the Second and Third Judges cases. It was the submission of the learned senior counsel, that "independence of the judiciary" could be achieved by other methods, as had been adopted in other countries, or in a manner, as the Parliament deemed just and proper for India. It was asserted, that the manner of appointment contemplated by the impugned constitutional amendment had no infirmity, with reference to the issue of

"independence of the judiciary", on account of the fact, that there was hardly any participation in the NJAC, at the behest of organs other than the judiciary.

128. Last of all, learned senior counsel contended, that the "collegium system" did not serve the purpose of choosing the best amongst the available. The failure of the "collegium system", according to the learned senior counsel, was apparent from the opinion expressed by V.R. Krishna Iyer, J. in the foreword to the book "Story of a Chief Justice", authored by U.L. Bhat, J. The "collegium system" was also adversely commented upon, by Ruma Pal, J., while delivering the 5th V.M. Tarkunde Memorial Lecture on the topic "An Independent Judiciary". Reference in this behalf, was also made to the observations made by S.S. Sodhi, J., a former Chief Justice of the Allahabad High Court, in his book "The Other Side of Justice", and the book authored by Fali S. Nariman, in his autobiography "Before Memory Fades". It was contended, that the aforesaid experiences, and the adverse all around comments, with reference to the implementation of the "collegium system", forced the Parliament to enact the Constitution (99th Amendment) Act, which provided for a far better method for selection and appointment of Judges to the higher judiciary, than the procedure contemplated under the "collegium system". It was submitted, that whilst the NJAC did not exclude the role of the judiciary, it included two "eminent persons" with one executive nominee, namely, the Union Minister in charge of Law and Justice, as Members of the NJAC. Since the role of the

executive/Government in the NJAC was minimal, it was preposterous to assume, that the executive would ever be able to have its way, in the matter of appointment of Judges to the higher judiciary. It was submitted, that the NJAC would fulfill the objective of transparency, in the matter of appointment of Judges, and at the same time, would make the selection process broad based. While concluding his submissions, it was also suggested by the learned counsel, that the NJAC should be allowed to operate for some time, so as to be tested, before being scrapped at its very inception. And that, it would be improper to negate the process even before the experiment had begun.

129. Mr. Dushyant A. Dave, Senior Advocate and President of the Supreme Court Bar Association, submitted that the only question that needed to be adjudicated upon, with reference to the present controversy was, whether the manner of appointment of Judges to the higher judiciary, through the NJAC, would fall within the constitutional frame work? Learned senior counsel commenced his submissions by highlighting the fact, that parliamentary democracy contemplated through the provisions of the Constitution, was a greater basic concept, as compared to the "independence of the judiciary". It was submitted, that the manner in which submissions had been advanced at the behest of the petitioners, it seemed, that the matter of appointment of Judges to the higher judiciary, is placed at the highest pedestal, in the "basic structure doctrine". Learned senior counsel seriously contested the veracity of the aforesaid belief. It was submitted, that if those

representing the petitioners, were placing reliance on the judgment rendered in the Second Judges case, to project the aforesaid principle, it was legally fallacious, to do so. The reason, according to learned senior counsel was, that the judgment in the Second Judges case, was not premised on an interpretation of any constitutional provision(s), nor was it premised on an elaborate discussion, with reference to the subject under consideration, nor was reliance placed on the Constituent Assembly debates. It was pointed out, that the judgment in the Second Judges case was rendered, on the basis of the principles contemplated by the authors of the judgment, and not on any principles of law. It was accordingly asserted, that the petitioners' contentions, deserved outright rejection.

130. Learned senior counsel invited this Court's attention to the fact, that the judgments rendered in the Kesavananda Bharati case[10], the Minerva Mills Ltd. case[33], and I.R. Coelho v. State of Tamil Nadu[85], wherein the concept of "basic structure" of the Constitution was formulated and given effect to, were all matters wherein on different aspects, the power of judicial review had been suppressed/subjugated. It was submitted, that none of the aforesaid judgments could be relied upon to determine, whether the manner of appointment of the Judges to the higher judiciary, constituted a part of the "basic structure" of the Constitution. It was therefore, that reliance was placed on Article 368 to contend, that the power to amend the Constitution, had been described

[85] (2007) 2 SCC 1

as a “constituent power”, i.e., a power similar to the one which came to be vested in the Constituent Assembly, for drafting the Constitution. It was submitted, that no judgment could negate or diminish the “constituent power” vested with the Parliament, under Article 368. Having highlighted the aforesaid factual position, learned senior counsel advanced passionate submissions with reference to various appointments made, on the basis of the procedure postulated in the Second and Third Judges cases. Reference was pointedly made to the appointment of a particular Judge to this Court as well. It was pointed out, that the concerned Judge had decided a matter, by taking seisin of the same, even though it was not posted for hearing before him. Thereafter, even though a review petition was filed to correct the anomaly, the same was dismissed by the concerned Judge. While projecting his concern with reference to the appointment of Judges to the higher judiciary under the collegium system, learned senior counsel emphatically pointed out, that the procedure in vogue before the impugned constitutional amendment, could be described as a closed-door process, where appointments were made in a hush-hush manner. He stated that the stakeholders, including prominent lawyers with unimpeachable integrity, were never consulted. It was submitted, that inputs were never sought, from those who could render valuable assistance, for the selection of the best, from amongst those available. It was pointed out, that the process of appointment of Judges under the collegium system, was known to have been abused in certain cases, and that, there were certain inherent

defects therein. It was submitted, that the policy of selection, and the method of selection, were not justiciable, being not amenable to judicial review, and as such, no challenge could be raised to the wrongful appointments made under the "collegium system".

131. On the subject of the manner of interpreting the Constitution, with reference to appointments to the higher judiciary, reliance was placed on Registrar (Admn), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy[32], to contend, that in spite of having noticed the judgments rendered in the Second Judges case, this Court struck a note of caution, with reference to the control, vested in the High Courts, over the subordinate judiciary. It was pointed out, that it had been held, that control had to be exercised without usurping the power vested with the executive, especially the power under Articles 233, 234 and 235. It is submitted, that the power of the executive in the matter of appointments of Judges to the higher judiciary, could not be brushed aside, without any justification. It was contended, that it was improper to assume, that only the judiciary could appoint the best Judges, and the executive or the legislature could not.

132. Learned senior counsel also made an impassioned reference, to the failure of the judiciary, to grant relief to the victims of the 1984 riots in Delhi, and the 2003 riots in Gujarat. It was also asserted, that justice had been denied to those who deserved it the most, namely, the poor citizenry of this country. It was pointed out, that the manner of appointment of Judges, through the "collegium system", had not

produced Judges of the kind who were sensitive to the rights of the poor and needy. It was the assertion of the learned senior counsel, that the new system brought in for selection and appointment of Judges to the higher judiciary, should be tried and tested, and in case, certain parameters had to be provided for, to ensure its righteous functioning to achieve the best results, it was always open to this Court to provide such guidelines.

V. THE DEBATE AND THE DELIBERATION:

I.

133. The Union Government, as also, the participating State Governments, were all unanimous in their ventilation, that the impugned constitutional amendment, had been passed unanimously by both the Lok Sabha and the Rajya Sabha, wherein parliamentarians from all political parties had spoken in one voice. The Lok Sabha had passed the Bill with 367 Members voting in favour of the Bill, and no one against it (the Members from the AIADMK – 37 in all, had however abstained from voting). The Rajya Sabha passed the Bill with 179 Members voting in favour of the Bill, and one of its Members – Ram Jethmalani, abstaining. It was submitted, that on account of the special procedure prescribed under the proviso to Article 368(2), the Bill was ratified in no time by half the State Legislatures. Mr. Tushar Mehta, learned Additional Solicitor

General of India, had informed the Court, that as many as twenty-eight State Assemblies, had eventually ratified the Bill. It was assented to by the President on 31.12.2014. It was therefore asserted, that the Constitution (99th Amendment) Act manifested, the unanimous will of the people, and therefore, the same must be deemed to be expressive of the desire of the nation. Based on the fact, that impugned constitutional amendment reflected the will of the people, it was submitted, that it would not be appropriate to test it through a process of judicial review, even on the touchstone of the concept of "basic structure".

134. Learned counsel representing the petitioners, described the aforesaid assertion as misplaced. The contention was repulsed by posing a query, whether the same was the will of the nation of the "haves", or the will of the nation of the "have-nots"? Another question posed was, whether the impugned constitutional amendment represented the desire of the rich, the prosperous and the influential, or the poor and the needy, whose conditions, hopes and expectations had nothing to do with the impugned constitutional amendment? It was submitted, that the will of the nation, could only be decided by a plebiscite or a referendum. It was submitted, that the petitioners would concede, that it could certainly be described as the overwhelming will of the political-executive. And no more. It was asserted, that the impugned constitutional amendment had an oblique motive. The amendment was passed unanimously, in the opinion of the petitioners, for the simple reason, that the higher judiciary

corrects the actions of the executive and the legislatures. This, it was pointed out, bothers the political-executive.

135. With reference to the will of the people, it was submitted, that the same could easily be ascertainable from the decision rendered in the L.C Golak Nath case[41], wherein a eleven-Judge Bench declared, that a constitutional amendment was "law" with reference to Part III of the Constitution, and therefore, was subject to the constraint of the fundamental rights, in the said part. It was pointed out, that the Parliament, had invoked Article 368, while passing the Constitution (25th Amendment) Act, 1971. By the above amendment, a law giving effect to the policy of the State under Articles 39(b) and 39(c) could not be declared void, on the ground that it was inconsistent with the fundamental rights expressed through Articles 14, 19 and 31. Article 31C also provided, that a legislative enactment containing such a "declaration", namely, that it was for giving effect to the above policy of the State, would not be called in question on the ground, that it did not factually gave effect to such policy. It was pointed out, that this Court in the Kesavananda Bharati case[10], had overruled the judgment in the I.C. Golak Nath case[41]. This Curt, while holding as unconstitutional the part of Article 31C, which denied judicial review, on the basis of the "declaration" referred to above, also held, that the right of judicial review was a part of the "basic structure" of the Constitution, and its denial would result in the violation of the "basic structure" of the Constitution.

136. Proceeding further, it was submitted, that on 12.6.1975, the election of Indira Gandhi to the Lok Sabha was set aside by the Allahabad High Court. That decision was assailed before the Supreme Court. Pending the appeal, the Parliament passed the Constitution (39th Amendment) Act, 1975. By the above amendment, election to the Parliament, of the Prime Minister and the Speaker could not be assailed, nor could the election be held void, or be deemed to have ever become void, on any of the grounds on which an election could be declared void. In sum and substance, by a deeming fiction of law, the election of the Prime Minister and the Speaker would continue to be valid, irrespective of the defect(s) and illegalities therein. By the above amendment, it was provided, that any pending appeal before the Supreme Court would be disposed of, in conformity with the provisions of the Constitution (39th Amendment) Act, 1975. The aforesaid amendment was struck down by this Court, by declaring that the same amounted to a negation of the "rule of law", and also because, it was "anti-democratic", and as such, violated the "basic structure" of the Constitution. It was submitted, that as an answer to the striking down of material parts of Article 39A of the Constitution, the Parliament while exercising its power under Article 368, had passed the Constitution (42nd Amendment) Act, 1976, by an overwhelming majority. Through the above amendment, the Parliament added clauses (4) and (5) to Article 368, which read as under:

"(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution

(Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.
(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

The aforesaid amendment was set aside, as being unconstitutional, by a unanimous decision, in the Minerva Mills Ltd. case[33]. It was held, that the amending power of the Parliament under Article 368 was limited, inasmuch as, it had no right to repeal or abrogate the Constitution, or to destroy its "basic or essential features".

137. Learned senior counsel pointed out, that over the years, yet another stratagem was adopted by the Parliament, for avoiding judicial interference in the working of the Parliament. In this behalf, reference was made to the Constitution (45th Amendment) Bill, 1978, wherein it was provided, that even the "basic structure" of the Constitution could be amended, on its approval through a referendum. The amendment added a proviso to Article 368(2) postulating, that a law compromising with the "independence of the judiciary" would require ratification by one half of the States, and thereupon, would become unassailable, if adopted by a simple majority vote in a referendum. Through its aforesaid action, the Government of the day, revealed its intention to compromise even the "independence of the judiciary". Though the above Bill was passed by an overwhelming majority in the Lok Sabha, it could not muster the two-thirds majority required in the Rajya Sabha. It was pointed out, that the propounder of the Bill was the then Janata Party Government, and

not the Congress Party Government (which was responsible for the emergency, and the earlier constitutional amendments). It was therefore asserted, that it should not surprise anyone, if all political parties had spoken in one voice, because all political parties were united in their resolve, to overawe and subjugate the judiciary.

138. It was submitted, that the intention of the legislature and the executive, irrespective of the party in power, has been to invade into the "independence of the judiciary". It was further submitted, that attempts to control the judiciary have been more pronounced in recent times. In this behalf, the Court's attention was drawn to the judgments in Lily Thomas v. Union of India[86], and Chief Election Commissioner v. Jan Chaukidar[87]. It was pointed out, that in the former judgment, this Court held as invalid and unconstitutional, Section 8(4) of the Representation of the People Act, 1951, which provided *inter alia,* that a Member of Parliament convicted of an offence and sentenced to imprisonment for not less than two years, would not suffer the disqualification contemplated under the provision, for a period of three months from the date of conviction, or if the conviction was assailed by way of an appeal or revision – till such time, as the appeal or revision was disposed of. By the former judgment, convicted Members became disqualified, and had to vacate their respective seats, even though, the conviction was under challenge. In the latter judgment, this Court upheld the order passed by the Patna High Court, declaring that a person who was confined to

[86] (2013) 7 SCC 653
[87] (2013) 7 SCC 507

prison, had no right to vote, by virtue of the provisions contained in Section 62(2) of the Representation of the People Act, 1951. Since he/she was not an elector, therefore it was held, that he/she could not be considered as qualified, to contest elections to either House of Parliament, or to a Legislative Assembly of a State.

139. It was pointed out, that Government (then ruled by the U.P.A.) introduced a series of Bills, to invalidate the judgment rendered by this Court in the Jan Choukidar case[87]. This was sought to be done by passing the Representation of the People (Amendment and Validation) Act, 2013, within three months of the rendering of the above judgment. It was submitted, that it was wholly misconceived for the learned counsel representing the Union of India, and the concerned States to contend, that the determination by the Parliament and the State Legislatures, with reference to constitutional amendments, could be described as actions which the entire nation desired, or represented the will of the people. It was submitted, that what was patently unconstitutional, could not constitute either the desire of the nation, or the will of the people.

140. Referring to the "collegium system" of appointing Judges to the higher judiciary, it was pointed out, that the same was put in place by a decision rendered by a nine-Judge Bench, in the Second Judges case, through which the "independence of the judiciary" was cemented and strengthened. This could be achieved, by vesting primacy with the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. It was further pointed out, that the collegium system

has been under criticism, on account of lack of transparency. It was submitted, that taking advantage of the above criticism, political parties across the political spectrum, have been condemning and denouncing the "collegium system". Yet again, it was pointed out, that the Parliament in its effort to build inroads into the judicial system, had enacted the impugned constitutional amendment, for interfering with the judicial process. This oblique motive, it was asserted, could not be described as the will of the people, or the will of the nation.

141. In comparison, while making a reference to the impugned constitutional amendment and the NJAC Act, it was equally seriously contended, that the constitutional amendment compromised the "independence of the judiciary", by negating the "primacy of the judiciary". With reference to the insinuations levelled by the Union of India and the concerned State Governments, during the course of hearing, reference was made to an article bearing the title "Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts", authored by Nick Robinson. Reference was made to the following expositions made therein:

"Given their virtual self-selection, judges on the Indian Supreme Court are viewed as less politicised than in the United States. The panel structure of the Court also prevents clear ideological blocks from being perceived (even if there are more "activist" or "conservative" judges) there is not the sense that all the judges have to assemble together for a decision to be legitimate or fair in the eyes of the public. Quite the opposite, judges are viewed as bringing different skills or backgrounds that should be selectively utilized."

142. It was submitted, that the method of appointment, evolved through the Second and Third Judges cases, had been hailed by several jurists, who had opined that the same could be treated as a precedent worthy of emulation by the United Kingdom. Reference in this behalf was also made to, the opinion of Lord Templeman, a Member of the House of Lords in the United Kingdom.

143. Having given our thoughtful consideration to the position assumed by the learned counsel representing the rival parties, it is essential to hold, that every constitutional amendment passed by the Parliament, either by following the ordinary procedure contemplated under Article 368(2), or the special procedure contemplated in the proviso to Article 368(2), could in a sense of understanding, by persons not conversant with the legal niceties of the issue, be treated as the will of the people, for the simple reason, that parliamentarians are considered as representatives of the people. In our view, as long as the stipulated majority supports a constitutional amendment, it would be treated as a constitutional amendment validly passed. Having satisfied the above benchmark, it may be understood as an expression of the will of the people, in the sense noticed above. The strength and enforceability of a constitutional amendment, would be just the same, irrespective of whether it was passed by the bare minimum majority postulated therefor, or by a substantial majority, or even if it was approved unanimously. What is important, is to keep in mind, that there are declared limitations,

on the amending power conferred on the Parliament, which cannot be breached.

144. An ordinary legislation enacted by the Parliament with reference to subjects contained in the Union List or the Concurrent List, and likewise, ordinary legislation enacted by State Legislatures on subjects contained in the State List and the Concurrent List, in a sense of understanding noticed above, could be treated as enactments made in consonance with the will of the people, by lay persons not conversant with the legal niceties of the issue. Herein also, there are declared limitations on the power of legislations, which cannot be violated.

145. In almost all challenges, raised on the ground of violation of the "basic structure" to constitutional amendments made under Article 368, and more particularly, those requiring the compliance of the special and more rigorous procedure expressed in the proviso under Article 368(2), the repeated assertion advanced at the hands of the Union, has been the same. It has been the contention of the Union of India, that an amendment to the Constitution, passed by following the procedure expressed in the proviso to Article 368(2), constituted the will of the people, and the same was not subject to judicial review. The same argument had been repeatedly rejected by this Court by holding, that Article 368 postulates only a "procedure" for amendment of the Constitution, and that, the same could not be treated as a "power" vested in the Parliament to amend the Constitution, so as to alter, the "core" of the Constitution, which has also been described as, the "basic

features/basic structure" of the Constitution. The above position has been projected, through the judgments cited on behalf of the petitioners, to which reference has been made hereinabove.

146. Therefore, even though the Parliament may have passed the Constitution (121st Amendment) Bill, with an overwhelming majority, inasmuch as, only 37 Members from the AIADMK had consciously abstained from voting in the Lok Sabha, and only one Member of the Rajya Sabha – Ram Jethmalani, had consciously abstained from voting in favour thereof, it cannot be accepted, that the same is exempted from judicial review. The scope of judicial review with reference to a constitutional amendment and/or an ordinary legislation, whether enacted by the Parliament or a State Legislature, cannot vary, so as to adopt different standards, by taking into consideration the strength of the Members of the concerned legislature, which had approved and passed the concerned Bill. If a constitutional amendment breaches the "core" of the Constitution or destroys its "basic or essential features" in a manner which was patently unconstitutional, it would have crossed over forbidden territory. This aspect, would undoubtedly fall within the realm of judicial review. In the above view of the matter, it is imperative to hold, that the impugned constitutional amendment, as also, the NJAC Act, would be subject to judicial review on the touchstone of the "basic structure" of the Constitution, and the parameters laid down by this Court in that behalf, even though the impugned constitutional amendment may have been approved and passed unanimously or by an

overwhelming majority, and notwithstanding the ratification thereof by as many as twenty-eight State Assemblies. Accordingly, we find no merit in the contention advanced by the learned counsel for the respondents, that the impugned constitutional amendment is not assailable, through a process of judicial review.

II.

147. It was the submission of the learned Attorney General, that the "basic features/basic structure" of the Constitution, should only be gathered from a plain reading of the provision(s) of the Constitution, as it/they was/were originally enacted. In this behalf, it was acknowledged by the learned counsel representing the petitioners, that the scope and extent of the "basic features/basic structure" of the Constitution, was to be ascertained only from the provisions of the Constitution, as originally enacted, and additionally, from the interpretation placed on the concerned provisions, by this Court. The above qualified assertion made on behalf of the petitioners, was unacceptable to the learned counsel representing the respondents.

148. The above disagreement, does not require any detailed analysis. The instant aspect, stands determined in the M. Nagaraj case[36], wherein it was held as under:

"...The question is – whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land."

149. The cause, effect and the width of a provision, which is the basis of a challenge, may sometimes not be apparent from a plain reading thereof. The interpretation placed by this Court on a particular provision, would most certainly depict a holistic understanding thereof, wherein the plain reading would have naturally been considered, but in addition thereto, the vital silences hidden therein, based on a harmonious construction of the provision, in conjunction with the surrounding provisions, would also have been taken into consideration. The mandate of Article 141, obliges every court within the territory of India, to honour the interpretation, conclusion, or meaning assigned to a provision by this Court. It would, therefore be rightful, to interpret the provisions of the Constitution relied upon, by giving the concerned provisions, the meaning, understanding and exposition, assigned to them, on their interpretation by this Court. In the above view of the matter, it would neither be legal nor just, to persist on an understanding of the concerned provision(s), merely on the plain reading thereof, as was suggested on behalf of the respondents. Even on a plain reading of Article 141, we are obligated, to read the provisions of the Constitution, in the manner they have been interpreted by this Court.

150. The manner in which the term "consultation" used in Articles 124, 217 and 222 has been interpreted by the Supreme Court, has been considered at great length in the "Reference Order", and therefore, there is no occasion for us, to re-record the same yet again. Suffice it to notice, that the term "consultation" contained in Articles 124, 217 and 222 will

have to be read as assigning primacy to the opinion expressed by the Chief Justice of India (based on a decision, arrived at by a collegium of Judges), as has been concluded in the "Reference Order". In the Second and Third Judges cases, the above provisions were interpreted by this Court, as they existed in their original format, i.e., in the manner in which the provisions were adopted by the Constituent Assembly, on 26.11.1949 (-which took effect on 26.01.1950). Thus viewed, we reiterate, that in the matter of appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to any other High Court, under Articles 124, 217 and 222, primacy conferred on the Chief Justice of India and his collegium of Judges, is liable to be accepted as an integral constituent of the above provisions (as originally enacted). Therefore, when a question with reference to the selection and appointment (as also, transfer) of Judges to the higher judiciary is raised, alleging that the "independence of the judiciary" as a "basic feature/structure" of the Constitution has been violated, it would have to be ascertained whether the primacy of the judiciary exercised through the Chief Justice of India (based on a collective wisdom of a collegium of Judges), had been breached. Then alone, would it be possible to conclude, whether or not, the "independence of the judiciary" as an essential "basic feature" of the Constitution, had been preserved (-and had not been breached).

III.

151. We have already concluded in the "Reference Order", that the term "consultation" used in Articles 124, 217 and 222 (as originally enacted) has to be read as vesting primacy in the judiciary, with reference to the decision making process, pertaining to the selection and appointment of Judges to the higher judiciary, and also, with reference to the transfer of Chief Justices and Judges of one High Court, to another. For arriving at the above conclusion, the following parameters were taken into consideration:

(i) Firstly, reference was made to four judgments, namely, the Samsher Singh case[11], rendered in 1974 by a seven-Judge Bench, wherein keeping in mind the cardinal principle – the "independence of the judiciary", it was concluded, that consultation with the highest dignitary in the judiciary – the Chief Justice of India, in practice meant, that the last word must belong to the Chief Justice of India, i.e., the primacy in the matter of appointment of Judges to the higher judiciary must rest with the judiciary. The above position was maintained in the Sankalchand Himatlal Sheth case[5] in 1977 by a five-Judge Bench, wherein it was held, that in all conceivable cases, advice tendered by the Chief Justice of India (in the course of his "consultation"), should principally be accepted by the Government of India, and that, if the Government departed from the counsel given by the Chief Justice of India, the Courts would have an opportunity to examine, if any other extraneous circumstances had entered into the verdict of the executive. In the instant judgment, so as to emphasize the seriousness of the

matter, this Court also expressed, that it expected, that the above words would not fall on deaf ears. The same position was adopted in the Second Judges case rendered in 1993 by a nine-Judge Bench, by a majority of 7:2, which also arrived at the conclusion, that the judgment rendered in the First Judges case, did not lay down the correct law. M.M. Punchhi, J., (as he then was) one of the Judges on the Bench, who supported the minority opinion, also endorsed the view, that the action of the executive to put off the recommendation(s) made by the Chief Justice of India, would amount to an act of deprival, "violating the spirit of the Constitution". In sum and substance therefore, the Second Judges case, almost unanimously concluded, that in the matter of selection and appointment of Judges to the higher judiciary, primacy in the decision making process, unquestionably rested with the judiciary. Finally, the Third Judges case, rendered in 1998 by another nine-Judge Bench, reiterated the position rendered in the Second Judges case.

(ii) Secondly, the final intent emerging from the Constituent Assembly debates, based *inter alia* on the concluding remarks expressed by Dr. B.R. Ambedkar, maintained that the judiciary must be independent of the executive. The aforesaid position came to be expressed while deliberating on the subject of "appointment" of Judges to the higher judiciary. Dr. B.R. Ambedkar while responding to the sentiments expressed by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar and Ananthasayanam Ayyangar, noted the view of the Constituent Assembly, that the Members were generally in

agreement, that "independence of the judiciary", from the executive "should be made as clear and definite as it could be made by law". The above assertion made while debating on the issue of appointment of Judges to the Supreme Court, effectively resulted in the acknowledgement, that the issue of "appointment" of the Judges to the higher judiciary, had a direct nexus with "independence of the judiciary". Dr. B.R. Ambedkar declined the proposal of adopting the manner of appointment of Judges, prevalent in the United Kingdom and in the United States of America, and thereby, rejected the subjugation of the process of selection and appointment of Judges to the higher judiciary, at the hands of the executive and the legislature respectively. While turning down the latter proposal, Dr. B.R. Ambedkar was suspicious and distrustful, that in such an eventuality, appointments to the higher judiciary, could be impacted by "political pressure" and "political considerations".

(iii) Thirdly, the actual practice and manner of appointment of Judges to the higher judiciary, emerging from the parliamentary debates, clearly depict, that absolutely all Judges (except in one case) appointed since 1950, had been appointed on the advice of the Chief Justice of India. It is therefore clear, that the political-executive has been conscious of the fact, that the issue of appointment of Judges to the higher judiciary, mandated the primacy of the judiciary, expressed through the Chief Justice of India. In this behalf, even the learned Attorney General had conceded, that the supersession of senior Judges of the Supreme Court,

at the time of the appointment of the Chief Justice of India in 1973, the mass transfer of Judges of the higher judiciary during the emergency in 1976, and the second supersession of a Supreme Court Judge, at the time of the appointment of the Chief Justice of India in 1977, were executive aberrations.

(iv) Fourthly, the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary drawn in 1950, soon after India became independent, as also, the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary redrawn in 1999, after the decision in the Second Judges case, manifest that, the executive had understood and accepted, that selection and appointment of Judges to the higher judiciary would emanate from, and would be made on the advice of the Chief Justice of India.

(v) Fifthly, having adverted to the procedure in place for the selection and appointment of Judges to the higher judiciary, the submission advanced on behalf of the respondents, that the Second and Third Judges cases had created a procedure, where Judges select and appoint Judges, or that, the system of *Imperium in Imperio* had been created for appointment of Judges, was considered and expressly rejected (in the "Reference Order"). Furthermore, the submission, that the executive had no role, in the prevailing process of selection and appointment of Judges to the higher judiciary was also rejected, by highlighting the role of the executive in the matter of appointment of Judges to the higher judiciary. Whilst recording the above conclusions, it was maintained (in the

"Reference Order"), that primacy in the matter of appointment of Judges to the higher judiciary, was with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges.

(vi) Sixthly, the contention advanced at the behest of the respondents, that even in the matter of appointment of Judges to the higher judiciary (and in the matter of their transfer) under Articles 124, 217 (and 222), must be deemed to be vested in the executive, because the President by virtue of the constitutional mandate contained in Article 74, had to act in accordance with the aid and advice tendered to him by the Council of Ministers, was rejected by holding, that primacy in the matter of appointment of Judges to the higher judiciary, continued to remain with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges. In recording the above conclusion, reliance was placed on Article 50. Reliance was also placed on Article 50, for recording a further conclusion, that if the power of appointment of Judges was left to the executive, the same would breach the principles of "independence of the judiciary" and "separation of powers".

152. In view of the above, it has to be concluded, that in the matter of appointment of Judges to the higher judiciary, as also, in the matter of their transfer, primacy in the decision making process, inevitably rests with the Chief Justice of India. And that, the same was expected to be expressed, on the basis of the collective wisdom, of a collegium of Judges. Having so concluded, we reject all the submissions advanced at the

hands of the learned counsel for the respondents, canvassing to the contrary.

IV.

153. The next question which arises for consideration is, whether the process of selection and appointment of Judges to the higher judiciary (i.e., Chief Justices, and Judges of the High Courts and the Supreme Court), and the transfer of Chief Justices and Judges of one High Court to another, contemplated through the impugned constitutional amendment, retains and preserves primacy in the decision making process, with the judiciary? It was the emphatic contention of the learned Attorney General, the learned Solicitor General, the learned Additional Solicitor General, and a sizeable number of learned senior counsel who represented the respondents, that even after the impugned constitutional amendment, primacy in the decision making process, under Articles 124, 217 and 222, has been retained with the judiciary. Insofar as the instant aspect of the matter is concerned, it was contended on behalf of the respondents, that three of the six Members of the NJAC were *ex officio* Members drawn from the judiciary - the Chief Justice of India, and two other senior Judges of the Supreme Court, next to the Chief Justice. In conjunction with the aforesaid factual position, it was pointed out, that there was only one nominee from the political-executive – the Union Minister in charge of Law and Justice. It was submitted, that the remaining two Members, out of the six-Member NJAC, were "eminent persons", who were expected to be politically neutral. Therefore,

according to learned counsel representing the respondents, primacy in the matter of selection and appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to another, even under the impugned constitutional amendment, continued to remain, in the hands of the judiciary.

154. In conjunction with the aforesaid submission, it was emphatically pointed out, that the provisions of the NJAC Act postulate, that the NJAC would not recommend a person for appointment as a Judge to the higher judiciary, if any two Members of the NJAC, did not agree with such recommendation. Based on the fact, that the Chief Justice of India and the two other senior Judges of the Supreme Court, were *ex officio* Members of the NJAC, it was asserted, that the veto power for rejecting an unsuitable recommendation by the judicial component of the NJAC, would result in retaining primacy in the hands of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to another. This according to learned counsel for the respondents, was because the judicial component would be sufficient, in preventing the other Members of the NJAC, from having their way.

155. Having given our thoughtful consideration to the above contention, there can be no doubt, that in the manner expressed by the learned counsel, the suggested inference may well be justified on paper. The important question to be considered is, whether as a matter of practicality, the impugned constitutional amendment can be considered

to have sustained, primacy in the matter of decision making, under the amended provisions of Articles 124, 217 and 222, in conjunction with the inserted provisions of Articles 124A to 124C, with the judiciary?

156. The exposition made by the learned Attorney General and some of the other learned counsel representing the respondents, emerges from an over simplified and narrow approach. The primacy vested in the Chief Justice of India based on the collective wisdom of a collegium of Judges, needs a holistic approach. It is not possible for us to accept, that the primacy of the judiciary would be considered to have been sustained, merely by ensuring that the judicial component in the membership of the NJAC, was sufficiently capable, to reject the candidature of an unworthy nominee. We are satisfied, that in the matter of primacy, the judicial component of the NJAC, should be competent by itself, to ensure the appointment of a worthy nominee, as well. Under the substituted scheme, even if the Chief Justice of India and the two other senior most Judges of the Supreme Court (next to the Chief Justice of India), consider a nominee to be worthy for appointment to the higher judiciary, the concerned individual may still not be appointed, if any two Members of the NJAC opine otherwise. This would be out-rightly obnoxious, to the primacy of the judicial component. The magnitude of the instant issue, is apparent from the fact that the two "eminent persons" (-lay persons, according to the learned Attorney General), could defeat the unanimous recommendation made by the Chief Justice of India and the two senior most Judges of the Supreme Court, favouring the appointment of an

individual under consideration. Without any doubt, demeaning primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. The reason to describe it as being obnoxious is this – according to the learned Attorney General, "eminent persons" had to be lay persons having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification, such lay persons would have the collective authority, to override the collective wisdom of the Chief Justice of India and two Judges of the Supreme Court of India. The instant issue, is demonstrably far more retrograde, when the Union Minister in charge of Law and Justice also supports the unanimous view of the judicial component, because still the dissenting voice of the "eminent persons" would prevail. It is apparent, that primacy of the judiciary has been rendered a further devastating blow, by making it extremely fragile.

157. When the issue is of such significance, as the constitutional position of Judges of the higher judiciary, it would be fatal to depend upon the moral strength of individuals. The judiciary has to be manned by people of unimpeachable integrity, who can discharge their responsibility without fear or favour. There is no question of accepting an alternative procedure, which does not ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary (as also, in the matter of transfer of Chief Justices and Judges of High Courts, to other High Courts). In the above stated position, it is not possible to conclude, that the combination contemplated for constitution

of the NJAC, is such, that would not be susceptible to an easy breach of the "independence of the judiciary".

158. Articles 124A(1)(a) and (b) do not provide for an adequate representation in the matter, to the judicial component, to ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary, and therefore, the same are liable to be set aside and struck down as being violative of the "basic structure" of the Constitution of India. Thus viewed, we are satisfied, that the "basic structure" of the Constitution would be clearly violated, if the process of selection of Judges to the higher judiciary was to be conducted, in the manner contemplated through the NJAC. The impugned constitutional amendment, being *ultra vires* the "basic structure" of the Constitution, is liable to be set aside.

V.

159. It is surprising, that the Chief Justice of India, on account of the position he holds as *pater familias* of the judicial fraternity, and on account of the serious issues, that come up for judicial adjudication before him, which have immeasurable political and financial consequences, besides issues of far reaching public interest, was suspected by none other than Dr. B.R. Ambedkar, during the course of the Constituent Assembly debates, when he declined to accept the suggestions made by some Members of the Constituent Assembly, that the selection and appointment of Judges to the higher judiciary should be made with the "concurrence" of the Chief Justice of India, by

observing, that even though the Chief Justice of India was a very eminent person, he was after all just a man with all the failings, all the sentiments, and all the prejudices, which common people have. And therefore, the Constituent Assembly did not leave it to the individual wisdom of the Chief Justice of India, but required consultation with a plurality of Judges, by including in the consultative process (at the discretion of the President of India), not only Judges of the Supreme Court of India, but also Judges of High Courts (in addition to the mandatory consultation with the Chief Justice of India). One would also ordinarily feel, that the President of India and/or the Prime Minister of India in the discharge of their onerous responsibilities in running the affairs of the country, practically all the time take decisions having far reaching consequences, not only in the matter of internal affairs of the country on the domestic front, but also in the matter of international relations with other countries. One would expect, that vesting the authority of appointment of Judges to the higher judiciary with any one of them should not ordinarily be suspect of any impropriety. Yet, the Constituent Assembly did not allow any of them, any defined participatory role. In fact the debate in the Constituent Assembly, removed the participation of the political-executive component, because of fear of being impacted by "political-pressure" and "political considerations". Was the view of the Constituent Assembly, and the above noted distrust, legitimate?

160. A little personal research, resulted in the revelation of the concept of the "legitimate power of reciprocity", debated by Bertram Raven in his article – "The Bases of Power and the Power/Interaction Model of Interpersonal Influence" (this article appeared in Analyses of Social Issues and Public Policy, Vol. 8, No.1, 2008, pp. 1-22). In addition to having dealt with various psychological reasons which influenced the personality of an individual, reference was also made to the "legitimate power of reciprocity". It was pointed out, that the reciprocity norm envisaged, that if someone does something beneficial for another, the recipient would feel an obligation to reciprocate ("I helped you when you needed it, so you should feel obliged to do this for me." – Goranson and Berkowitz, 1966; Gouldner, 1960). In the view expressed by the author, the inherent need of power, is universally available in the subconscious of the individual. On the satisfaction and achievement of the desired power, there is a similar unconscious desire to reciprocate the favour.

161. The psychological concept of the "legitimate power of reciprocity", was also highlighted by Dennis T. Regan of the Cornell University in his article – "Effects of a Favour and Liking on Compliance". It was pointed out, that there was sufficient evidence to establish, that favours do generate feelings of obligation, and the desire to reciprocate. According to the author, the available data suggested, that a favour would lead to reported feelings of obligation, on the part of its recipient.

162. In his book "Influence: The Psychology of Persuasion" – Robert Cialdini, Regent's Professor Emeritus of Psychology and Marketing at

Arizona State University, in Chapter II titled – “Reciprocation”, expressed the view, that “possibly one of the most potent compliance techniques, was the rule of reciprocation, which prompts one to repay, what someone has given to him. When a gift is extended, the recipient feels indebted to the giver, often feels uncomfortable with this indebtedness, and feels compelled to cancel the debt…often against his/her better judgment”. It was pointed out, that the rule of reciprocation, was widespread across the human cultures, suggesting that it was fundamental to creating interdependencies on which societies, cultures, and civilizations were built. It was asserted, that in fact the rule of reciprocation assured, that someone who had given something away first, has a relative assurance, that this initial gift will eventually be repaid. In the above view of the matter, nothing would be lost. Referring to Marcel Nauss, who had conducted a study on gift giving, it was emphasised, that “there is an obligation to give, an obligation to receive, and an obligation to repay”. According to the author, it was in the above network of indebtedness, that the first giver could exploit the favour, and would rightfully assume the role of a compliance practitioner. And accordingly it was concluded, that although the obligation to repay constituted the essence of the reciprocity rule, it was the obligation to receive, that made the rule so easy to exploit. Describing the power of reciprocity, Cialdini in his article expressed, that the person who gives first remains, in control; and the person who was the recipient, always remained in debt. It is pointed out, that the above situation was often deliberately created, and

psychologically maintained. It was also the view of the author, that the more valuable, substantial and helpful the original favour, the more indebted the recipient would continue to feel. In the above article, a reference was made to Alvin Gouldner, in whose opinion, there was no human society on earth, that does not follow the rule of reciprocity. Referring also to the views of the renowned cultural anthropologists – Lionel Tiger and Robin Fox, it was affirmed, that humans lived in a "web of indebtedness". Therefore it was felt, that reciprocity was a debt and a powerful psychological tool, which was all, but impossible to resist.

163. Under the constitutional scheme in place in the United States of America, federal Judges are nominated by the President, and confirmed by the Senate. The issue being debated, namely, the concept of "the legitimate power of reciprocity", therefore directly arises in the United States, in the matter of appointment of federal Judges. The first favour to the federal Judge is extended by the President, who nominates his name, and further favours are extended by one or more Member(s) of the Senate, with whose support the Judge believes he won the vote of confirmation. An article titled as "Loyalty, Gratitude, and the Federal Judiciary", written by Laura E. Little (Associate Professor of Law, Temple University School of Law, as far back as in 1995), deals with the issue in hand, pointedly with reference to appointment of Judges. The article reveals, that the issue of reciprocity has been a subject of conscious debate, with reference to the appointment of Judges for a substantial

length of time. The conclusions drawn in the above article are relevant to the present controversy, and are being extracted hereunder:

"On the issue of impartiality, an individual undertaking a federal judgeship confronts a difficult task. Contemporary lawyers commonly agree that the law is not wholly the product of neutral principles and that a judge must choose among values as she shapes the law. Yet, the standards governing impartiality in federal courts largely assume that total judicial neutrality and dispassion are possible. The process of mapping out a personal framework for decisionmaking is therefore apt to create considerable discordance for the judge. Added to this burden are the special pulls of gratitude and loyalty toward the individuals who made possible the judge's job.

I have sought to show both that gratitude and loyalty can have a powerful influence for a federal judge undertaking to decide a case. The problem is complex because loyalty and gratitude pose a greater potential problem for some judges than for others. This complexity emerges to a great degree from the process of nomination and confirmation, which often generates, or at least reinforces, a judge's sense of loyalty and gratitude to her benefactors.

In the last few years, we have witnessed a wave of dissatisfaction with the selection process for federal judges. Legal scholarship in particular has offered frequent critique and constructive suggestions for change. As it must, this scholarship recognizes that any change ventured must weigh the impact of nomination and confirmation on a number of segments of American life, including the constitutional balance of powers and public perception of the judiciary.

To omit from these concerns the effect of any change on the ultimate quality of judicial decisionmaking would, of course, be a mistake. Thus, in studying any new selection procedure, we must contemplate the procedure's potential for creating and invigorating a judge's feelings of loyalty and gratitude to her benefactors. The foregoing should, therefore, not only shed light on the process of federal court decisionmaking in general, but also give much needed guidance for evaluating proposed changes to judicial selection."

164. It is however pertinent to mention, that in her article, Laura E. Little has expressed, what most moral philosophers believed, that gratitude has significant moral components. And further, that gratitude has a ready place in utilitarian moral systems, which were designed to ensure the greatest good for the greatest number of individuals. The concept of

gratitude was however intertwined with loyalty by Laura E. Little, as in her view, gratitude and loyalty, were closely related. A beneficiary could show gratitude to a benefactor, through an expression of loyalty. The point sought to be made was, that in understanding loyalty one understands, who we are in our friendships, loves, family bonds, national ties, and religious devotion. Insofar as the patterns of behaviour in the Indian cultural system is concerned, a child is always obligated to his parents for his upbringing, and it is the child's inbuilt moral obligation, to reciprocate to his parents by extending unimpeachable loyalty and gratitude. The above position finds replication in relationships of teacher and taught, master and servant, and the like. In the existing Indian cultural scenario, an act of not reciprocating towards a benefactor, would more often than not, be treated as an act of grave moral deprivation. When the favour extended is as important as the position of judgeship in the higher judiciary, one would best leave it to individual imagination, to determine the enormity of the reciprocal gratitude and loyalty.

165. The consideration recorded hereinabove, endorses the view, that the political-executive, as far as possible, should not have a role in the ultimate/final selection and appointment of Judges to the higher judiciary. Specially keeping in mind the enormity of the participation of the political-executive, in actions of judicial adjudication. Reciprocity, and feelings of pay back to the political-executive, would be disastrous to "independence of the judiciary". In this, we are only reiterating the position adopted by Dr. B.R. Ambedkar. He feared, that with the

participation of the political-executive, the selection of Judges, would be impacted by "political pressure" and "political considerations". His view, finds support from established behavioural patterns expressed by Psychologists. It is in this background, that it needs to be ensured, that the political-executive dispensation has the least nexus, with the process of finalization of appointments of Judges to the higher judiciary.

VI.

166. The jurisdictions that have to be dealt with, by Judges of the higher judiciary, are large and extensive. Within the above jurisdictions, there are a number of jurisdictions, in which the executive is essentially a fundamental party to the *lis*. This would *inter alia* include cases arising out of taxing statutes which have serious financial implications. The executive is singularly engaged in the exploitation of natural resources, often through private entrepreneurs. The sale of natural resources, which also, have massive financial ramifications, is often subject to judicial adjudication, wherein also, the executive is an indispensable party. Challenges arising out of orders passed by Tribunals of the nature of the Telecom Disputes Settlement & Appellate Tribunal and the Appellate Tribunal for Electricity, and the like, are also dealt with by the higher judiciary, where also the executive has a role. Herein also, there could be massive financial implications. The executive is also a necessary party in all matters relating to environmental issues, including appeals from the National Green Tribunals. Not only in all criminal matters, but also in high profile scams, which are no longer a rarity, the executive has an

indispensable role. In these matters, sometimes accusations are levelled against former and incumbent Prime Ministers and Ministers of the Union Cabinet, and sometimes against former and incumbent Chief Ministers and Ministers of the State Cabinets. Even in the realm of employment issues, adjudication rendered by the Central Administrative Tribunal, and the Armed Forces Appellate Tribunal come up before the Judges of the higher judiciary. These adjudications also sometimes include, high ranking administrators and armed forces personnel. Herein too, the executive is an essential constituent. This is only a miniscule part of the extensive involvement of the political-executive, in litigation before the higher judiciary.

167. Since the executive has a major stake, in a majority of cases, which arise for consideration before the higher judiciary, the participation of the Union Minister in charge of Law and Justice, as an *ex officio* Member of the NJAC, would be clearly questionable. In today's world, people are conscious and alive to the fact, that their rights should be adjudicated in consonance of the rules of natural justice. One of the rules of natural justice is, that the adjudicator should not be biased. This would mean, that he should neither entertain a prejudice against either party to a *lis*, nor should he be favourably inclined towards any of them. Another component of the rule of bias is, that the adjudicator should not have a conflict of interest, with the controversy he is to settle. When the present set of cases came up for consideration, a plea of conflict of interest was raised even against one of the presiding Judges on the Bench, which

resulted in the recusal of Anil R. Dave, J. on 15.4.2015. A similar prayer was again made against one of us (J.S. Khehar, J.), on 21.4.2015, on the ground of conflict of interest. What needs to be highlighted is, that bias, prejudice, favour and conflict of interest are issues which repeatedly emerge. Judges are careful to avoid adjudication in such matters. Judges are not on one or the other side of the adjudicatory process. The political-executive in contrast, in an overwhelming majority of cases, has a participatory role. In that sense, there would/could be an impact/effect, of a decision rendered one way or the other. A success or a defeat – a win or a loss. The plea of conflict of interest would be available against the executive, if it has a participatory role in the final selection and appointment of Judges, who are then to sit in judgment over matters, wherever the executive is an essential and mandatory party. The instant issue arose for consideration in the Madras Bar Association case[35]. In the above case a five-Judge Bench considered the legality of the participation of Secretaries of Departments of the Central Government in the selection and appointment of the Chairperson and Members of the National Tax Tribunal. On the above matter, this Court held, as under:

"131.Section 7 cannot even otherwise be considered to be constitutionally valid, since it includes in the process of selection and appointment of the Chairperson and Members of NTT, Secretaries of Departments of the Central Government. In this behalf, it would also be pertinent to mention that the interests of the Central Government would be represented on one side in every litigation before NTT. It is not possible to accept a party to a litigation can participate in the selection process whereby the Chairperson and Members of the adjudicatory body are selected…."

The position herein is no different. The Attorney General however attempted to distinguish the matter in hand, from the controversy decided in the cited case by asserting, that in cases adjudicated upon by the National Tax Tribunal the "…Central Government would be represented on one side in every litigation …" which is not the case before the higher judiciary. The rebuttal, clearly avoids the issue canvassed. One would assume from the response, that the position was conceded to the extent of matters, where the executive was a party to the *lis*. But that itself would exclude the selected Judges from hearing a large majority of cases. One would therefore reject the response of the Union of India.

168. We are of the view, that consequent upon the participation of the Union Minister in charge of Law and Justice, a Judge approved for appointment with the Minister's support, may not be able to resist or repulse a plea of conflict of interest, raised by a litigant, in a matter when the executive has an adversarial role. In the NJAC, the Union Minister in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest (if such a plea was to be raised, and pressed), where the political-executive is a party to the *lis*. The above, would have the inevitable effect of undermining the "independence of the judiciary", even where such a plea is repulsed. Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Therefore, merely the participation of the Union

Minister in charge of Law and Justice, in the final process of selection, as an *ex officio* Member of the NJAC, would render the amended provision of Article 124A(1)(c) as *ultra vires* the Constitution, as it impinges on the principles of "independence of the judiciary" and "separation of powers".

VII.

169. The learned Attorney General had invited our attention to the manner in which judicial appointments were being made in fifteen countries. It was submitted, that in nine countries Judges were appointed either through a Judicial Appointments Commission, or through a Judicial Appointments Committee, or through a Judicial Appointments Council. It was highlighted, that in four countries, Judges were appointed directly by the executive, i.e., by the Governor General or the President. We were informed, that in one European country, Judges were nominated by the Minister of Justice and confirmed by the Parliamentary Committee. In the United States of America, Judges were appointed through a process of nomination by the President and confirmation by the Senate. It was highlighted, that in all the fifteen countries, the executive was the final determinative/appointing authority. And further that, in all the countries, the executive had a role to play in the selection and appointment of Judges. The foresaid factual position was brought to our notice for the singular purpose of demonstrating, that executive participation in the process of selection and appointment of Judges had not made the judiciary in any of the fifteen countries, subservient to the political-executive. It was asserted,

that the countries referred to by him were in different continents of the world, and there was no complaint with reference to the "independence of the judiciary". The point sought to be driven home was, that the mere participation of the executive in the selection and appointment of Judges to the higher judiciary, did not impinge upon the "independence of the judiciary".

170. The aforestated submission does not require an elaborate debate. Insofar as the instant aspect of the matter is concerned, as the same was examined in the Second Judges case, wherein S. Ratnavel Pandian, J., one of the Judges who passed a separate concurring order, supporting the majority view. He had rejected the submission of the nature advanced by the learned Attorney General, with the following observations:

"194. Nevertheless, we have, firstly to find out the ails from which our judicial system suffers; secondly to diagnose the root cause of those ailments under legalistic biopsies, thirdly to ascertain the nature of affliction on the system and finally to evolve a new method and strategy to treat and cure those ailments by administering and injecting a 'new invented medicine' (meaning thereby a newly-developed method and strategy) manufactured in terms of the formula under Indian pharmacopoeia (meaning thereby according to national problems in a mixed culture etc.) but not according to American or British pharmacopoeia which are alien to our Indian system though the system adopted in other countries may throw some light for the development of our system. The outcry of some of the critics is when the power of appointment of Judges in all democratic countries, far and wide, rests only with the executive, there is no substance in insisting that the primacy should be given to the opinion of the CJI in selection and appointment of candidates for judgeship. This proposition that we must copy and adopt the foreign method is a dry legal logic, which has to be rejected even on the short ground that the Constitution of India itself requires mandatory consultation with the CJI by the President before making the appointments to the superior judiciary. It has not been brought to our notice by any of the counsel for the respondents that in other countries the executive alone makes the appointments

notwithstanding the existence of any existing similar constitutional provisions in their Constitutions."

171. Despite our having dealt with the submission canvassed at the hands of the learned Attorney General based on the system of appointment of Judges to the higher judiciary in fifteen countries, we consider it expedient to delve further on the subject. During the hearing of the present controversy, a paper written in November 2008, by Nuno Garoupa and Tom Ginsburg of the Law School, University of Chicago, came to hand. The paper bore the caption – "Guarding the Guardians: Judicial Councils and Judicial Independence". The paper refers to comparative evidence, of the ongoing debate, about the selection and discipline of Judges. The article proclaims to aim at two objectives. Firstly, the theory of formation of Judicial Councils, and the dimensions on which they differ. And secondly, the extent to which different designs of Judicial Council, affect judicial quality. These two issues were considered as of extreme importance, as the same were determinative of the fact, whether Judges would be able to have an effective role in implementing social policy, as broadly conceived. It was observed, that Judicial Councils had come into existence to insulate the appointment, promotion and discipline of Judges from partisan political influence, and at the same time, to cater to some level of judicial accountability. It was the authors' view, that the Judicial Councils lie somewhere in between the polar extremes of letting Judges manage their own affairs, and the

alternative of complete political-executive control of appointments, promotions and discipline.

172. According to the paper, France established the first High Council of the Judiciary in 1946. Italy's Judicial Council was created in 1958. Italy was the first to fully insulate the entire judiciary from political control. It was asserted, that the Italian model was, thereupon, followed in other countries. The model established in Spain and Portugal comprised of a significant proportion of Members who were Judges. These models were established, after the fall of dictatorship in these countries. Councils created by these countries, are stated to be vested with, final decision making authority, in matters pertaining to judicial promotion, tenure and removal. According to the paper, the French model came into existence as a consequence of concerns about excessive politicization. Naturally, the process evolved into extensive independence of judicial power. Yet, judicial concern multiplied manifolds in the judiciary's attempt to give effect to the European Convention of Human Rights. And the judiciary's involvement in the process of judicial review, in the backdrop of surmounting political scandals. The paper describes the pattern in Italy to be similar. In Italy also, prominent scandals led to investigation of businessmen, politicians and bureaucrats (during the period from 1992 to 1997), which resulted in extensive judicial participation, in political activity. The composition of the Council in Italy, was accordingly altered in 2002, to increase the influence of the Parliament.

173. The paper noted, that the French-Italian models had been adopted in Latin America, and other developing countries. It was pointed out, that the World Bank and other similar multilateral donor agencies, insist upon Judicial Councils, to be associated with judicial reform, for enforcement of the rule of law. The Elements of European Statute on the Judiciary, was considered as a refinement of the Judicial Council model. The perceived Supreme Council of Magistracy, requires that at least half of the Members are Judges, even though, some of the Members of the Supreme Council are drawn from the Parliament. It was the belief of the authors of the paper, that the motivating concern for adoption of the Supreme Councils, in the French-Italian tradition, was aimed at ensuring "independence of the judiciary" after periods of undemocratic rule. Perhaps because of concerns over structural problems, it was pointed out, that external accountability had emerged as a second goal for these Supreme Councils. Referring to the Germany, Austria and Netherlands models, it was asserted, that their Councils were limited to playing a role in selection (rather than promotion and discipline) of Judges. Referring to Dutch model, it was pointed out, that recent reforms were introduced to ensure more transparency and accountability.

174. It was also brought out, that Judicial Councils in civil law jurisdictions, had a nexus to the Supreme Court of the country. Referring to Costa Rica and Austria, it was brought out, that the Judicial Councils in these countries were a subordinate organ of the Supreme Court. In some countries like Brazil, Judicial Councils were independent

bodies with constitutional status, while in others Judicial Councils governed the entire judiciary. And in some others, like Guatemala and Argentina, they only governed lower courts.

175. Referring to recruitment to the judiciary in common law countries, it was pointed out, that in the United Kingdom, the Constitutional Reform Act, 2005 created a Judicial Appointments Commission, which was responsible for appointments solely based on merit, had no executive participation. It was pointed out, that New Zealand and Australia were debating whether to follow the same. The above legislation, it was argued, postulated a statutory duty on Government Members, not to influence judicial decisions. And also, excluded the participation of the Lord Chancellor in all such activities, by transferring his functions to the President of the Courts of England and Wales, (formerly designated as Lord Chief Justice of England and Wales).

176. Referring to the American experience, it was noted, that concern over traditional methods of judicial selection (either by politicians or by election) had given way to "Merit Commissions" so as to base selection of Judges on merit. Merit Commissions, it was felt, were analogous to Judicial Councils. The system contemplated therein, was non-partisan. The Judicial Selection Commission comprised of judges, lawyers and political appointees.

177. Referring to the works of renowned jurists on the subject, it was sought to be concluded, that in today's world, there was a strong consensus, that of all the procedures, the merit plan insulated the

judiciary from political pressure. In their remarks, emerging from the survey carried out by them, it was concluded, that it was impossible to eliminate political pressure on the judiciary. Judicial Commissions/ Councils created in different countries were, in their view, measures to enhance judicial independence, and to minimize political influence. It was their view that once given independence, Judges were more useful for resolving a wider range of more important disputes, which were considered essential, given the fact that more and more tasks were now being assigned to the judiciary.

178. In analyzing the conclusions drawn in the article, one is constrained to conclude, that in the process of evolution of societies across the globe, the trend is to free the judiciary from executive and political control, and to incorporate a system of selection and appointment of Judges, based purely on merit. For it is only then, that the process of judicial review will effectively support nation building. In the subject matter, which falls for our consideration, it would be imperative for us, to keep in mind, the progression of the concepts of "independence of the judiciary" and "judicial review" were now being recognized the world over. The diminishing role of executive and political participation, on the matter of appointments to the higher judiciary, is an obvious reality. In recognition of the above trend, there cannot be any greater and further participation of the executive, than that which existed hitherto before. And in the Indian scenario, as is presently conceived, through the judgments rendered in the Second and Third Judges cases.

It is therefore imperative to conclude, that the participation of the Union Minister in charge of Law and Justice in the final determinative process vested in the NJAC, as also, the participation of the Prime Minister and the Leader of the Opposition in the Lok Sabha (and in case of there being none – the Leader of the single largest Opposition Party in the House of the People), in the selection of "eminent persons", would be a retrograde step, and cannot be accepted.

VIII.

179. The only component of the NJAC, which remains to be dealt with, is with reference to the two "eminent persons" required to be nominated to the NJAC. It is not necessary to detail the rival submissions on the instant aspect, as they have already been noticed extensively, hereinbefore.

180. We may proceed by accepting the undisputed position, that neither the impugned constitutional amendment, nor the NJAC Act postulate any positive qualification to be possessed by the two "eminent persons" to be nominated to the NJAC. These constitutional and legislative enactments do not even stipulate any negative disqualifications. It is therefore apparent, that the choice of the two "eminent persons" would depend on the free will of the nominating authorities. The question that arises for consideration is, whether it is just and appropriate to leave the issue, to the free will and choice, of the nominating authorities?

181. The response of the learned Attorney General was emphatic. Who could know better than the Prime Minister, the Chief Justice of India, or

the Leader of Opposition in the Lok Sabha (and when there is no such Leader of Opposition, then the Leader of the single largest Opposition Party in the Lok Sabha)? And he answered the same by himself, that if such high ranking constitutional authorities can be considered as being unaware, then no one in this country could be trusted, to be competent, to take a decision on the matter – neither the legislature, nor the executive, and not even the judiciary. The Attorney General then quipped – surely this Court would not set aside the impugned constitutional amendment, or the NJAC Act, on such a trivial issue. He also suggested, that we should await the outcome of the nominating authorities, and if this Court felt that a particular individual nominated to discharge the responsibility entrusted to him as an "eminent person" on the NJAC, was inappropriate or unacceptable or had no nexus with the responsibility required to be shouldered, then his appointment could be set aside.

182. Having given our thoughtful consideration to the matter, we are of the view, that the issue in hand is certainly not as trivial, as is sought to be made out. The two "eminent persons" comprise of 1/3rd strength of the NJAC, and double that of the political-executive component. We could understand the import of the submission, only after hearing learned counsel. The view emphatically expressed by the Attorney General was that the "eminent persons" had to be "lay persons" having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification. Mr. T.R. Andhyarujina, learned senior counsel who represented the State

of Maharashtra, which had ratified the impugned constitutional amendment, had appeared to support the impugned constitutional amendment, as well as, the NJAC Act, expressed a diametrically opposite view. In his view, the "eminent persons" with reference to the NJAC, could only be picked out of, eminent lawyers, eminent jurists, and even retired Judges, or the like, having an insight to the working and functioning of the judicial system. It is therefore clear, that in the view of the learned senior counsel, the nominated "eminent persons" would have to be individuals, with a legal background, and certainly not lay persons, as was suggested by the learned Attorney General. We have recorded the submissions advanced by Mr. Dushyant A. Dave, learned senior counsel – the President of the Supreme Court Bar Association, who had addressed the Bench in his usual animated manner, with no holds barred. We solicited his view, whether it would be proper to consider the inclusion of the President of the Supreme Court Bar Association and/or the Chairman of the Bar Council of India, as *ex officio* Members of the NJAC in place of the two "eminent persons". His response was spontaneous "Please don't do that !!" and then after a short pause, "… that would be disastrous !!". Having examined the issue with the assistance of the most learned and eminent counsel, it is imperative to conclude, that the issue of description of the qualifications (– perhaps , also the disqualifications) of "eminent persons" is of utmost importance, and cannot be left to the free will and choice of the nominating authorities, irrespective of the high constitutional positions held by them.

Specially so, because the two "eminent persons" comprise of 1/3rd strength of the NJAC, and double that of the political-executive component, and as such, will have a supremely important role in the decision making process of the NJAC. We are therefore persuaded to accept, that Article 124A(1)(d) is liable to be set aside and struck down, for having not laid down the qualifications of eligibility for being nominated as "eminent persons", and for having left the same vague and undefined.

183. It is even otherwise difficult to appreciate the logic of including two "eminent persons", in the six-Member NJAC. If one was to go by the view expressed by the learned Attorney General, "eminent persons" had been included in the NJAC, to infuse inputs which were hitherto not available with the prevailing selection process, for appointment of Judges to the higher judiciary. Really a submission with all loose ends, and no clear meaning. He had canvassed, that they would be "lay persons" having no connection with the judiciary, or even with the profession of advocacy, perhaps individuals who did not even have any law related academic qualification. It is difficult to appreciate what inputs the "eminent persons", satisfying the qualification depicted by the learned Attorney General, would render in the matter of selection and appointment of Judges to the higher judiciary. The absurdity of including two "eminent persons" on the NJAC, can perhaps be appreciated if one were to visualize the participation of such "lay persons", in the selection of the Comptroller and Auditor-General, the Chairman and Members of the

Finance Commission, the Chairman and Members of the Union Public Service Commission, the Chief Election Commissioner and the Election Commissioners and the like. The position would be disastrous. In our considered view, it is imprudent to ape a system prevalent in an advanced country, with an evolved civil society.

184. The sensitivity of selecting Judges is so enormous, and the consequences of making inappropriate appointments so dangerous, that if those involved in the process of selection and appointment of Judges to the higher judiciary, make wrongful selections, it may well lead the nation into a chaos of sorts. The role of "eminent persons" cannot be appreciated in the manner expressed through the impugned constitutional amendment and legislative enactment. At best, to start with, one or more "eminent persons" (perhaps even a committee of "eminent persons"), can be assigned an advisory/consultative role, by allowing them to express their opinion about the nominees under consideration. Perhaps, under the judicial component of the selection process. And possibly, comprising of eminent lawyers, eminent jurists, and even retired Judges, or the like having an insight to the working and functioning of the judicial system. And by ensuring, that the participants have no conflict of interest. Obviously, the final selecting body would not be bound by the opinion experienced, but would be obliged to keep the opinion tendered in mind, while finalizing the names of the nominated candidates.

185. It is also difficult to appreciate the wisdom of the Parliament, to introduce two lay persons, in the process of selection and appointment of Judges to the higher judiciary, and to simultaneously vest with them a power of veto. The second proviso under Section 5(2), and Section 6(6) of the NJAC Act, clearly mandate, that a person nominated to be considered for appointment as a Judge of the Supreme Court, and persons being considered for appointment as Chief Justices and Judges of High Courts, cannot be appointed, if any two Members of the NJAC do not agree to the proposal. In the scheme of the selection process of Judges to the higher judiciary, contemplated under the impugned constitutional amendment read with the NJAC Act, the two "eminent persons" are sufficiently empowered to reject all recommendations, just by themselves. Not just that, the two "eminent persons" would also have the absolute authority to reject all names unanimously approved by the remaining four Members of the NJAC. That would obviously include the power to reject, the unanimous recommendation of the entire judicial component of the NJAC. In our considered view, the vesting of such authority in the "eminent persons", is clearly unsustainable, in the scheme of "independence of the judiciary". Vesting of such authority on persons who have no nexus to the system of administration of justice is clearly arbitrary, and we hold it to be so. The inclusion of "eminent persons", as already concluded above (refer to paragraph 156), would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). For the reasons

recorded hereinabove, it is apparent, that Article 124A(1)(d) is liable to be set aside and struck down as being violative of the "basic structure" of the Constitution.

IX.

186. During the course of hearing, the learned Attorney General, made some references to past appointments to the Supreme Court, so as to trumpet the accusation, that the "collegium system" had not functioned efficiently, inasmuch as, persons of the nature referred to by him, came to be selected and appointed as Judges of the Supreme Court. In a manner as would be in tune with the dignity of this Court, he had not referred to any of the Judge(s) by name. His reference was by deeds. Each and every individual present in the Court-hall, was aware of the identity of the concerned Judge, in the manner the submissions were advanced. The projection by the learned Attorney General was joyfully projected by the print and electronic media, extensively highlighting the allusions canvassed by the learned Attorney General.

187. If our memory serves us right, the learned Attorney General had made a reference to the improper appointment of three Judges to the Supreme Court. One would have felt, without going into the merits of the charge, that finding fault with just three Judges, despite the appointment of over a hundred Judges to the Supreme Court, since the implementation of the judgment rendered in the Second Judges case (pronounced on 6.10.1993) – M.K. Mukherjee, J., being the first Judge appointed under the "collegium system" on 14.12.1993, and B.N. Kirpal,

CJ., the first Chief Justice thereunder, having been appointed as Judge of the Supreme Court on 11.9.1995, under the "collegium system", should be considered as no mean achievement.

188. The first on the list of the learned Attorney General was a Judge who, according to him, had hardly delivered any judgments, both during the period he remained a Judge and Chief Justice of different High Courts in the country, as also, the period during which he remained a Judge of this Court. The failure of the "collegium system", was attributed to the fact, that such a person would have been weeded out, if a meaningful procedure had been in place. And despite his above disposition, the concerned Judge was further elevated to the Supreme Court. The second instance cited by him was, in respect of a Judge, who did not abide by any time schedule. It was asserted, that the Judge, was inevitably late in commencing court proceedings. It was his contention, that past experience with reference to the said Judge, indicated a similar demeanour, as a Judge of different High Courts and as Chief Justice of one High Court. It was lamented, that the above behaviour was not sufficient, in the process adopted under the "collegium system", to reject the Judge from elevation to the Supreme Court. The third Judge was described as an individual, who was habitually tweeting his views, on the internet. He described him as an individual unworthy of the exalted position of a Judge of the Supreme Court, and yet, the "collegium system" had supported his appointment to the Supreme Court.

189. Just as it was impossible to overlook a submission advanced by the Attorney General, so also, it would be improper to leave out submissions advanced on a similar note, by none other than the President of the Supreme Court Bar Association. Insofar as Mr. Dushyant A. Dave, Senior Advocate, is concerned, his pointed assertion of wrongful appointments included a reference to a Judge of this Court, who had allegedly taken on his board a case, which was not assigned to his roster. It was alleged, that he had disposed of the case wrongfully. Before, we dwell on the above contention, it is necessary to notice, that the charge leveled, does not relate to an allegedly improper selection and appointment. The accusation is limited to a wrongful determination of "one" case. Insofar as the instant aspect of the matter is concerned, it is necessary for us to notice, that a review petition came to be filed against the alleged improper order, passed by the said Judge. The same was dismissed. After the Judge demitted office, a curative petition was filed, wherein the alleged improper order passed by the concerned Judge, was assailed. The same was also dismissed. Even thereafter, a petition was filed against the concerned Judge, by impleading him as a party-respondent. The said petition was also dismissed. We need to say no more, than what has been observed hereinabove, with reference to the particular case, allegedly wrongly decided by the concerned Judge.

190. It is imperative for us, while taking into consideration the submissions advanced by the learned Attorney General, to highlight, that the role of appointment of Judges in consonance with the judgment

rendered in the Second Judges case, envisages the dual participation of the members of the judiciary, as also, the members of the executive. Details in this behalf have been recorded by us in the "Reference Order". And therefore, in case of any failure, it is not only the judicial component, but also the executive component, which are jointly and equally responsible. Therefore, to single out the judiciary for criticism, may not be a rightful reflection of the matter.

191. It is not within our realm to express our agreement or disagreement with the contentions advanced at the hands of the learned Attorney General. He may well be right in his own perception, but the misgivings pointed out by him may not be of much significance in the perception of others, specially those who fully appreciate the working of the judicial system. The misgivings pointed out by the learned Attorney General, need to be viewed in the background of the following considerations:

Firstly, the allegations levelled against the Judges in question, do not depict any lack of ability in the discharge of judicial responsibility. Surely, that is the main consideration to be taken into account, at the time of selection and appointment of an individual, as a Judge at the level of the higher judiciary.

Secondly, none of the misgivings expressed on behalf of the respondents, are referable to integrity and misdemeanor. Another aspect, which cannot be compromised, at the time of selection of an individual, as a Judge at the level of the higher judiciary. Nothing wrong at this front also.

Thirdly, not in a single of the instances referred to above, the political-executive had objected to the elevation of the Judges referred to. We say so, because on our asking, we were furnished with the details of those who had been elevated, despite objections at the hands of the Union-executive. None of the Judges referred to, figured in that list.

Fourthly, no allegation whatsoever was made by the Attorney General, with reference to Judges, against whom objections were raised by the political-executive, and yet, they were appointed at the insistence of the Chief Justice, under the "collegium system".

Fifthly, that the political-executive disposition, despite the allegations levelled by the learned Attorney General, chose to grant post-retirement assignments, to three of the four instances referred to, during the course of hearing. A post-retirement assignment was also allowed by the political-executive, to the Judge referred to by Mr. Dushyant A. Dave. In the above factual scenario, either the learned Attorney General had got it all wrong. And if he is right, the political-executive got it all wrong, because it faltered despite being aware of the factual position highlighted.

Lastly, it has not been possible for us to comprehend, how and why, a Judge who commenced to tweet his views after his retirement, can be considered to be unworthy of elevation. The fact that the concerned Judge started tweeting his views after his retirement, is not in dispute. The inclusion of this instance may well demonstrate, that all in all, the functioning of the "collegium system" may well not be as bad as it is shown to be.

192. The submissions advanced by Mr. Dushyant A. Dave were not limited just to the instance of a Judge of the Supreme Court. He expressed strong views about persons like Maya Kodnani, a former Gujarat Minister, convicted in a riots case, for having been granted relief, while an allegedly renowned activist Teesta Setalvad, had to run from pillar to post, to get anticipatory bail. He also made a reference to convicted politicians and film stars, who had been granted relief by two different High Courts, as also by this Court. It was his lament, that whilst film stars and politicians were being granted immediate relief by the higher judiciary, commoners suffered for years. He attributed all this, to the defective selection process in vogue, which had resulted in the appointment of "bad Judges". He repeatedly emphasized, that victims of the 1984 anti-Sikh riots in Delhi, and the 2002 anti-Muslim riots in Gujarat, had not got any justice. It was his contention, that Judges selected and appointed through the process presently in vogue, were to blame. He also expressed the view, that the appointed Judges were oblivious of violations of human rights. It was submitted, that it was shameful, that courts of law could not deliver justice, to those whose fundamental and human rights had been violated.

193. It is necessary to emphasise, that under every system of law, there are two sides to every litigation. Only one of which succeeds. The question of how a matter has been decided would always be an issue of debate. The party, who succeeds, would feel justice had been done. While the party that loses, would complain that justice had been denied.

In the judicial process, there are a set of remedies, that are available to the parties concerned. The process contemplates, culmination of proceedings at the level of the Supreme Court. Once the process has run the full circle, it is indeed futile to allege any wrong doing, except on the basis of adequate material to show otherwise. Not that, the Supreme Court is right, but that, there has to be a closure. Most of the instances, illustratively mentioned by the President of the Supreme Court Bar Association, pertained to criminal prosecutions. The adjudication of such controversies is dependent on the adequacy of evidence produced by the prosecution. The nature of the allegations (truthful, or otherwise), have an important bearing, on the interim relief(s) sought, by the parties. The blame for passing (or, not passing) the desired orders, does not therefore *per se,* rest on the will of the adjudicating Judge, but the quality and authenticity of the evidence produced, and the nature of the allegations. Once all remedies available stand exhausted, it does not lie in the mouth of either the litigant, or the concerned counsel to imply motives, without placing on record any further material. It also needs to be recorded, that while making the insinuations, learned senior counsel, did not make a pointed reference to any High Court Judge by name, nor was it possible for us to identify any such Judge, merely on the basis of the submissions advanced, unlike the instances with reference to Judges of the Supreme Court. In the above view of the matter, it is not possible for us to infer, that there are serious infirmities in the matter of selection and

appointment of Judges to the higher judiciary, under the prevailing "collegium system", on the basis of the submissions advanced before us.

194. It is apparent that learned counsel had their say, without any limitations. That was essential, to appreciate the misgivings in the prevailing procedure of selection and appointment of Judges to the higher judiciary. We have also recorded all the submissions (hopefully) in terms of the contentions advanced, even in the absence of supporting pleadings. We will be failing in discharging our responsibility, if we do not refer to the parting words of Mr. Dushyant A. Dave – the President of the Supreme Court Bar Association, who having regained his breath after his outburst, did finally concede, that still a majority of the Judges appointed to the High Courts and the Supreme Court, were/are outstanding, and a miniscule minority were "bad Judges". All in all, a substantial emotional variation, from how he had commenced. One can only conclude by observing, that individual failings of men who are involved in the actual functioning of the executive, the legislature and the judiciary, do not necessarily lead to the inference, that the system which selects them, and assigns to them their role, is defective.

x.

195. It must remain in our minds, that the Indian Constitution is an organic document of governance, which needs to change with the evolution of civil society. We have already concluded, that for far more

reasons than the ones, recorded in the Second Judges case, the term "consultation", referred to selection of Judges to the higher judiciary, really meant, even in the wisdom of the framers of the Constitution, that primacy in the matter, must remain with the Chief Justice of India (arrived at, in consultation with a plurality of Judges). Undoubtedly, it is open to the Parliament, while exercising its power under Article 368, to provide for some other alternative procedure for the selection and appointment of Judges to the higher judiciary, so long as, the attributes of "separation of powers" and "independence of the judiciary", which are "core" components of the "basic structure" of the Constitution, are maintained.

196. That, however, will depend upon the standards of the moral fiber of the Indian polity. It cannot be overlooked, that the learned Attorney General had conceded, that there were certain political upheavals, which had undermined the "independence of the judiciary", including an executive overreach, at the time of appointment of the Chief Justice of India in 1973, followed by the mass transfer of Judges of the higher judiciary during the emergency in 1976, and thereafter a second supersession, at the time of appointment of another Chief Justice of India in 1977. And further, the interference by the executive, in the matter of appointment of Judges to the higher judiciary during the 1980's.

197. An important issue, that will need determination, before the organic structure of the Constitution is altered, in the manner contemplated by the impugned constitutional amendment, would be, whether the civil

society, has been able to maneuver its leaders, towards national interest? And whether, the strength of the civil society, is of a magnitude, as would be a deterrent for any overreach, by any of the pillars of governance? At the present juncture, it seems difficult to repose faith and confidence in the civil society, to play any effective role in that direction. For the simple reason, that it is not yet sufficiently motivated, nor adequately determined, to be in a position to act as a directional deterrent, for the political-executive establishment. It is therefore, that the higher judiciary, which is the savior of the fundamental rights of the citizens of this country, by virtue of the constitutional responsibility assigned to it under Articles 32 and 226, must continue to act as the protector of the civil society. This would necessarily contemplate the obligation of preserving the "rule of law", by forestalling the political-executive, from transgressing the limits of their authority as envisaged by the Constitution.

198. Lest one is accused of having recorded any sweeping inferences, it will be necessary to record the reasons, for the above conclusion. The Indian Express, on 18.6.2015, published an interview with L.K. Advani, a veteran BJP Member of Parliament in the Lok Sabha, under the caption "Ahead of the 40th anniversary of the imposition of the Emergency on 25.6.1975". His views were dreadfully revealing. In his opinion, forces that could crush democracy, were now stronger than ever before. He asserted, "I do not think anything has been done that gives me the assurance that civil liberties will not be suspended or destroyed again.

Not at all"!! It was also his position, that the emergency could happen again. While acknowledging, that the media today was more alert and independent, as compared to what it was, when emergency was declared by the then Prime Minister Indira Gandhi, forty years ago. In his perception, the media did not have any real commitment to democracy and civil liberties. With reference to the civil society, he pointed out, that hopes were raised during the Anna Hazare mobilization against corruption, which according to him, ended in a disappointment, even with reference to the subject of corruption. This when the poor and downtrodden majority of this country, can ill afford corruption. Of the various institutions, that could be held responsible, for the well functioning of democracy in this country, he expressed, that the judiciary was more responsible than the other institutions.

199. On the above interview, Mani Shankar Aiyar, a veteran Congress Member of Parliament in the Rajya Sabha, while expressing his views noticed, that India could not be "emergency proof", till the Constitution provided for the declaration of emergency, at the discretion of an elected Government. He pointed out, that it should not be forgotten, that in 1975, emergency had been declared within the framework of the Constitution. It was therefore suggested, that one of the solutions to avoid a declaration of emergency could be, to remove Part XVIII of the Constitution, or to amend it, and "to provide for only an external emergency". He however raised a poser, whether it would be practical to do so? One would venture to answer the same in the negative. And in

such situation, to trust, that the elected Government would act in the interest of the nation.

200. The stance of L.K. Advani was affirmed by Sitaram Yechury, a veteran CPI (Marxist) Member of Parliament in the Rajya Sabha, who was arrested, like L.K. Advani, during the emergency in 1975.

201. The present N.D.A. Government was sworn in, on 26.5.2014. One believes, that thereafter thirteen Governors of different States and one Lieutenant Governor of a Union Territory tendered their resignations in no time. Some of the Governors demitted their office shortly after they were appointed, by the previous U.P.A. – dispensation. That is despite the fact, that a Governor under the Constitutional mandate of Article 156(3) has a term of five years, from the date he enters upon his office. A Governor is chosen out of persons having professional excellence and/or personal acclaim. Each one of them, would be eligible to be nominated as an "eminent person" under Article 124A(1)(d). One wonders, whether all these resignations were voluntary. The above depiction is not to cast any aspersion. As a matter of fact, its predecessor – the U.P.A. Government, had done just that in 2004.

202. It is necessary to appreciate, that the Constitution does not envisage the "spoils system" (also known as the "patronage system"), wherein the political party which wins an election, gives Government positions to its supporters, friends and relatives, as a reward for working towards victory, and as an incentive to keep the party in power.

203. It is also relevant to indicate, the images of the "spoils system" are reflected from the fact, that a large number of persons holding high positions, in institutions of significance, likewise resigned from their assignments, after the present N.D.A. Government was sworn in. Some of them had just a few months before their tenure would expire – and some, even less than a month. Those who left included bureaucrats from the All India Services occupying coveted positions at the highest level, Directors/Chairmen of academic institutions of national acclaim, constitutional authorities (other than Governors), Directors/Chairmen of National Research Institutions, and the like. Seriously, the instant narration is not aimed at vilification, but of appreciation of the ground reality, how the system actually works.

204. From the above, is one to understand, that all these individuals were rank favorites, approved by the predecessor political-executive establishment? Or, were the best not chosen to fill the slot by the previous dispensation? Could it be, that those who get to hold the reins of Government, introduce their favourites? Or, whether the existing incumbents, deserved just that? Could it be, that just like its predecessor, the present political establishment has now appointed its rank favourites? What emerges is, trappings of the spoils system, and nothing else. None of the above parameters, can be adopted in the matter of appointment of Judges to the higher judiciary. For the judiciary, the best out of those available have to be chosen. Considerations cannot be varied, with a change in Government. Demonstrably, that is exactly what

has happened (repeatedly?), in the matter of non-judicial appointments. It would be of utmost importance therefore, to shield judicial appointments, from any political-executive interference, to preserve the "independence of the judiciary", from the regime of the spoils system. Preserving primacy in the judiciary, in the matter of selection and appointment of Judges to the, higher judiciary would be a safe way to do so.

205. In conclusion, it is difficult to hold, in view of the factual position expressed above, that the wisdom of appointment of Judges, can be shared with the political-executive. In India, the organic development of civil society, has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance. In our considered view, the present status of the evolution of the "civil society" in India, does not augur the participation of the political-executive establishment, in the selection and appointment of Judges to the higher judiciary, or in the matter of transfer of Chief Justices and Judges of one High Court, to another.

XI.

206. It may be noticed, that one of the contentions advanced on behalf of the petitioners was, that after the 121st Constitution Amendment Bill was passed by the Lok Sabha and the Rajya Sabha, it was sent to the State Legislatures for ratification. Consequent upon the ratification by

the State Legislatures, in compliance of the mandate contained in Article 368, the President granted his assent to the same on 31.12.2014, whereupon it came to be enacted as the Constitution (99th Amendment) Act. Section 1(2) thereof provides, that the provisions of the amendment, would come into force from such date as may be notified by the Central Government, in the Official Gazette. And consequent upon the issuance of the above notification, the amendment was brought into force, through a notification, with effect from 13.4.2015. It was the submission of the petitioners, that the jurisdiction to enact the NJAC Act, was acquired by the Parliament on 13.4.2015, for the simple reason, that the same could not have been enacted whilst the prevailing Articles 124(2) and 217(1) were in force, as the same, did not provide for appointments to be made by a body such as the NJAC. It was submitted, that the NJAC Act was promulgated, to delineate the procedure to be followed by the NJAC while recommending appointments of Judges and Chief Justices, to the higher judiciary. It was contended, that procedure to be followed by the NJAC could not have been legislated upon by the Parliament, till the Constitution was amended, and the NJAC was created, as a constitutional entity for the selection and appointment (as also, transfer) of Judges at the level of the higher judiciary. The NJAC, it was asserted, must be deemed to have been created, only when the Constitution (99th Amendment) Act, was brought into force, with effect from 13.4.2015. It was submitted, that the NJAC Act received the assent of the President on 31.12.2014 i.e., on a date when the NJAC had not yet come into

existence. For this, learned counsel had placed reliance on the A.K. Roy case[49], to contend, that the constitutional amendment in the instant case would not come into force on 13.12.2014, but on 13.4.2015.

207. A complementary additional submission was advanced on behalf of the petitioners, by relying upon the same sequence of facts. It was contended, that the power of veto vested in two Members of the NJAC, through the second proviso under Section 5(2) of the NJAC Act (in the matter of appointment of the Chief Justice and Judges of the Supreme Court), and Section 6(6) of the NJAC Act (in the matter of appointment of Chief Justices and Judges of High Courts) could not be described as laying down any procedure. It was submitted, that the above provisions clearly enacted substantive law. Likewise, it was contended, that the amendment of the words "after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose", on being substituted by the words "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A", as also, the deletion of the first proviso under Article 124(2) which mandated consultation with the Chief Justice of India, and the substitution of the same with the words, "on the recommendation of the National Judicial Appointments Commission referred to under Article 124A", would result in the introduction of an absolutely new regimen. It was submitted, that such substitution would also amount to an amendment of the existing provisions of the Constitution, and as such, the same would also require the postulated

ratification provided in respect of a constitutional amendment, under the proviso to Article 368(2). And since the NJAC Act, had been enacted as an ordinary legislation, the same was liable to be held as *non est* on account of the fact, that the procedure contemplated under Article 368, postulated for an amendment to the Constitution, had not been followed.

208. Since it was not disputed, that the Parliament had indeed enacted Rules of Procedure and the Conduct of Business of Lok Sabha under Article 118, which contained Rule 66 postulating, that a Bill which was dependent wholly or partly on another Bill could be "introduced" in anticipation of the passing of the Bill, on which it was dependent. Leading to the inference, that the 121st Constitution Amendment Bill, on which the NJAC Bill was dependent, could be taken up for consideration (by introducing the same in the Parliament), but could not have been passed till after the passing of the Constitution (99th Amendment) Act, on which it was dependent.

209. Whilst there can be no doubt, that viewed in the above perspective, we may have unhesitatingly accepted the above submission, and in fact the same was conceded by the Attorney General to the effect, that the dependent Bill can "… be taken up for consideration and passing in the House, only after the first Bill has been passed by the House…". But our attention was invited by the Attorney General to Rule 388, which authorises the Speaker to allow the suspension, of a particular rule (which would include Rule 66). If Rule 66 could be suspended, then Rule 66 would not have the impact, which the petitioners seek through the

instant submission. It is not a matter of dispute, that the then Union Minister in charge of Law and Justice had sought (under Rule 388 of the Rules of Procedure and Conduct of Business of the Lok Sabha) the suspension of the proviso to Rule 66. And on due consideration, the Lok Sabha had suspended the proviso to Rule 66, and had taken up the NJAC Bill for consideration. Since the validity of Rule 388 is not subject matter of challenge before us, it is apparent, that it was well within the competence of the Parliament, to have taken up for consideration the NJAC Act, whilst the Constitution (121st Amendment) Bill, on which the NJAC Act was fully dependent, had still not been passed, in anticipation of the passing of the Constitution (121st Amendment) Bill.

210. The principle contained in Rule 66, even if the said rule had not been provided for, would always be deemed to have been impliedly there. In the absence of a foundation, no superstructure can be raised. The instant illustration is relateable to Rule 66, wherein the pending Bill would constitute the foundation, and the Bill being introduced in anticipation of the passing of the pending Bill, would constitute the superstructure. Therefore, in the absence of the foundational Bill (-in the instant case, the 121st Constitution Amendment Bill), there could be no question of raising the infrastructure (-in the instant case, the NJAC Act). In our considered view, it was possible in terms of Rule 388, to introduce and pass a Bill in the Parliament, in anticipation of the passing of the dependent Bill – the Constitution (121st Amendment) Bill. But, it is still not possible to contemplate, that a Bill which is dependent wholly (or, in

part) upon another Bill, can be passed and brought into operation, till the dependent Bill is passed and brought into effect.

211. It is however necessary to record, that even though the position postulated in the preceding paragraphs, as canvassed by the Attorney General, was permissible, the passing of the dependent enactment i.e., the NJAC Bill, could not have been given effect to, till the foundational enactment had become operational. In the instant case, the NJAC Act, would have failed the test, if it was given effect to, from a date prior to the date on which, the provisions of the enactment on which it was dependent – the Constitution (99th Amendment) Act, became functional. In other words, the NJAC Act, would be stillborn, if the dependent provisions, introduced by way of a constitutional amendment, were yet to come into force. Stated differently, the contravention of the principle contemplated in Rule 66, could not have been overlooked, despite the suspension of the said rule, and the dependent enactment could not come into force, before the depending/controlling provision became operational. The sequence of facts narrated hereinabove reveals, that the dependent and depending provisions, were brought into force simultaneously on the same date, i.e., on 13.4.2015. It is therefore apparent, that the foundation – the Constitution (99th Amendment) Act, was in place, when the superstructure – the NJAC Act, was raised. Thus viewed, we are satisfied, that the procedure adopted by the Parliament at the time of putting to vote the NJAC Bill, or the date on which the NJAC

Act received the assent of the President, cannot invalidate the enactment of the NJAC Act, as suggested by the learned counsel for the petitioners.

212. One is also persuaded to accept the contention advanced by the learned Attorney General, that the validity of any proceeding, in Parliament, cannot be assailed on the ground of irregularity of procedure, in view of the protection contemplated through Article 122. Whilst accepting the instant contention, of the learned Attorney General, it is necessary for us to record, that in our considered view, the aforestated irregularity pointed out by the learned counsel, would be completely beyond the purview of challenge, specially because it was not the case of the petitioners, that the Parliament did not have the legislative competence to enact the NJAC Act. For the reasons recorded hereinabove, it is not possible for us to accept, that the NJAC Act was stillborn, or that it was liable to be set aside, for the reasons canvassed by the learned counsel for the petitioners.

213. It is also not possible for us to accept, that while enacting the NJAC Act, it was imperative for the Parliament to follow the procedure contemplated under Article 368. Insofar as the instant aspect of the matter is concerned, the Constitution (99th Amendment) Act, amended Articles 124 and 217 (as also, Articles 127, 128, 222, 224, 224A and 231), and Articles 124A to 124C were inserted in the Constitution. While engineering the above amendments, the procedural requirements contained in Article 368 were admittedly complied with. It is therefore apparent, that no procedural lapse was committed while enacting the

Constitution (99th Amendment) Act. Article 124C, authorized the Parliament to enact a legislation in the nature of the NJAC Act. This could validly be done, by following the procedure contemplated for an ordinary legislation. It is not disputed, that such procedure, as was contemplated for enacting an ordinary legislation, had indeed been followed by the Parliament, after the NJAC Bill was tabled in the Parliament, inasmuch as, both Houses of Parliament approved the NJAC Bill by the postulated majority, and thereupon, the same received the assent of the President on 31.12.2014. For the above reasons, the instant additional submission advanced by the petitioners, cannot also be acceded to, and is accordingly declined.

XII.

214. Mr. Mukul Rohatgi, learned Attorney General for India, repulsed the contentions advanced at the hands of the petitioners, that *vires* of the provisions of the NJAC Act, could be challenged, on the ground of being violative of the "basic structure" of the Constitution.

215. The first and foremost contention advanced, at the hands of the learned Attorney General was, that the constitutional validity of an amendment to the Constitution, could only be assailed on the basis of being violative of the "basic structure" of the Constitution. Additionally it was submitted, that an ordinary legislative enactment (like the NJAC Act), could only be assailed on the grounds of lack of legislative competence and/or the violation of Article 13 of the Constitution. Inasmuch as, the State cannot enact laws, which take away or abridge

rights conferred in Part III of the Constitution, or are in violation of any other constitutional provision. It was acknowledged, that law made in contravention of the provisions contained in Part III of the Constitution, or of any other constitutional provision, to the extent of such contravention, would be void. Insofar as the instant aspect of the matter is concerned, the learned Attorney General, placed reliance on the Indira Nehru Gandhi case[56], State of Karnataka v. Union of India[88], and particularly to the following observations:

"238. Mr Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental backbone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of Smt Indira Nehru Gandhi v. Shri Raj Narain such an argument was expressedly rejected by this Court. We may rest content by referring to a passage from the judgment of our learned brother Chandrachud, J., … which runs thus:
"The constitutional amendments may, on the ratio of the Fundamental Rights case be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the Legislature as defined and specified in Chapter I, Part 11 of the Constitution and (2) it must not offend against the provisions of Articles 13(1) and (2) of the Constitution. 'Basic structure', by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. 'The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features'— this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution."

[88] (1977) 4 SCC 608

The Court's attention was also drawn to Kuldip Nayar v. Union of India[89], wherein it was recorded:

"107. The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners."

Last of all, learned Attorney General placed reliance on Ashoka Kumar Thakur v. Union of India[90], and referred to the following observations:

"116. For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It may be noticed that it is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution."

Based on the afore-quoted judgments, it was the assertion of the learned Attorney General, that the validity of a legislative enactment, i.e., an ordinary statute, could not be assailed on the ground, that the same was violative of the "basic structure" of the Constitution. It was therefore asserted, that reliance placed at the hands of the learned counsel, appearing for the petitioners, on the Madras Bar Association case[35], was not acceptable in law.

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[89] (2006) 7 SCC 1
[90](2008) 6 SCC 1

216. The above contention, advanced by the learned Attorney General, has been repulsed. For this, in the first instance, reliance was placed on Public Services Tribunal Bar Association v. State of U.P.[91] In the instant judgment, it is seen from the observations recorded in paragraph 26, that this Court concluded, that the constitutional validity of an ordinary legislation could be challenged on only two grounds, namely, for reasons of lack of legislative competence, and on account of violation of any fundamental rights guaranteed in Part III of the Constitution, or of any other constitutional provision. The above determination supports the contention advanced by the learned Attorney General, who seeks to imply from the above conclusion, that an ordinary legislation cannot be assailed on the ground of it being violative of the "basic structure" of the Constitution. Despite having held as above, in its final conclusion recorded in paragraph 44, it was observed as under:

"44. For the reasons stated above, we find that the State Legislature was competent to enact the impugned provisions. Further, that the provisions enacted are not arbitrary and therefore not violative of Articles 14, 16 or any other provisions of the Constitution. They are not against the basic structure of the Constitution of India either. Accordingly, we do not find any merit in these appeals and the same are dismissed with no order as to costs."

It was pointed out, that it was apparent, that even while determining the validity of an ordinary legislation, namely, the U.P. Public Services (Tribunals) Act, 1976, this Court in the aforestated judgment had examined, whether the provisions of the assailed legislation, were against the "basic structure" of the Constitution, and having done so, it had

[91] (2003) 4 SCC 104

rejected the contention. Thereby implying, that it was open for an aggrieved party to assail, even the provisions of an ordinary legislation, based on the concept of "basic structure". In addition to the above, reliance was placed on the Kuldip Nayar case[89] (also relied upon by the learned Attorney General), and whilst acknowledging the position recorded in the above judgment, that an ordinary legislation could not be challenged on the ground of violation of the "basic structure" of the Constitution, the Court, in paragraph 108, had observed thus:

"108. As stated above, "residence" is not the constitutional requirement and, therefore, the question of violation of basic structure does not arise."

It was submitted, that in the instant judgment also, this Court had independently examined, whether the legislative enactment in question, namely, the Representation of the People (Amendment) Act 40 of 2003, indeed violated the "basic structure" of the Constitution. And in so determining, concluded that the question of residence was not a constitutional requirement, and therefore, the question of violation of the "basic structure" did not arise. Learned counsel then placed reliance on the M. Nagaraj case[36], wherein it was concluded as under:

"124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case."

217. It was submitted by Dr. Rajeev Dhavan, learned senior counsel, that this Court in the M. Nagaraj case[36], while upholding the constitutional validity of the impugned constitutional amendment, by testing the same by applying the "width test", extended the aforesaid concept to State legislations. It was accordingly sought to be inferred, that State legislations could be assailed, not only on the basis of the letter and text of constitutional provisions, but also, on the basis of the "width test", which was akin to a challenge raised to a legislative enactment based on the "basic structure" of the Constitution.

218. Reliance was then placed on Uttar Pradesh Power Corporation Limited v. Rajesh Kumar[92], wherein the issue under reference had been raised, as is apparent from the discussion in paragraph 61, which is extracted below:

"61. Dr. Rajeev Dhavan, learned senior Counsel, supporting the decision of the Division Bench which has declared the Rule as ultra vires, has submitted that if M. Nagaraj is properly read, it does clearly convey that social justice is an overreaching principle of the Constitution like secularism, democracy, reasonableness, social justice, etc. and it emphasises on the equality code and the parameters fixed by the Constitution Bench as the basic purpose is to bring in a state of balance but the said balance is destroyed by Section 3(7) of the 1994 Act and Rule 8-A inasmuch as no exercise has been undertaken during the post M. Nagaraj period. In M. Nagraj, there has been emphasis on interpretation and implementation, width and identity, essence of a right, the equality code and avoidance of reverse discrimination, the nuanced distinction between the adequacy and proportionality, backward class and backwardness, the concept of contest specificity as regards equal justice and efficiency, permissive nature of the provisions and conceptual essence of guided power, the implementation in concrete terms which would not cause violence to the constitutional mandate; and the effect of accelerated seniority and the conditions prevalent for satisfaction of the conditions precedent to invoke the settled principles."

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[92] (2012) 7 SCC 1

The matter was adjudicated upon as under:

"86. We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein."

In addition to the above judgment, reliance was also placed on State of Bihar v. Bal Mukund Sah[93], wherein a Constitution Bench of this Court, while examining the power of the State legislature, to legislate on the subject of recruitment of District Judges and other judicial officers, placed reliance on the judgment rendered by this Court in the Kesavananda Bharati case[10], which took into consideration five of the declared "basic features" of the Constitution, and examined the subject matter in question, by applying the concept of "separation of powers" between the legislature, the executive and the judiciary, which was accepted as an essential feature of the "basic structure" of the Constitution. Finally, reliance was placed on Nawal Kishore Mishra v. High Court of Judicature of Allahabad[94], wherefrom reliance was placed on conclusion no. 20.11, which is extracted below:

[93] (2000) 4 SCC 640
[94] (2015) 5 SCC 479

"20.11 Any such attempt by the legislature would be forbidden by the constitutional scheme as that was found on the concept relating to separation of powers between the legislature, the executive and the judiciary as well as the fundamental concept of an independent judiciary as both the concepts having been elevated to the level of basic structure of the Constitution and are the very heart of the constitutional scheme."

It was therefore the contention of the learned senior counsel, that it was not justified for the respondents to raise the contention, that the validity of the provisions of the NJAC Act could not be tested on the touchstone of the concept of the "basic structure" of the Constitution.

219. It needs to be highlighted, that the issue under reference arose on account of the fact, that learned counsel for the petitioners had placed reliance on the judgment of this Court, in the Madras Bar Association case[35], wherein this Court had examined the provisions of the National Tax Tribunal Act, 2005, and whilst doing so, had held the provisions of the above legislative enactment as *ultra vires* the provisions of the Constitution, on account of their being violative of the "basic structure" of the Constitution. It is therefore quite obvious, that the instant contention was raised, to prevent the learned counsel for the petitioners, from placing reliance on the conclusions recorded in the Madras Bar Association case[35].

220. We have given our thoughtful consideration to the above contentions. The "basic structure" of the Constitution, presently *inter alia* includes the supremacy of the Constitution, the republican and democratic form of Government, the "federal character" of distribution of powers, secularism, "separation of powers" between the legislature, the

executive, and the judiciary, and "independence of the judiciary". This Court, while carving out each of the above "basic features", placed reliance on one or more Articles of the Constitution (some times, in conjunction with the preamble of the Constitution). It goes without saying, that for carving out each of the "core" or "basic features/basic structure" of the Constitution, only the provisions of the Constitution are relied upon. It is therefore apparent, that the determination of the "basic features" or the "basic structure", is made exclusively from the provisions of the Constitution. Illustratively, we may advert to "independence of the judiciary" which has been chosen because of its having been discussed and debated during the present course of consideration. The deduction of the concept of "independence of the judiciary" emerged from a collective reading of Articles 12, 36 and 50. It is sometimes not possible, to deduce the concerned "basic structure" from a plain reading of the provisions of the Constitution. And at times, such a deduction is made, from the all-important silences hidden within those Articles, for instance, the "primacy of the judiciary" explained in the Samsher Singh case[11] the Sankalchand Himatlal Sheth case[5] and the Second Judges case, wherein this Court while interpreting Article 74 along with Articles 124, 217 and 222, in conjunction with the intent of the framers of the Constitution gathered from the Constituent Assembly debates, and the conventions adhered to by the political-executive authority in the matter of appointment and transfer of Judges of the higher judiciary, arrived at the conclusion, that "primacy of the judiciary" was a constituent of the

"independence of the judiciary" which was a "basic feature" of the Constitution. Therefore, when a plea is advanced raising a challenge on the basis of the violation of the "basic structure" with reference to the "independence of the judiciary", its rightful understanding is, and has to be, that Articles 12, 36 and 50 on the one hand, and Articles 124, 217 and 222 on the other, (read collectively and harmoniously) constitute the basis thereof. Clearly, the "basic structure" is truly a set of fundamental foundational principles, drawn from the provisions of the Constitution itself. These are not fanciful principles carved out by the judiciary, at its own. Therefore, if the conclusion drawn is, that the "independence of the judiciary" has been transgressed, it is to be understood, that rule/principle collectively emerging from the above provisions, had been breached, or that the above Articles read together, had been transgressed.

221. So far as the issue of examining the constitutional validity of an ordinary legislative enactment is concerned, all the constitutional provisions, on the basis whereof the concerned "basic feature" arises, are available. Breach of a single provision of the Constitution, would be sufficient to render the legislation, *ultra vires* the Constitution. In such view of the matter, it would be proper to accept a challenge based on constitutional validity, to refer to the particular Article(s), singularly or collectively, which the legislative enactment violates. And in cases where the cumulative effect of a number of Articles of the Constitution is stated to have been violated, reference should be made to all the concerned

Articles, including the preamble, if necessary. The issue is purely technical. Yet, if a challenge is raised to an ordinary legislative enactment based on the doctrine of "basic structure", the same cannot be treated to suffer from a legal infirmity. That would only be a technical flaw. That is how, it will be possible to explain the observations made by this Court, in the judgments relied upon by the learned counsel for the petitioners. Therefore, when a challenge is raised to a legislative enactment based on the cumulative effect of a number of Articles of the Constitution, it is not always necessary to refer to each of the concerned Articles, when a cumulative effect of the said Articles has already been determined, as constituting one of the "basic features" of the Constitution. Reference to the "basic structure", while dealing with an ordinary legislation, would obviate the necessity of recording the same conclusion, which has already been scripted while interpreting the Article(s) under reference, harmoniously. We would therefore reiterate, that the "basic structure" of the Constitution is inviolable, and as such, the Constitution cannot be amended so as to negate any "basic features" thereof, and so also, if a challenge is raised to an ordinary legislation based on one of the "basic features" of the Constitution, it would be valid to do so. If such a challenge is accepted, on the ground of violation of the "basic structure", it would mean that the bunch of Articles of the Constitution (including the preamble thereof, wherever relevant), which constitute the particular "basic feature", had been violated. We must however credit the contention of the learned Attorney General by accepting, that it would be technically

sound to refer to the Articles which are violated, when an ordinary legislation is sought to be struck down, as being *ultra vires* the provisions of the Constitution. But that would not lead to the inference, that to strike down an ordinary legislative enactment, as being violative of the "basic structure", would be wrong. We therefore find no merit in the contention advanced by the learned Attorney General, but for the technical aspect referred to hereinabove.

XIII.

222. Various challenges were raised to the different provisions of the NJAC Act. First and foremost, a challenge was raised to the manner of selection and appointment of the Chief Justice of India. Section 5(1) of the NJAC Act, it was submitted, provides that the NJAC would recommend the senior most Judge of the Supreme Court, for being appointed as Chief Justice of India, subject to the condition, that he is considered "fit" to hold the office. It was contended, that the Parliament had been authorized by law to regulate the procedure for the appointment of the Chief Justice of India, under Article 124C. It was submitted, that the NJAC should have been allowed to frame regulations, with reference to the manner of selection and appointment of Judges to the higher judiciary including the Chief Justice of India.

223. It was submitted, that the term "fit", expressed in Section 5(1) of the NJAC Act, had not been elaborately described. And as such, fitness would be determined on the subjective satisfaction of the Members of the NJAC. It was acknowledged, that even though the learned Attorney

General had expressed, during the course of hearing, that fitness only meant "…mental and physical fitness…", a successor Attorney General may view the matter differently, just as the incumbent Attorney General has differed with the concession recorded on behalf of his predecessor (in the Third Judges case), even though they both represent the same ruling political party. And, it was always open to the Parliament to purposefully define the term "fit", in a manner which could sub-serve the will of the executive. It was pointed out, that even an ordinance could be issued without the necessity, of following the procedure of enacting law, to bring in a person of the choice of the political-executive. It was contended, that the criterion of fitness could be defined or redefined, as per the sweet will of the non-judicial authorities.

224. It was pointed out, that there was a constitutional convention, whereunder the senior most Judge of the Supreme Court, has always been appointed as Chief Justice of India. And that, the aforesaid convention had remained unbroken, even though in some cases the tenure of the appointee had been extremely short, and may not have enured to the advantage of the judiciary, as an institution. Experience had shown, according to learned counsel, that adhering to the practice of appointing the senior most Judge as the Chief Justice of India, had resulted in institutional harmony and collegiality amongst Judges, which was extremely important for the health of the judiciary, and also, for the independence of the judiciary. It was submitted, that it would be just

and appropriate, at the present juncture, to understand the width of the power, so as to prevent any likelihood of its misuse in future.

225. It was suggested, that various ways and means could be devised to supersede senior Judges, to bring in favourites. Past experience had shown, that the executive had abused its authority, when it departed from the above seniority rule in April 1973, by superseding J.M. Shelat, the senior most Judge, and even the next two Judges in the order of seniority after him, namely, K.S. Hegde and A.N. Grover, while appointing the fourth senior most Judge A.N Ray, as the Chief Justice of India. Again in January 1977 on the retirement of A.N. Ray, CJ., the senior most Judge H.R. Khanna, was ignored, and the next senior most Judge M.H. Beg, was appointed as the Chief Justice of India. Such control in the hands of the executive, according to learned counsel, would cause immense inroads in the decision making process. And could result in, Judges trying to placate and appease the political-executive segment, aimed at personal gains and rewards.

226. The submission noticed above, was sought to be illustrated through the following instance. It was contended, that it would be genuine and legitimate, for the Parliament to enact by law, that a person would be considered "fit" for appointment as Chief Justice of India, only if he had a minimum left over tenure of two years. Such an enactment would have a devastating effect, even though it would appear to be innocuously legitimate. It was pointed out, that out of the 41 Chief Justices of India appointed till date, only 12 Chief Justices of India had a tenure of more

than two years. If such action, as has been illustrated above, was to be taken at the hands of the Parliament, it was bound to cause discontent to those who had a legitimate expectation to hold the office of Chief Justice of India, under the seniority rule, which had been in place for all this while.

227. It was asserted, that the illustration portrayed in the foregoing paragraph, could be dimensionally altered, by prescribing different parameters, tailor-made for accommodating a favoured individual. It was submitted, that the Parliament should never be allowed the right to create uncertainty, in the matter of selection and appointment of the Chief Justice of India, as the office of the Chief Justice of India was pivotal, and shouldered extremely onerous responsibilities. The exercise of the above authority by the Parliament, it was pointed out, could/would seriously affect the "independence of the judiciary".

228. In the above context, reference was also made, to the opinion expressed by renowned persons, having vast experience in judicial institutions, effectively bringing out the veracity of the contention advanced. Reference in this regard was made to the observations of M.C. Chagla, in his book, "Roses in December – An Autobiography", wherein he described the impact of supersession on Judges, who by virtue of the existing convention, were in line to be the Chief Justice of India, but were overlooked by preferring a junior. The position was expressed thus:

<u>The effect of these supersessions was most deleterious on the judges of the Supreme Court who were in the line of succession to the Chief Justiceship. Each eyed the other with suspicion and tried to outdo him</u>

in proclaiming his loyalty to the Government either in their judgments or even on public platforms. If a judge owes his promotion to the favour of Government and not to his own intrinsic merit, then the independence of the judiciary is inevitably lost."

H.R. Khanna, J., (in his book – "Neither Roses Nor Thorns") expressed the position as under:

"A couple of days before the pronouncement of judgment the atmosphere of tension got aggravated because all kinds of rumours started circulating and the name of the successor of the Chief Justice was not being announced. The announcement came on the radio after the judgment was pronounced and it resulted in the supersession of the three senior judges.

I felt extremely perturbed because in my opinion it was bound to generate fear complex or hopes of reward and thus undermine the independence of the judiciary. Immediately on hearing the news I went to the residence of Justice Hegde. I found him somewhat tense, as anyone in that situation would be, but he was otherwise calm. He told me that he, as well as Justice Shelat and Justice Grover who had been superseded, were tendering their resignations.

After the resignation of Shelat, Hegde and Grover, the court acquired a new complexion and I found perceptible change in the atmosphere. Many things happened which made one unhappy and I thought the best course was to get engrossed in the disposal of judicial work. The judicial work had always an appeal for me and I found the exclusive attention paid to it to be rewarding as well as absorbing.

One of the new trends was the change in the approach of the court with a view to give tilt in favour of upholding the orders of the government. Under the cover of highsounding words like social justice the court passed orders, the effect of which was to unsettle settled principles and dilute or undo the dicta laid down in the earlier cases."

In this behalf, reference was also made to the observations of H.M. Seervai (in "Constitutional Law of India – A Critical Commentary"), which are as follows:

"In Sankalchand Sheth's Case, Bhagwati J. after explaining why the Chief Justice of India had to be consulted before a judge could be transferred to the High Court of another State, said: "I think it was Mr. Justice Jackson who said 'Judges are more often bribed by their ambition and loyalty rather than by money'... In my submission in quoting the above passage Bhagwati J. failed to realize that his only loyalty was to himself for, as will appear later, he was disloyal, inter alia,

to his Chief, Chandrachud C.J. in order to fulfil his own ambition to be the Chief Justice of India as soon as possible. That Bhagwati J. was bribed by that ambition will be clear when I deal with his treatment in the Judges' Case of Chief Justice Chandrachud's part in the case of Justice Kumar and Singh C.J. It will interest the reader to know that the word "ambition" is derived from "ambit, canvass for votes.",... Whether Bhagwati J. canvassed the votes of one or more of his brother judges that they should disbelieve Chief Justice Chandrachud's affidavit in reply to the affidavit of Singh C.J. is not known; but had he succeeded in persuading one or more of his brother judges to disbelieve that affidavit, Chandrachud C.J. would have resigned,and Justice Bhagwati's ambition to be the next Chief Justice of India, would, in all probability, have been realised. However, his attempt to blacken the character and conduct of Chandrachud C.J. proved futile because 4 of his brother judges accepted and acted upon the Chief Justice's affidavit and held that the transfer of Singh C.J. to Madras was valid."

229. It was submitted, that leaving the issue of determination of fitness, with the Parliament, was liable to fan ambitions of Judges, and was likely to make the Judges loyal, to those who could satisfy their ambitions. It was therefore emphasized, that Section 5(1), which created an ambiguity, in the matter of appointment to the office of Chief Justice of India, had the trappings of being abused to imperil "independence of the judiciary", and therefore, could not be permitted to remain on the statute-book, irrespective of the assurance of the Attorney General, that for the purpose in hand, the term "fit" meant "... mental and physical fitness...".

230. It was also contended, that while recommending names for appointment of a Judge to the Supreme Court, the concerned Judges' seniority in the cadre of Judges (of High Courts), was liable to be taken as the primary consideration, coupled with his ability and merit. It was submitted, that the instant mandate contained in the first proviso under Section 5(2) of the NJAC Act, clearly breached the convention of regional

representation in the Supreme Court. Since the "federal character", of distribution of powers, was also one of the recognized "basic structures", it was submitted, that regional representation could not have been overlooked.

231. Besides the above, the Court's attention was invited to the second proviso under Section 5(2), which forbids the NJAC from making a favourable recommendation, if any two Members thereof, opposed the nomination of a candidate. It was contended, that placing the power of veto, in the hands of two Members of the NJAC, would violate the recommendatory power expressed in Article 124B. In this behalf, it was contended, that the above position would entitle two "eminent persons"–lay persons (if the submission advanced by the learned Attorney General is to be accepted), to defeat a unanimous recommendation of the Chief Justice of India and the two senior most Judges of the Supreme Court. And would also, negate the primacy vested in the judiciary, in the matter of appointment of Judges, to the higher judiciary.

232. It was submitted, that the above power of veto exercisable by two lay persons, or alternatively one lay person, in conjunction with the Union Minister in charge of Law and Justice, would cause serious inroads into the "independence of the judiciary". Most importantly, it was contended, that neither the impugned constitutional amendment, nor the provisions of the NJAC Act, provided for any quorum for holding meetings of the NJAC. And as such, quite contrary to the contentions advanced at the hands of the learned Attorney General, a meeting of the

NJAC could not be held, without the presence of the all Members of the NJAC. In order to support his above contention, he illustratively placed reliance on the Constitution (122nd Amendment) Bill, 2014 (brought before the Parliament, by the same ruling political party, which had amended the Constitution, by tabling the Constitution (121st Amendment) Bill, 2014. The objective sought to be achieved under the above Bill was, to insert a new Article 279A. The new Article 279A created the Goods and Services Tax Council. Sub-Article (7) of Article 279A postulates, that "… One-half of the total number of Members of the Goods and Services Tax Council…" would constitute the quorum for its meetings. And furthermore, that "… Every decision of the Goods and Services Tax Council would be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting …". Having laid down the above parameters, in the Bill which followed the Bill, that led to the promulgation of the impugned Constitution (99th Amendment) Act, it was submitted, that the omission of a quorum for the functioning of the NJAC, and the omission of quantifying the strength required for valid decision making, vitiated the provision itself.

233. The contention advanced at the hands of the learned counsel for the petitioners, as has been noticed in the foregoing paragraph, does not require any detailed examination, as the existing declared legal position, is clear and unambiguous. In this behalf, it may be recorded, that in case a statutory provision vests a decision making authority in a body of

persons without stipulating the minimum quorum, then a valid meeting can be held only if the majority of all the members of the body, deliberate in the process of decision making. On the same analogy therefore, a valid decision by such a body will necessitate a decision by a simple majority of all the members of the body. If the aforesaid principles are made applicable to the NJAC, the natural outcome would be, that a valid meeting of the NJAC must have at least four Members participating in a six–Member NJAC. Likewise, a valid decision of the NJAC can only be taken (in the absence of any prescribed prerequisite), by a simple majority, namely, by at least four Members of the NJAC (three Members on either side, would not make up the simple majority). We are satisfied, that the provisions of the NJAC Act which mandate, that the NJAC would not make a recommendation in favour of a person for appointment as a Judge of the High Court or of the Supreme Court, if any two Members thereof did not agree with such recommendation, cannot be considered to be in violation of the rule/principle expressed above. As a matter of fact, the NJAC Act expressly provides, that if any two Members thereof did not agree to any particular proposal, the NJAC would not make a recommendation. There is nothing in law, to consider or treat the aforesaid stipulations in the second proviso to Section 5(2) and Section 6(6) of the NJAC Act, as unacceptable. The instant submission advanced at the hands of the learned counsel for the petitioners is therefore liable to be rejected, and is accordingly rejected.

234. We have also given our thoughtful consideration to the other contentions advanced at the hands of the learned counsel for the petitioners, with reference to Section 5 of the NJAC Act. We are of the view, that it was not within the realm of Parliament, to subject the process of selection of Judges to the Supreme Court, as well as, to the position of Chief Justice of India, in uncertain and ambiguous terms. It was imperative to express, the clear parameters of the term "fit", with reference to the senior most Judge of the Supreme Court under Section 5 of the NJAC Act. We are satisfied, that the term "fit" can be tailor-made, to choose a candidate far below in the seniority list. This has been adequately demonstrated by the learned counsel for the petitioners.

235. The clear stance adopted by the learned Attorney General, that the term "fit" expressed in Section 5(1) of the NJAC Act, had been accepted by the Government, to mean and include, only "…mental and physical fitness…", to discharge the onerous responsibilities of the office of Chief Justice of India, and nothing more. Such a statement cannot, and does not, bind successor Governments or the posterity for all times to come. The present wisdom, cannot bind future generations. And, it was exactly for this reason, that the respondents could resile from the statement made by the then Attorney General, before the Bench hearing the Third Judges case, that the Union of India was not seeking a review or reconsideration of the judgment in the Second Judges case (that, it had accepted to treat as binding, the decision in the Second Judges case).

And yet, during the course of hearing of the present case, the Union of India did seek a reconsideration of the Second Judges case.

236. Insofar as the challenge to Section 5(1) of the NJAC Act is concerned, we are satisfied to affirm and crystalise the position adopted by the Attorney General, namely, that the term "fit" used in Section 5(1) would be read to mean only "… mental and physical fitness …". If that is done, it would be legal and constitutional. However, if the position adopted breached the "independence of the judiciary", in the manner suggested by the learned counsel for the petitioners, the same would be assailable in law.

237. We will now endeavour, to address the second submission with reference to Section 5 of the NJAC Act. Undoubtedly, postulating "seniority" in the first proviso under Section 5(2) of the NJAC Act, is a laudable objective. And if seniority is to be supplemented and enmeshed with "ability and merit", the most ideal approach, can be seen to have been adopted. But what appears on paper, may sometimes not be correct in practice. Experience shows, that Judges to every High Court are appointed in batches, each batch may have just two or three appointees, or may sometimes have even ten or more individuals. A group of Judges appointed to one High Court, will be separated from the lot of Judges appointed to another High Court, by just a few days, or by just a few weeks, and sometimes by just a few months. In the all India seniority of Judges, the complete batch appointed on the same day, to one High Court, will be placed in a running serial order (in seniority)

above the other Judges appointed to another High Court, just after a few days or weeks or months. Judges appointed later, will have to be placed en masse below the earlier batch, in seniority. If appointment of Judges to the Supreme Court, is to be made on the basis of seniority (as a primary consideration), then the earlier batch would have priority in the matter of elevation to the Supreme Court. And hypothetically, if the batch had ten Judges (appointed together to a particular High Court), and if all of them have proved themselves able and meritorious as High Court Judges, they will have to be appointed one after the other, when vacancies of Judges arise in the Supreme Court. In that view of the matter, Judges from the same High Court would be appointed to the Supreme Court, till the entire batch is exhausted. Judges from the same High Court, in the above situation where the batch comprised of ten Judges, will occupy a third of the total Judge positions in the Supreme Court. That would be clearly unacceptable, for the reasons indicated by the learned counsel for the petitioners. We also find the position, unacceptable in law.

238. Therefore, insofar as Section 5(2) of the NJAC Act is concerned, there cannot be any doubt, that consideration of Judges on the basis of their seniority, by treating the same as a primary consideration, would adversely affect the present convention of ensuring representation from as many State High Courts, as is possible. The convention in vogue is, to maintain regional representation. For the reasons recorded above, the first proviso under Section 5(2) is liable to be struck down and set aside.

Section 6(1) applies to appointment of a Judge of a High Court as Chief Justice of a High Court. It has the same seniority connotation as has been expressed hereinabove, with reference to the first proviso under Section 5(2). For exactly the same reasons as have been noticed above, based on seniority (as a primary consideration), ten High Courts in different States could have Chief Justices drawn from one parent High Court. Section 6(1) of the NJAC Act was therefore liable to meet the same fate, as the first proviso under Section 5(2).

239. We are also of the considered view, that the power of veto vested in any two Members of the NJAC, would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). Details in this behalf have already been recorded in part VIII hereinabove. Section 6(6) of the NJAC Act, has the same connotation as the second proviso under Section 5(2), and Section 6(6) of the NJAC Act would therefore meet the same fate, as Section 5(2). For the reasons recorded hereinabove, we are satisfied, that Sections 5(2) and 6(6) of the NJAC Act also breach the "basic structure" of the Constitution, with reference to the "independence of the judiciary" and the "separation of powers". Sections 5(2) and 6(6), in our considered view, are therefore, also liable to be declared as *ultra vires* the Constitution.

240. A challenge was also raised by the learned counsel for the petitioners to Section 7 of the NJAC Act. It was asserted, that on the recommendation made by the NJAC, the President was obliged to appoint

the individual recommended as a Judge of the High Court under Article 217(1). It was submitted, that the above position was identical to the position contemplated under Article 124(2), which also provides, that a candidate recommended by the NJAC would be appointed by the President, as a Judge of the Supreme Court. It was submitted, that neither Article 124(2) nor Article 217(1) postulate, that the President could require the NJAC to reconsider, the recommendation made by the NJAC, as has been provided for under the first proviso to Section 7 of the NJAC Act. It was accordingly the contention of the learned counsel for the petitioners, that the first proviso to Section 7 was *ultra vires* the provisions of Articles 124(2) and 217(1), by providing for reconsideration, and that, the same was beyond the pale and scope of the provisions referred to above.

241. Having considered the submission advanced by the learned counsel for the petitioners in the foregoing paragraph, it is not possible for us to accept that Section 7 of the NJAC Act, by providing that the President could require the NJAC to reconsider a recommendation made by it, would in any manner violate Articles 124(2) and 217(1) (which mandate, that Judges would be appointed by the President on the recommendation of the NJAC). It would be improper to infer, that the action of the President, requiring the NJAC to reconsider its proposal, amounted to rejecting the proposal made by the NJAC. For, if the NJAC was to reiterate the proposal made earlier, the President even in terms of Section 7, was bound to act in consonance therewith (as is apparent from the

second proviso under Section 7 of the NJAC Act). In our considered view, the instant submission advanced at the hands of the petitioners deserves to be rejected, and is accordingly rejected.

242. Learned counsel for the petitioners had also assailed the validity of Section 8 of the NJAC Act, which provides for the Secretary to the Government of India, in the Department of Justice, to be the convener of the NJAC. It was contended, that the function of a convener, with reference to the NJAC, would entail the responsibility of *inter alia* preparing the agenda for the meetings of the NJAC, namely, to decide the names of the individuals to be taken up for consideration, in the next meeting. This would also include, the decision to ignore names from being taken up for consideration in the next meeting. He may include or exclude names from consideration, at the behest of his superior. It would also be the responsibility of the convener, to compile data made available from various quarters, as contemplated under the NJAC Act, and in addition thereto, as may be required by the Union Minister in charge of Law and Justice, and the Chief Justice of India. It was submitted, that such an onerous responsibility, could not be left to the executive alone, because material could be selectively placed by the convener before the NJAC, in deference to the desire of his superior – the Union Minister in charge of Law and Justice, by excluding favourable material, with reference to a candidate considered unsuitable by the executive, and by excluding unfavourable material, with reference to a candidate who carried favour with the executive.

243. It was additionally submitted, that it was imperative to exclude all executive participation in the proceedings of the NJAC for two reasons. Firstly, the executive was the largest individual litigant, in matters pending before the higher judiciary, and therefore, cannot have any discretionary role in the process of selection and appointment of Judges to the higher judiciary (in the manner expressed in the preceding paragraph). And secondly, the same would undermine the concepts of "separation of powers" and "independence of the judiciary", whereunder the judiciary has to be shielded from any possible interference, either from the executive or the legislature.

244. We have given our thoughtful consideration to the above two submissions, dealt with in the preceding two paragraphs. We have already concluded earlier, that the participation of the Union Minister in charge of Law and Justice, as a Member of the NJAC, as contemplated under Article 124A(1), in the matter of appointment of Judges to the higher judiciary, would breach the concepts of "separation of powers" and the "independence of the judiciary", which are both undisputedly components of the "basic structure" of the Constitution of India. For exactly the same reasons, we are of the view, that Section 8 of the NJAC Act which provides, that the Secretary to the Government of India, in the Department of Justice, would be the convener of the NJAC, is not sustainable in law. In a body like the NJAC, the administrative functioning cannot be under executive or legislative control. The only remaining alternative, is to vest the administrative control of such a

body, with the judiciary. For the above reasons, Section 8 of the NJAC Act would likewise be unsustainable in law.

245. Examined from the legal perspective, it was unnecessary for us to examine the individual provisions of the NJAC Act. Once the constitutional validity of Article 124A(1) is held to be unsustainable, the impugned constitutional amendment, as well as, the NJAC Act, would be rendered a nullity. The necessity of dealing with some of the issues was prompted by the consideration, that broad parameters should be expressed.

V. THE EFFECT OF STRIKING DOWN THE IMPUGNED CONSTITUTIONAL AMENDMENT:

246. Would the amended provisions of the Constitution revive, if the impugned constitutional amendment was to be set aside, as being violative of the "basic structure" of the Constitution? It would be relevant to mention, that the instant issue was not adverted to by the learned counsel for the petitioners, possibly on the assumption, that if on a consideration of the present controversy, this Court would strike down the Constitution (99th Amendment) Act, then Articles 124, 127, 128, 217, 222, 224, 224A and 231, as they existed prior to the impugned amendment, would revive. And on such revival, the judgments rendered in the Second and Third Judges cases, would again regulate selections and appointments, as also, transfer of Judges of the higher judiciary.

247. A serious objection to the aforesaid assumption, was raised on behalf of the respondents by the Solicitor General, who contended, that

the striking down of the impugned constitutional amendment, would not result in the revival of the provisions, which had been amended by the Parliament. In order to canvass the aforesaid proposition, reliance was placed on Article 367, which postulates, that the provisions of the General Clauses Act, 1897 had to be applied, for an interpretation of the Articles of the Constitution, in the same manner, as the provisions of the General Clauses Act, are applicable for an interpretation of ordinary legislation. Insofar as the instant submission is concerned, we have no hesitation in affirming, that unless the context requires otherwise, the provisions of the General Clauses Act, can be applied, for a rightful and effective understanding of the provisions of the Constitution.

248. Founded on the submission noticed in the foregoing paragraph, the Solicitor General placed reliance on Sections 6, 7 and 8 of the General Clauses Act, which are being extracted hereunder:

"6. Effect of repeal.-Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--
(a) revive anything not in force or existing at the time at which the repeal takes effect; or
(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;
and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

7. Revival of repealed enactments.-(1) In any Central Act or Regulation made after the commencement of this Act, it shall be necessary, for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.
(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.
8. Construction of references to repealed enactments.-(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.
(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

249. Relying on Section 6, it was submitted, that the setting aside of the impugned constitutional amendment, should be considered as setting aside of a repealing provision. And as such, the acceptance of the claim of the petitioners, would not lead to the automatic revival of the provisions as they existed prior to the amendment. Relying on Section 7 it was asserted, that if a repealed provision had to be revived, it was imperative for the legislature to express such intendment, and unless so expressly indicated, the enactment wholly or partly repealed, would not stand revived. Finally relying on Section 8 of the General Clauses Act, it was submitted, that when an existing provision was repealed and another provision was re-enacted as its replacement, no further reference could be made to the repealed enactment, and for all intents and purposes, reference must mandatorily be made, only to the re-enacted provision. Relying on the principles underlying Sections 6, 7 and 8, it

was submitted, that even if the prayers made by the petitioners were to be accepted, and the impugned constitutional amendment was to be set aside, the same would not result in the revival of the unamended provisions.

250. Learned Solicitor General also referred to a number of judgments rendered by this Court, to support the inference drawn by him. We shall therefore, in the first instance, examine the judgments relied upon:

(i) Reliance in the first instance was placed on the Ameer-un-Nissa Begum case[70]. Our pointed attention was drawn to the observations recorded in paragraph 24 thereof, which is reproduced hereunder:

"24 The result will be the same even if we proceed on the footing that the various 'Firmans' issued by the Nizam were in the nature of legislative enactments determining private rights somewhat on the analogy of private Acts of Parliament. We may assume that the 'Firman' of 26-6-1947 was repealed by the 'Firman' of 24-2-1949, and the latter 'Firman' in its turn was repealed by that of 7-9-1949. Under the English Common Law when a repealing enactment was repealed by another statute, the repeal of the second Act revived the former Act 'ab initio'. But this rule does not apply to repealing Acts passed since 1850 and now if an Act repealing a former Act is itself repealed, the last repeal does not revive the Act before repealed unless words are added reviving it: vide Maxwell's Interpretation of Statutes, p. 402 (10th Edition).
It may indeed be said that the present rule is the result of the statutory provisions introduced by the Interpretation Act of 1889 and as we are not bound by the provisions of any English statute, we can still apply the English Common Law rule if it appears to us to be reasonable and proper. But even according to the Common Law doctrine, the repeal of the repealing enactment would not revive the original Act if the second repealing enactment manifests an intention to the contrary…."

Having given our thoughtful consideration to the conclusions recorded in the judgment relied upon, we are satisfied, that the same does not support the cause of the respondents, because in the judgment relied upon, it was clearly concluded, that under the English Common Law

when a repealing enactment was repealed by another law, the repeal of the second enactment would revive the former "*ab initio*". In the above view of the matter, based exclusively on the English Common Law, on the setting aside of the impugned constitutional amendment, the unamended provision, would stand revived. It also needs to be noticed, that the final position to the contrary, expressed in the judgment relied upon, emerged as a consequence of subsequent legislative enactment, made in England, which is inapplicable to India. Having taken the above subsequent amendments into consideration, it was concluded, that the repeal of the repealing enactment would not revive the original enactment, except "… if the second repealing enactment manifests an intention to the contrary. …" In other words, the implication would be, that the original Act would revive, but for an intention to the contrary expressed in the repealing enactment. It is however needs to be kept in mind, that the above judgment, did not deal with an exigency where the provision enacted by the legislation had been set aside by a Court order.

(ii) Reliance was then placed on the Firm A.T.B. Mehtab Majid & Co. case[71], and more particularly, the conclusions drawn in paragraph 20 thereof. A perusal of the above judgment would reveal, that this Court had recorded its conclusions, without relying on either the English Common Law, or the provisions of the General Clauses Act, which constituted the foundation of the contentions advanced at the hands of the respondents, before us. We are therefore satisfied, that the conclusions drawn in the instant judgment, would not be applicable, to

arrive at a conclusion one way or the other, insofar as the present controversy is concerned.

(iii) Reference was thereafter made to the B.N. Tewari case[72], and our attention was drawn to the following observations:

"6. We shall first consider the question whether the carry forward rule of 1952 still exists. It is true that in Devadasan's case, AIR 1964 SC 179, the final order of this Court was in these terms:-
"In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid."
That however does not mean that this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive. We are therefore of opinion that after the judgment of this Court in Devadasan's case AIR 1964 SC 179 there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place. But it must be made clear that the judgment of this Court in Devadasan's case AIR 1964 SC 179, is only concerned with that part of the instructions of the Government of India which deal with the carry forward rule; it does not in any way touch the reservation for scheduled castes and scheduled tribes at 12-1/2% and 5%, respectively; nor does it touch the filling up of schedule tribes vacancies by scheduled caste candidates where sufficient number of scheduled tribes are not available in a particular year or vice versa. The effect of the judgment in Devadasan's case, AIR 1964 SC 179, therefore is only to strike down the carry forward rule and it does not affect the year to year reservation for scheduled castes and scheduled tribes or filling up of scheduled tribe vacancies by a member of scheduled castes in a particular year if a sufficient number of scheduled tribe candidates are not available in that year of vice versa. This adjustment in the reservation between scheduled castes and tribes has nothing to do with the carry forward rule from year to year either of 1952 which had ceased to exist or of 1955 which was struck down by this Court. In this view of the matter it is unnecessary to consider whether the carry

forward rule of 1952 would be unconstitutional, for that rule no longer exists."

The non-revival of the carry-forward-rule of 1952, which was sought to be modified in 1955, determined in the instant judgment, was not on account of the submissions, that have been advanced before us in the present controversy. But, on account of the fact, that the Government of India had itself cancelled the carry-forward-rule of 1952. Moreover, the issue under consideration in the above judgment, was not akin to the controversy in hand. As such, we are satisfied that reliance on the B.N. Tewari case[72] is clearly misplaced.

(iv) Relying on the Koteswar Vittal Kamath case[73], learned Solicitor General placed reliance on the following observations recorded therein:

"8. On that analogy, it was argued that, if we hold that the Prohibition Order of 1950, was invalid, the previous Prohibition Order of 1119, cannot be held to be revived. This argument ignores the distinction between supersession of a rule, and substitution of a rule. In the case of Firm A. T. B. Mehtab Majid & Co. (supra), the new Rule 16 was substituted for the old Rule 16. The process of substitution consists of two steps. First, the old rule it made to cease to exist and, next, the new rule is brought into existence in its place. Even if the new rule be invalid, the first step of the old rule ceasing to exist comes into effect, and it was for this reason that the court held that, on declaration of the new rule as invalid, the old rule could not be held to be revived. In the case before us, there was no substitution of the Prohibition Order of 1950, for the Prohibition Order of 1119. The Prohibition Order of 1950, was promulgated independently of the Prohibition Order of 1119 and because of the provisions of law it would have had the effect of making the Prohibition Order of 1119 inoperative if it had been a valid Order. If the Prohibition Order of 1950 is found to be void ab initio, it could never make the Prohibition Order of 1119 inoperative. Consequently, on the 30th March, 1950, either the Prohibition Order of 1119 or the Prohibition Order of 1950 must be held to have been in force in Travancore-Cochin, so that the provisions of Section 73(2) of Act 5 of 1950 would apply to that Order and would continue it in force. This further continuance after Act 5 of 1950, of course, depends on the validity of Section 3 of Act 5 of 1950, because Section 73(2) purported to continue the Order in force

under that section, so that we proceed to examine the argument relating to the validity of Section 3 of Act 5 of 1950."

A perusal of the conclusion drawn hereinabove, apparently supports the contention advanced at the hands of the respondents, that if the amendment to an erstwhile legislative enactment, envisages the substitution of an existing provision, the process of substitution must be deemed to comprise of two steps. The first step would envisage, that the old rule would cease to exist, and the second step would envisage, that the new rule had taken the place of the old rule. And as such, even if the new rule was to be declared as invalid, the first step depicted above, namely, that the old rule has ceased to exist, would remain unaltered. Thereby, leading to the inference, that in the present controversy, even if the impugned constitutional amendment was to be set aside, the same would not lead to the revival of the unamended Articles 124, 127, 128, 217, 222, 224, 224A and 231. In our considered view, the observations made in the judgment leading to the submissions and inferences recorded above, are not applicable to the present case. The highlighted portion of the judgment extracted above, would apply to the present controversy. In the present case the impugned constitutional amendment was promulgated independently of the original provisions of the Constitution. In fact, the amended provisions introduce a new scheme of selection and appointment of Judges to the higher judiciary, directionally different from the prevailing position. And therefore, the original provisions of the Constitution would have been made inoperative, only if

the amended provisions were valid. Consequently, if reliance must be placed on the above judgment, the conclusion would be against the proposition canvassed. It would however be relevant to mention, that the instant judgment, as also, some of the other judgments relied upon by the learned counsel for the respondents, have been explained and distinguished in the State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd.[76], which will be dealt with chronologically hereinafter.

(v) The learned Solicitor General then placed reliance on, the Mulchand Odhavji case[74], and invited our attention to the observations recorded in paragraph 8 thereof. Reliance was even placed on, the Mohd. Shaukat Hussain Khan case[75], and in particular, the observations recorded in paragraph 11 thereof. We are satisfied, that the instant two judgments are irrelevant for the determination of the pointed contention, advanced at the hands of the learned counsel for the respondents, as the subject matter of the controversy dealt with in the above cases, was totally different from the one in hand.

(vi) Reference was then made to the Central Provinces Manganese Ore Co. Ltd. case[76], and our attention was drawn to the following observations recorded therein:

"18. We do not think that the word substitution necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. Indeed, the natural meaning of the word "substitution" is to indicate that the process cannot be split up into two pieces like this. If the process described as substitution fails, it is totally ineffective so as to leave intact what was sought to be displaced. That seems to us to be the ordinary and natural

meaning of the words "shall be substituted". This part could not become effective without the assent of the Governor-General. The State Governor's assent was insufficient. It could not be inferred that, what was intended was that, in case the substitution failed or proved ineffective, some repeal, not mentioned at all, was brought about and remained effective so as to create what may be described as a vacuum in the statutory law on the subject-matter. Primarily, the question is one of gathering, the intent from the use of words in the enacting provision seen in the light of the procedure gone through. Here, no intention to repeal, without a substitution, is deducible. In other words, there could be no repeal if substitution failed. The two were a part and parcel of a single indivisible process and not bits of a disjointed operation.

19. Looking at the actual procedure which was gone through, we find that, even if the Governor had assented to the substitution, yet, the amendment would have been effective, as a piece of valid legislation, only when the assent of the Governor-General had also been accorded to it. It could not be said that what the Legislature intended or what the Governor had assented to consisted of a separate repeal and a fresh enactment. The two results were to follow from one and the same effective Legislative process. The process had, therefore, to be so viewed and interpreted.

20. Some help was sought to be derived by the citation of B.N. Tewari v. Union of India [1965]2 SCR 421 and the case of Firm A. T. B. Mehtab Majid and Co. v. State of Madras. Tewari's case related to the substitution of what was described as the "carry forward" rule contained in the departmental instruction which was sought to be substituted by a modified instruction declared invalid by the court. It was held that when the rule contained in the modified instruction of 1955 was struck down the rule contained in a displaced instruction did not survive. Indeed, one of the arguments there was that the original "carry forward" rule of 1952 was itself void for the very reason for which the "carry forward" rule, contained in the modified instructions of 1955, had been struck down. Even the analogy of a merger of an order into another which was meant to be its substitute could apply only where there is a valid substitution. Such a doctrine applies in a case where a judgment of a subordinate court merges in the judgment of the appellate court or an order reviewed merges in the order by which the review is granted. Its application to a legislative process may be possible only in cases of valid substitution. The legislative intent and its effect is gathered, inter alia, from the nature of the action of the authority which functions. It is easier to impute an intention to an executive rule-making authority to repeal altogether in any event what is sought to be displaced by another rule. The cases cited were of executive instructions. We do not think that they could serve as useful guides in interpreting a Legislative provision sought to be amended by a fresh enactment. The procedure for enactment is far more elaborate and formal. A repeal and a displacement of a Legislative provision by a fresh enactment can only take place after that elaborate

procedure has been followed in toto. In the case of any rule contained in an executive instruction, on the other hand, the repeal as well as displacement are capable of being achieved and inferred from a bare issue of fresh instructions on the same subject.

21. In Mehtab Majid & Co.'s case a statutory role was held not to have revived after it was sought to be substituted by another held to be invalid. This was also a case in which no elaborate legislative procedure was prescribed for a repeal as it is in the case of statutory enactment of statutes by legislatures. In every case, it is a question of intention to be gathered from the language as well as the acts of the rule-making or legislating authority in the context in which these occur.

22. A principle of construction contained now in a statutory provision made in England since 1850 has been:

Where an Act passed after 1850 repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into operation. (See: Halsbury's Laws of England, Third Edn. Vol. 36, P. 474; Craies on "Statute Law", 6th Edn. p.386).

Although, there is no corresponding provision in our General Clauses Acts, yet, it shows that the mere use of words denoting a substitution does not ipso facto or automatically repeal a provision until the provision, which is to take its place becomes legally effective. We have as explained above, reached the same conclusion by considering the ordinary and natural meaning of the term "substitution" when it occurs without anything else in the language used or in the context of it or in the surrounding facts and circumstances to lead to another inference. It means, ordinarily, that unless the substituted provision is there to take its place, in law and in effect, the pre-existing provision continues. There is no question of a "revival".”

It would be relevant to mention, that the learned Solicitor General conceded, that the position concluded in the instant judgment, would defeat the stance adopted by him. We endorse the above view. The position which is further detrimental to the contention advanced on behalf of the respondents is, that in recording the above conclusions, this Court in the above cited case, had taken into consideration, the judgments in the Firm A.T.B. Mehtab Majid case[71], the B.N. Tewari case[72], the Koteswar Vittal Kamath case[73], and the Mulchand Odhavji case[74]. The earlier judgments relied upon by the learned counsel for the

respondents would, therefore, be clearly inapplicable to the controversy in hand. In this view of the matter, there is hardly any substance in the pointed issue canvassed on behalf of the respondents.

(vii) The learned Solicitor General, then placed reliance on Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India[95], and invited our attention to the following observations recorded therein:

"107. In the cases before us we do not have rules made by two different authorities as in Mulchand case (1971) 3 SCC 53 and no intention on the part of the Central Government to keep alive the exemption in the event of the subsequent notification being struck down is also established. The decision of this Court in Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. (1969) 3 SCR 40) does not also support the Petitioners. In that case again the question was whether a subsequent legislation which was passed by a legislature without competence would have the effect of reviving an earlier rule which it professed to supersede. This case again belongs to the category of Mohd. Shaukat Hussain Khan case, AIR 1974 SC 1480. It may also be noticed that in Koteswar Vittal Kamath case, AIR 1969 SC 504, the ruling in the case of Firm A.T.B. Mehtab Majid and Co. AIR 1963 SC 928 has been distinguished. The case of State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd., AIR 1977 SC 879 is again distinguishable. In this case the whole legislative process termed substitution was abortive, because, it did not take effect for want of the assent of the Governor-General and the Court distinguished that case from Tiwari case, AIR 1965 SC 1430. We may also state that the legal effect on an earlier law when the later law enacted in its place is declared invalid does not depend merely upon the use of words like, 'substitution', or 'supersession'. It depends upon the totality of circumstances and the context in which they are used."

What needs to be noticed from the extract reproduced above is, that this Court in the above judgment clearly concluded, that the legal effect on an earlier law, when the later law enacted in its place was declared invalid, did not depend merely upon the use of the words like 'substitution' or, 'supersession'. And further, that it would depend on the totality of the

[95] (1985) 1 SCC 641

circumstances, and the context, in which the provision was couched. If the contention advanced by the learned Solicitor General is accepted, it would lead to a constitutional breakdown. The tremors of such a situation are already being felt. The retiring Judges of the higher judiciary, are not being substituted by fresh appointments. The above judgment, in our considered view, does not support the submission being canvassed, because on consideration of the "…totality of circumstances and the context…" the instant contention is just not acceptable. We are therefore of the considered view, that even the instant judgment can be of no avail to the respondents, insofar as the present controversy is concerned.

(viii) Reliance was next placed on the judgment rendered by this Court in Bhagat Ram Sharma v. Union of India[96]. The instant judgment was relied upon only to show, that an enactment purported to be an amendment, has the same qualitative effect as a repeal of the existing statutory provision. The aforesaid inference was drawn by placing reliance on Southerland's Statutory Construction, 3rd Edition, Volume I. Since there is no quarrel on the instant proposition, it is not necessary to record anything further. It however needs to be noticed, that we are not confronted with the effect of an amendment or a repeal. We are dealing with the effect of the striking down of a constitutional amendment and a legislative enactment, through a process of judicial review.

[96] 1988 (Supp) SCC 30

(ix) Reliance was then placed on State of Rajasthan v. Mangilal Pindwal[97], and particularly on the observations/conclusions recorded in paragraph 12 thereof. All that needs to be stated is, that the issue decided in the above judgment, does not arise for consideration in the present case, and accordingly, the conclusions drawn therein cannot be made applicable to the present case.

(x) Next in order, reliance was placed on the India Tobacco Co. Ltd. case[77], and our attention was invited to the following observations recorded therein:

"15. The general rule of construction is that the repeal of a repealing Act does not revive anything repealed thereby. But the operation of this rule is not absolute. It is subject to the appearance of a "different intention" in the repealing statute. Again, such intention may be explicit or implicit. The questions, therefore, that arise for determination are: Whether in relation to cigarettes, the 1941 Act was repealed by the 1954 Act and the latter by the 1958 Act? Whether the 1954 Act and 1958 Act were repealing enactments? Whether there is anything in the 1954 Act and the 1958 Act indicating a revival of the 1941 Act in relation to cigarettes?
16. It is now well settled that "repeal" connotes abrogation or obliteration of one statute by another, from the statute book as completely "as if it had never been passed"; when an Act is repealed, "it must be considered (except as to transactions past and closed) as if it had never existed". (Per Tindal, C.J. in Kay v. Goodwin (1830) 6 Bing 576, 582 and Lord Tenterdon in Surtees v. Ellison (1829) 9 B&C 750, 752 cited with approval in State of Orissa v. M.A. Tulloch & Co., AIR 1964 SC 1284).
17. Repeal is not a matter of mere from but one of substance, depending upon the intention of the Legislature. If the intention, indicated expressly or by necessary implication in the subsequent statute, was to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to a repeal - (see Craies on statute Law, 7th Edn. pp. 349, 353, 373, 374 and 375; Maxwell's Interpretation of Statutes, 11th Edn. pp. 164, 390 based on Mount v. Taylor (1868) L.R. 3 C.P. 645; Southerland's Statutory

[97] (1996) 5 SCC 60

Construction 3rd Edn. Vol. I, paragraphs 2014 and 2022, pp. 468 and 490). Broadly speaking, the principal object of a Repealing and Amending Act is to 'excise dead matter, prune off superfluities and reject clearly inconsistent enactments'-see Mohinder Singh v. Mst. Harbhajan Kaur."

What needs to be kept in mind, as we have repeatedly expressed above is, that the issue canvassed in the judgments relied upon, was the effect of a voluntary decision of a legislature in amending or repealing an existing provision. That position would arise, if the Parliament had validly amended or repealed an existing constitutional provision. Herein, the impugned constitutional amendment has definetly the effct of substituting some of the existing provisions of the Constitution, and also, adding to it some new provisions. Naturally substitution connotes, that the earlier provision ceases to exist, and the amended provision takes its place. The present situation is one where, the impugned constitutional amendment by a process of judicial review, has been set aside. Such being the position, whatever be the cause and effect of the impugned constitutional amendment, the same will be deemed to be set aside, and the position preceding the amendment will be restored. It does not matter what are the stages or steps of the cause and effect of the amendment, all the stages and steps will stand negated, in the same fashion as they were introduced by the amendment, when the amended provisions are set aside.

(xi) In addition to the above judgment, reliance was also placed on the Kolhapur Canesugar Works Ltd. case[78], West U.P. Sugar Mills

Association v. State of U.P.[98], Gammon India Ltd. v. Special Chief Secretary[99], the Hirendra Pal Singh case[79], the Joint Action Committee of Air Line Pilots' Associations of India case[80], and the K. Shyam Sunder case[81]. The conclusions drawn in the above noted judgments were either based on the judgments already dealt with by us hereinabove, or on general principles. It is not necessary to examine all the above judgments, by expressly taking note of the observations recorded in each of them.

251. Even though we have already recorded our determination with reference to the judgments cited by the learned Solicitor General, it is imperative for us to record, that it is evident from the conclusions returned in the Central Provinces Manganese Ore Co. Ltd. case[76], that in the facts and circumstances of the present case, it would have to be kept in mind, that if the construction suggested by the learned Solicitor General was to be adopted, it would result in the creation of a void. We say so, because if neither the impugned constitutional provision, nor the amended provisions of the Constitution would survive, it would lead to a breakdown of the constitutional machinery, inasmuch as, there would be a lacuna or a hiatus, insofar as the manner of selection and appointment of Judges to the higher judiciary is concerned. Such a position, in our view, cannot be the result of any sound process of interpretation. Likewise, from the observations emerging out of the decision rendered in the Indian Express Newspapers (Bombay) Pvt. Ltd. case[95], we are

[98] (2002) 2 SCC 645
[99] (2006) 3 SCC 354

satisfied, that the clear intent of the Parliament, while enacting the Constitution (99th Amendment) Act, was to provide for a new process of selection and appointment of Judges to the higher judiciary by amending the existing provisions. Naturally therefore, when the amended provision postulating a different procedure is set aside, the original process of selection and appointment under the unamended provisions would revive. The above position also emerges from the legal position declared in the Koteswar Vittal Kamath case[73].

252. It is not possible for us to accept the inferential contentions, advanced at the hands of the learned counsel for the respondents by placing reliance on Sections 6, 7 and 8 of the General Clauses Act. We say so, because the contention of the learned Solicitor General was based on the assumption, that a judicial verdict setting aside an amendment, has the same effect as a repeal of an enactment through a legislation. This is an unacceptable assumption. When a legislature amends or repeals an existing provision, its action is of its own free will, and is premised on well founded principles of interpretation, including the provisions of the General Causes Act. Not so when an amendment/repeal is set aside through a judicial process. It is not necessary to repeat the consideration recorded in paragraph 250(ix) above. When a judgment sets aside, an amendment or a repeal by the legislature, it is but natural that the *status quo ante*, would stand restored.

253. For the reasons recorded hereinabove, we are of the view, that in case of setting aside of the impugned Constitution (99th Amendment)

Act, the provisions of the Constitution sought to be amended thereby, would automatically revive.

VI. CONCLUSIONS:

254. Article 124A constitutes the edifice of the Constitution (99th Amendment) Act, 2014. The striking down of Article 124A would automatically lead to the undoing of the amendments made to Articles 124, 124B, 124C, 127, 128, 217, 222, 224, 224A and 231. This, for the simple reason, that the latter Articles are sustainable only if Article 124A is upheld. Article 124A(1) provides for the constitution and the composition of the National Judicial Appointments Commission (NJAC). Its perusal reveals, that it is composed of the following:

(a) the Chief Justice of India, Chairperson, *ex officio*;

(b) two other senior Judges of Supreme Court, next to the Chief Justice of India – Members, *ex officio*;

(c) the Union Minister in charge of Law and Justice – Member, *ex officio*;

(d) two eminent persons, to be nominated – Members.

If the inclusion of anyone of the Members of the NJAC is held to be unconstitutional, Article 124A will be rendered nugatory, in its entirety. While adjudicating upon the merits of the submissions advanced at the hands of the learned counsel for the rival parties, I have arrived at the conclusion, that clauses (a) and (b) of Article 124A(1) do not provide an adequate representation, to the judicial component in the NJAC, clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary, in the matter of selection and appointment of Judges, to

the higher judiciary (as also transfer of Chief Justices and Judges, from one High Court to another). The same are accordingly, violative of the principle of "independence of the judiciary". I have independently arrived at the conclusion, that clause (c) of Article 124A(1) is *ultra vires* the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an *ex officio* Member of the NJAC. Clause (c) of Article 124A(1), in my view, impinges upon the principles of "independence of the judiciary", as well as, "separation of powers". It has also been concluded by me, that clause (d) of Article 124A(1) which provides for the inclusion of two "eminent persons" as Members of the NJAC is *ultra vires* the provisions of the Constitution, for a variety of reasons. The same has also been held as violative of the "basic structure" of the Constitution. In the above view of the matter, I am of the considered view, that all the clauses (a) to (d) of Article 124A(1) are liable to be set aside. The same are, accordingly struck down. In view of the striking down of Article 124A(1), the entire Constitution (99th Amendment) Act, 2014 is liable to be set aside. The same is accordingly hereby struck down in its entirety, as being *ultra vires* the provisions of the Constitution.

255. The contention advanced at the hands of the respondents, to the effect, that the provisions of the Constitution which were sought to be amended by the impugned constitutional amendment, would not revive, even if the challenge raised by the petitioners was accepted (and the Constitution (99th Amendment) Act, 2014, was set aside), has been

considered under a separate head, to the minutest detail, in terms of the submissions advanced. I have concluded, that with the setting aside of the impugned Constitution (99th Amendment) Act, 2014, the provisions of the Constitution sought to be amended thereby, would automatically revive, and the *status quo ante* would stand restored.

256. The National Judicial Appointments Commission Act, 2014 *inter alia* emanates from Article 124C. It has no independent existence in the absence of the NJAC, constituted under Article 124A(1). Since Articles 124A and 124C have been set aside, as a natural corollary, the National Judicial Appointments Commission Act, 2014 is also liable to be set aside, the same is accordingly hereby struck down. In view of the above, it was not essential for us, to have examined the constitutional *vires* of individual provisions of the NJAC Act. I have all the same, examined the challenge raised to Sections 5, 6, 7 and 8 thereof. I have concluded, that Sections 5, 6 and 8 of the NJAC Act are *ultra vires* the provisions of the Constitution.

VII. <u>ACKNOWLEDGEMENT</u>:

257. Before parting with the order, I would like to record my appreciation for the ablest assistance rendered to us, by the learned counsel who addressed us from both the sides. I would also like to extend my deepest sense of appreciation to all the assisting counsel, who had obviously whole heartedly devoted their time and energy in the preparation of the case, and in instructing the arguing counsel. I would be failing in my duty, if I do not express my gratitude to my colleagues on the Bench, as

also, learned counsel who agreed to assist the Bench, during the summer vacation. I therefore, express my gratefulness and indebtedness to them, from the bottom of my heart.

.....J.
(Jagdish Singh Khehar)

Note: The emphases supplied in all the quotations in the instant judgment, are mine.

New Delhi;
October 16, 2015.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 13 OF 2015

Supreme Court Advocates-on-Record - Association and another ... Petitioner(s)

versus

Union of India ... Respondent(s)

With

WRIT PETITION (C) NO. 14 OF 2015
WRIT PETITION (C) NO. 18 OF 2015
WRIT PETITION (C) NO. 23 OF 2015
WRIT PETITION (C) NO. 24 OF 2015
WRIT PETITION (C) NO. 70 OF 2015
WRIT PETITION (C) NO. 83 OF 2015
WRIT PETITION (C) NO. 108 OF 2015
WRIT PETITION (C) NO. 124 OF 2015
WRIT PETITION (C) NO. 209 OF 2015
WRIT PETITION (C) NO. 309 OF 2015
WRIT PETITION (C) NO. 310 OF 2015
WRIT PETITION (C) NO. 323 OF 2015
WRIT PETITION (C) NO. 341 OF 2015
TRANSFER PETITION(C) NO. 391 OF 2015
TRANSFER PETITION(C) NO. 971 OF 2015

ORDER OF THE COURT

1. The prayer for reference to a larger Bench, and for reconsideration of the Second and Third Judges cases [(1993) 4 SCC 441, and (1998) 7 SCC 739, respectively], is rejected.

2. The Constitution (Ninety-ninth Amendment) Act, 2014 is declared unconstitutional and void.

3. The National Judicial Appointments Commission Act, 2014, is declared unconstitutional and void.

4. The system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Courts; and transfer of Chief Justices and Judges of High Courts from one High Court, to another,

as existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014 (called the "collegium system"), is declared to be operative.

5. To consider introduction of appropriate measures, if any, for an improved working of the "collegium system", list on 3.11.2015.

.....J.
(Jagdish Singh Khehar)

.....J.
(J. Chelameswar)

.....J.
(Madan B. Lokur)

.....J.
(Kurian Joseph)

.....J.
(Adarsh Kumar Goel)

New Delhi;
October 16, 2015.

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.13 OF 2015

Supreme Court Advocates-on-Record Association & Another ... Petitioners

Versus

Union of India ... Respondent

WITH

WRIT PETITION (CIVIL) NO.23 OF 2015

WRIT PETITION (CIVIL) NO.70 OF 2015

WRIT PETITION (CIVIL) NO.83 OF 2015

TRANSFER PETITION (CIVIL) NO.391 OF 2015

WRIT PETITION (CIVIL) NO.108 OF 2015

WRIT PETITION (CIVIL) NO.124 OF 2015

WRIT PETITION (CIVIL) NO.14 OF 2015

WRIT PETITION (CIVIL) NO.18 OF 2015

WRIT PETITION (CIVIL) NO.24 OF 2015

AND

WRIT PETITION (CIVIL) NO.209 OF 2015

O R D E R

Chelameswar, J.

1. Very important and far reaching questions fall for the consideration of this Court in this batch of matters. The constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 are under challenge.

2. When these matters were listed for preliminary hearing on 21.04.2015, an objection was raised by Shri Fali S. Nariman, learned senior counsel appearing for one of the petitioners, that it is inappropriate for Justice Jagdish Singh Khehar to participate in the proceedings as the Presiding Judge of this Bench. The objection is predicated on the facts : Being the third senior most Puisne Judge of this Court, Justice Khehar is a member of the collegium propounded under the ***Second Judges case***[100] exercising "significant constitutional power" in the matter of selection of Judges, of this Court as well as High Courts of this country; by virtue of the impugned

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100 Supreme Court Advocates-on-Record Association & Others v. Union of India, (1993) 4 SCC 441

legislation, until he attains the position of being the third senior most Judge of this Court, Justice Khehar would cease to enjoy such power; and therefore, there is a possibility of him not being impartial.

3. When the objection was raised, various counsel appearing on behalf of either side expressed different viewpoints regarding the appropriateness of participation of Justice Khehar in these proceedings. We, therefore, called upon learned counsel appearing in this matter to precisely state their respective points of view on the question and assist the Court in identifying principles of law which are relevant to arrive at the right answer to the objection raised by Shri Fali S. Nariman.

4. The matter was listed again on 22.04.2015 on which date Shri Nariman filed a brief written statement[101] indicating reasons which according to him make it inappropriate for Justice Khehar to preside over the present Bench.

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[101] The position of the Presiding Judge on this Bench hearing these cases of constitutional challenge is not consistent with (and apparently conflicts with) his position as a member of the 'Collegium'; and is likely to be seen as such; always bearing in mind that if the Constitution Amendment and the statute pertaining thereto are held constitutionally valid and are upheld, the present Presiding Judge would no longer be part of the Collegium – The Collegium, it must be acknowledged exercises significant constitutional power.

5. On the other hand, Shri Arvind P. Datar, learned senior counsel appearing for one of the petitioners made elaborate submissions explaining the legal principles which require a Judge to recuse himself from hearing a particular case and submitted that in the light of settled principles of law in this regard there is neither impropriety in Justice Khehar hearing these matters nor any need for him to do so.

6. Shri Mukul Rohatgi, learned Attorney General very vehemently opposed the suggestion of Shri Nariman and submitted that there is nothing in law which demands the recusal of Justice Khehar nor has the Union of India any objection to Justice Khehar hearing these batch of matters.

7. Shri Harish N. Salve and Shri K.K. Venugopal, learned senior counsel who proposed to appear on behalf of different States also supported the stand of the learned Attorney General and made independent submissions in support of the conclusion.

8. After an elaborate hearing of the matter, we came to the unanimous conclusion that there is no principle of law which warrants Justice Khehar's recusal from the proceedings. We recorded the conclusion of the Bench in the proceedings dated 22.04.2015 and indicated that because of paucity of time, the reasons for the conclusion would follow later[102].

9. At the outset, we must record that each of the learned counsel who objected to the participation of Justice Khehar in these proceedings anchored this objection on distinct propositions of law. While Shri Nariman put it on the ground of inappropriateness, Shri Santosh Paul invoked the principle of bias, on the ground of him having conflicting interests - one in his capacity as member of the Collegium and the other in his capacity as a Judge to examine the constitutional validity of the provisions which seek to displace the Collegium system.

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[102] Order dated 22.04.2015 insofar as it is relevant reads thus:

"A preliminary objection, whether Justice Jagdish Singh Khehar should preside over this Bench, by virtue of his being the fourth senior most Judge of this Court, also happens to be a member of the collegium, was raised by the petitioners. Elaborate submissions were made by the learned counsel for the petitioners and the respondents. After hearing all the learned counsel, we are of the unanimous opinion that we do not see any reason in law requiring Justice Jagdish Singh Khehar to recuse himself from hearing the matter. Reasons will follow.

Issue rule. "

In substance, some of the petitioners are of the opinion that Justice Khehar should recuse[103].

10. It is one of the settled principles of a civilised legal system that a Judge is required to be impartial. It is said that the hallmark of a democracy is the existence of an impartial Judge.

11. It all started with a latin maxim *Nemo Judex in Re Sua* which means literally – that no man shall be a judge in his own cause. There is another rule which requires a Judge to be impartial. The theoretical basis is explained by Thomas Hobbes in his Eleventh Law of Nature. He said "If a man be trusted to judge between man and man, it is a precept of the law of Nature that he deal equally between them. For without that, the controversies of men cannot be determined but by war. He therefore, said that is partial in judgment doth what in him lies, to deter men from the use of judges and arbitrators; and consequently, against the fundamental law of Nature, is the cause of war."

[103] The expression 'recuse' according to the New Oxford Dictionary English means – (the act of a Judge) to excuse himself from a case because of possible conflict of interest for lack of impartiality.

12. Grant Hammond, a former Judge of the Court of Appeal of New Zealand and an academician, in his book titled "Judicial Recusal"[104] traced out principles on the law of recusal as developed in England in the following words :-

> "The central feature of the early English common law on recusal was both simple and highly constrained: a judge could only be disqualified for a direct pecuniary interest. What would today be termed 'bias', which is easily the most controversial ground for disqualification, was entirely rejected as a ground for recusal of judges, although it was not completely dismissed in relation to jurors.
>
> This was in marked contrast to the relatively sophisticated canon law, which provided for recusal if a judge was suspected of partiality because of consanguinity, affinity, friendship or enmity with a party, or because of his subordinate status towards a party or because he was or had been a party's advocate."

He also pointed out that in contrast in the United States of America, the subject is covered by legislation.

13. ***Dimes*** *v.* ***Proprietors of Grand Junction Canal***, (1852) 10 ER 301, is one of the earliest cases where the question of disqualification of a Judge was considered. The ground was that he had some pecuniary interest in the matter. We are not concerned with the details of the dispute between the parties to the case. Lord Chancellor Cottenham heard the appeal against an order of the Vice-Chancellor and confirmed the order. The order went

[104] R. Grant Hammond, *Judicial Recusal: Principles, Process and Problems,* (Hart Publishing, 2009).

in favour of the defendant company. A year later, ***Dimes*** discovered that Lord Chancellor Cottenham had shares in the defendant company. He petitioned the Queen for her intervention. The litigation had a long and chequered history, the details of which are not material for us. Eventually, the matter reached the House of Lords. The House dismissed the appeal of ***Dimes*** on the ground that setting aside of the order of the Lord Chancellor would still leave the order of the Vice-Chancellor intact as Lord Chancellor had merely affirmed the order of the Vice-Chancellor. However, the House of Lords held that participation of Lord Cottenham in the adjudicatory process was not justified. Though Lord Campbell observed:

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern: but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest …. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

14. Summing up the principle laid down by the abovementioned case, ***Hammond*** observed as follows:

> "The 'no-pecuniary interest' principle as expressed in ***Dimes*** requires a judge to be automatically disqualified when there is

> neither actual bias nor even an apprehension of bias on the part of that judge. The fundamental philosophical underpinning of ***Dimes*** is therefore predicated on a conflict of interest approach."

15. The next landmark case on the question of "bias" is ***Regina*** *v.* ***Gough***, (1993) AC 646. Gough was convicted for an offence of conspiracy to rob and was sentenced to imprisonment for fifteen years by the Trial Court. It was a trial by Jury. After the conviction was announced, it was brought to the notice of the Trial Court that one of the jurors was a neighbour of the convict. The convict appealed to the Court of Appeal unsuccessfully. One of the grounds on which the conviction was challenged was that, in view of the fact that one of the jurors being a neighbour of the convict presented a possibility of bias on her part and therefore the conviction is unsustainable. The Court of Appeal noticed that there are two lines of authority propounding two different tests for determining disqualification of a Judge on the ground of bias:

(1) "real danger" test; and

(2) "reasonable suspicion" test.

The Court of Appeal confirmed the conviction by applying the "real danger" test.

16. The matter was carried further to the House of Lords.

17. Lord Goff noticed that there are a series of authorities which are "not only large in number but bewildering in their effect". After analyzing the judgment in ***Dimes*** *(supra)*, Lord Goff held:

> "In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

In other words, where a Judge has a pecuniary interest, no further inquiry as to whether there was a "real danger" or "reasonable suspicion" of bias is required to be undertaken. But in other cases, such an inquiry is required and the relevant test is the "real danger" test.

> "But in other cases, the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include …. cases in which the member of the tribunal has an interest in the outcome of the proceedings, which falls short of a direct pecuniary interest. Such interests may vary widely in their nature, in their effect, and in their relevance to the subject matter of the proceedings; and there is no rule …. that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts. "

18. The learned Judge examined various important cases on the subject and finally concluded:

> "Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

19. Lord Woolf agreed with Lord Goff in his separate judgment. He held:

> "There is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings as in ***Dimes*** *v.* ***Proprietors of Grand Junction Canal***, 3 H.L. Case 759. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist."

20. In substance, the Court held that in cases where the Judge has a pecuniary interest in the outcome of the proceedings, his disqualification is automatic. No further enquiry whether such an interest lead to a "real danger" or gave rise to a "reasonable suspicion" is necessary. In cases of other interest, the test to determine whether the

Judge is disqualified to hear the case is the "real danger" test.

21. The ***Pinochet***[105] case added one more category to the cases of automatic disqualification for a judge. Pinochet, a former Chilean dictator, was sought to be arrested and extradited from England for his conduct during his incumbency in office. The issue was whether Pinochet was entitled to immunity from such arrest or extradition. Amnesty International, a charitable organisation, participated in the said proceedings with the leave of the Court. The House of Lords held that Pinochet did not enjoy any such immunity. Subsequently, it came to light that Lord Hoffman, one of the members of the Board which heard the Pinochet case, was a Director and Chairman of a company (known as A.I.C.L.) which was closely linked with Amnesty International. An application was made to the House of Lords to set aside the earlier judgment on the ground of bias on the part of Lord Hoffman.

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[105] ***Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte***, (1999) 1 All E.R. 577

22. The House of Lords examined the following questions;

- Whether the connection of Lord Hoffman with Amnesty International required him to be automatic disqualified?

- Whether an enquiry into the question whether cause of Lord Hoffman's connection with Amnesty International posed a real danger or caused a reasonable apprehension that his judgment is biased – is necessary?

- Did it make any difference that Lord Hoffman was only a member of a company associated with Amnesty International which was in fact interested in securing the extradition of Senator Pinochet?

23. Lord Wilkinson summarised the principles on which a Judge is disqualified to hear a case. As per Lord Wilkinson -

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.
>
> In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is

> sufficient to disqualify him unless he has made sufficient disclosure.

And framed the question;

> "….the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient **automatically to disqualify** a man from sitting as judge in the cause."

He opined that although the earlier cases have "all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification."

24. Lord Wilkinson concluded that Amnesty International and its associate company known as A.I.C.L., had a non-pecuniary interest established that Senator Pinochet was not immune from the process of extradition. He concluded that, "….the matter at issue does not relate to money or economic advantage but is concerned with the **promotion of the cause**, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties"

25. After so concluding, dealing with the last question, whether the fact that Lord Hoffman was only a member of A.I.C.L. but not a member of Amnesty International made any difference to the principle, Lord Wilkinson opined

that even though a judge may not have financial interest in the outcome of a case, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial and held that if the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions. This aspect of the matter was considered in ***P.D. Dinakaran case***[106].

26. From the above decisions, in our opinion, the following principles emerge;

1. If a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case.
2. In cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias.
3. The ***Pinochet case*** added a new category i.e that the Judge is automatically disqualified from hear-

[106] *P.D. Dinakaran(1) v. Judges Inquiry Committee*, (2011) 8 SCC 380, paras 49 to 53.

ing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case.

27. It is nobody's case that, in the case at hand, Justice Khehar had any pecuniary interest or any other interest falling under the second of the above-mentioned categories. By the very nature of the case, no such interest can arise at all.

28. The question is whether the principle of law laid down in ***Pinochet case*** is attracted. In other words, whether Justice Khehar can be said to be sharing any interest which one of the parties is promoting. All the parties to these proceedings claim to be promoting the cause of ensuring the existence of an impartial and independent judiciary. The only difference of opinion between the parties is regarding the process by which such a result is to be achieved. Therefore, it cannot be said that Justice Khehar shares any interest which any one of the parties to the proceeding is seeking to promote.

29. The implication of Shri Nariman's submission is that Justice Khehar would be pre-determined to hold the impugned legislation to be invalid. We fail to understand the stand of the petitioners. If such apprehension of the petitioners comes true, the beneficiaries would be the petitioners only. The grievance, if any, on this ground should be on the part of the respondents.

30. The learned Attorney General appearing for the Union of India made an emphatic statement that the Union of India has no objection for Justice Khehar hearing the matter as a presiding Judge of the Bench.

31. No precedent has been brought to our notice, where courts ruled at the instance of the beneficiary of bias on the part of the adjudicator, that a judgment or an administrative decision is either voidable or void on the ground of bias. On the other hand, it is a well established principle of law that an objection based on bias of the adjudicator can be waived. Courts generally did not entertain such objection raised belatedly by the aggrieved party.

> "The right to object to a disqualified adjudicator may be waived, and this may be so even where the disqualification is statutory.[107] The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisers know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged."[108]

In our opinion, the implication of the above principle is that only a party who has suffered or likely to suffer an adverse adjudication because of the possibility of bias on the part of the adjudicator can raise the objection.

32. The significant power as described by Shri Nariman does not inhere only to the members of the Collegium, but inheres in every Judge of this Court who might be called upon to express his opinion regarding the proposals of various appointments of the High Court Judges, Chief Justices or Judges of this Court, while the members of the Collegium are required to exercise such "significant power" with respect to each and every appointment of the above-mentioned categories, the other Judges of this Court are required to exercise such "significant power", at least with respect to the appointments to or from the High Court with which they

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[107] Wakefield Local Board of Health v. West Riding and Grimsby Rly Co. (1865) 1 Q.B. 84.

[108] R V. Byles ex p. Hollidge (1912) 77 J.P. 40; R. v. Nailsworth Licensing Justices ex p. Bird [1953] 1 W.L.R. 1046; R v. Lilydale Magistrates Court ex p. Ciccone [1973] V.R. 122; and see R. v. Antrim Justices [1895] 2 I.R. 603; Tolputt (H.) & Co. Ltd. v. Mole [1911] 1 K.B. 836; Corrigan v. Irish Land Commission [1977] I.R. 317.

were earlier associated with either as judges or Chief Justices. The argument of Shri Nariman, if accepted would render all the Judges of this Court disqualified from hearing the present controversy. A result not legally permitted by the "doctrine of necessity".

33. For the above-mentioned reasons, we reject the submission that Justice Khehar should recuse from the proceedings.

.....J.
(J. Chelameswar)

.....J.
(Adarsh Kumar Goel)

New Delhi;
October 16, 2015.

Reportable

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TRANSFER PETITION (CIVIL) NO.971 OF 2015

AND

WRIT PETITION (CIVIL) NO.341 OF 2015

J U D G M E N T

Chelameswar, J.

1. We the members of the judiciary exult and frolic in our emancipation from the other two organs of the State. But have we developed an alternate constitutional morality to emancipate us from the theory of checks and balances, robust enough to keep us in control from abusing such independence? Have we acquired independence greater than our intelligence maturity and nature could digest? Have we really outgrown the malady of dependence or merely transferred it from the political to judicial hierarchy? Are we nearing such ethical and constitutional disorder that frightened civil society runs back to Mother Nature or some other less wholesome authority to discipline us? Has all the independence acquired by the judicial branch since 6th October, 1993 been a myth – a euphemism for nepotism enabling *inter alia* promotion of mediocrity or even less

occasionally – are questions at the heart of the debate in this batch of cases by which the petitioners question the validity of the Constitution (99th Amendment) Act, 2014 and The National Judicial Appointments Commission Act, 2014 (hereinafter referred to as the "AMENDMENT" and the "ACT", for the sake of convenience).

2. To understand the present controversy, a look at the relevant provisions of the Constitution of India, as they stood prior to and after the impugned AMENDMENT, is required.

Prior to the AMENDMENT

> **Article 124. Establishment and constitution of Supreme Court**
> (1) There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than thirty other Judges.
> (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years:
> Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:
> xxxx xxxxx xxxxx xxxxx
>
> **Article 217. Appointment and conditions of the office of a Judge of a High Court**
> (1) 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, ……..
> xxxx xxxxx xxxxx xxxxx

3. The pre AMENDMENT text stipulated that the President of India shall appoint Judges of this Court and High Courts of this country (hereinafter the CONSTITUTIONAL COURTS) in consultation with the Chief Justice of India (hereinafter CJI) and other constitutional functionaries indicated in Article 124 and 217. In practice, the appointment process for filling up vacancies was being initiated by the Chief Justice of the concerned High Court or the CJI, as the case may be. Such a procedure was stipulated by a memorandum of the Government of India[109].

After the AMENDMENT

4. Articles 124 and 217 insofar as they are relevant for our purpose read

> "**Article 124** xxxxx xxxxx xxxx
>
> (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A and shall hold office until he attains the age of sixty-five years.
>
> **Article 217** . **Appointment and conditions of the office of a Judge of a High Court** – (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A, and shall hold office, in

109 The details of which are already noted in the judgment of my brother Khehar, J.

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."

5. The AMENDMENT inserted Articles 124A, 124B and 124C.

These provisions read:

"124A (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:-

- the Chief Justice of India, Chairperson, *ex officio*;
- two other senior Judges of the Supreme Court next to the Chief Justice of India – Members, *ex officio*;
- the Union Minister in charge of Law and Justice – Member, *ex officio*
- *t*wo eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People – Members:

  Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women;

  Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

124B. It shall be the duty of the National Judicial Appointments Commission to –

(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

> (c) ensure that the person recommended is of ability and integrity.
>
> 124C. Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.

Consequent amendments to other Articles are also made, details are not necessary.

6. The crux of the AMENDMENT is that the institutional mechanism by which selection and appointment process of the Judges of CONSTITUTIONAL COURTS was undertaken came to be substituted by a new body called the National Judicial Appointments Commission (hereinafter referred to as NJAC). It consists of six members. The CJI is its ex-officio Chairperson. Two senior Judges of the Supreme Court next to the CJI and the Union Law Minister are also ex-officio members, apart from two eminent persons to be nominated by a Committee contemplated in Article 124A (1)(d).

7. Under Article 124B, the NJAC is charged with the duty of recommending persons of ability and integrity for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other

Judges of High Courts and of recommending transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court.

8. Article 124C authorizes Parliament to regulate by law, the procedure for the appointment of Chief Justice and other Judges of the Supreme Court etc. It also empowers the NJAC to make regulations laying down the procedure for the discharge of its functions.

9. Pursuant to the mandate of Article 124C, Parliament made the ACT. For the present, suffice it to note that though the amended text of the Constitution does not so provide, Section 6(6)[110] of the ACT provides that the NJAC shall not recommend a person for appointment, if any two members of the Commission do not agree for such recommendation.

10. The AMENDMENT made far reaching changes in the scheme of the Constitution, insofar as it relates to the selection process of Judges of the CONSTITUTIONAL COURTS. The President is no more obliged for making appointments to CONSTITUTIONAL COURTS to consult the CJI, the Chief Justices

[110] **Section 6 (6)**. "The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation."

of High Courts and Governors of the States but is obliged to consult the NJAC.

11. The challenge to the AMENDMENT is principally on the ground that such substitution undermines the independence of the judiciary. It is contended that independence of judiciary is a part of the basic structure of the Constitution and the AMENDMENT is subversive of such independence. Hence, it is beyond the competence of the Parliament in view of the law declared by this Court in *His Holiness Kesavananda Bharati Sripadagalvaru* v. *State of Kerala & Another,* (1973) 4 SCC 225 (hereinafter referred to as *Bharati case*).

12. Fortunately there is no difference of opinion between the parties to this *lis* regarding the proposition that existence of an independent judiciary is an essential requisite of a democratic Republic. Nor is there any difference of opinion regarding the proposition that an independent judiciary is one of the basic features of the Constitution of India.

13. The only issue is what is the permissible procedure or mechanism which would ensure establishment of an

independent judiciary. The resolution of the issue requires examination of the following questions;

Whether the mechanism established by the Constituent Assembly for the appointment of Judges of the CONSTITUTIONAL COURTS is the only permissible mode for securing an independent judiciary or can there be alternatives?

If there can be alternatives, whether the mechanism (NJAC) sought to be established by the AMENDMENT transgresses the boundaries of the constituent power?

14. In the last few weeks, after the conclusion of hearing in this batch of matters, I heard many a person – say that the whole country is awaiting the judgment. Some even said the whole world is awaiting. There is certainly an element of hyperbole in those statements. Even those who are really waiting, I am sure, have concerns which vary from person to person. Inquisitiveness regarding the jurisprudential and political correctness, impact on the future of the judiciary, assessment of political and personal fortunes etc. could be some of those concerns. I am only reminded of Justice Fazal

Ali's view in *S.P. Gupta v. Union of India & Ors.*[111] AIR 1982 SC 149 (for short *S.P. Gupta case*) that the issue is irrelevant for the masses and litigants. They only want that their cases should be decided quickly by judges who generate confidence. The question is – what is the formula by which judges - who can decide cases quickly and also generate confidence in the masses and litigants - be produced. What are the qualities which make a Judge decide cases quickly and also generate confidence?

15. Deep learning in law, incisive and alert mind to quickly grasp the controversy, energy and commitment to resolve the problem are critical elements which make a Judge efficient and enable him to decide cases quickly. However, every Judge who has all the above-mentioned qualities need not automatically be a Judge who can generate confidence in the litigants unless

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[111] "Para 520. There is another fact of life which, however unpleasant, cannot be denied and this is that precious little are our masses or litigants concerned with which Judge is appointed or not appointed or which one is continued or not continued. The high sounding concept of independence of judiciary or primacy of one or the other of the Constitutional functionaries or the mode of effective consultation are matters of academic interest in which our masses are least interested. On the other hand, they are mainly concerned with dangerous forces at work and evils reflected in economic-pressures, inflationary tendencies, gruelling poverty, emancipation of women, maintenance of law and order, food and clothing, bread and butter, and above all the serious problem of unemployment,

521. It is only a sizeable section of the intellectuals consisting of the press and the lawyers who have made a prestigious issue of the independence of judiciary. I can fully understand that lawyers or other persons directly connected with the administration of justice may have a grievance however ill-founded that proper selection of Judges or interference with the appointment of Judges strictly according to constitutional provisions may mar the institution of judiciary and therefore they may to some extent be justified in vindicating their rights. But at the same time, however biting or bitter, distasteful and diabolical it may seem to be, the **fact remains that the masses** in general are not at all concerned with these legal niceties and so far as administration of justice is concerned they **merely want that their cases should be decided quickly** by **Judges who generate confidence**."

the litigant believes that the Judge is absolutely fair and impartial.

16. Belief regarding the impartiality of a Judge depends upon the fact that Judge shares no relationship with either of the parties to the litigation. Relationship in the context could be personal, financial, political or even philosophical etc. When one of the parties to the litigation is either the State or one of its instrumentalities, necessarily there is a relationship. Because, it is the State which establishes the judiciary. Funds required to run the judicial system including the salaries and allowances of Judges necessarily flow from the State exchequer.

17. Democratic societies believe that the State not only has authority to govern but also certain legally enforceable obligations to its subjects. The authority of judicial fora to command the State to discharge its obligations flows from the existence of such enforceable obligations. To generate confidence that the judicial fora decide controversies brought to their consideration impartially, they are required to be independent. Notwithstanding the fact that they are

established and organized by the State as a part of its larger obligation to govern.

18. Judiciary is the watchdog of the Constitution and its fundamental values. It is also said to be the lifeblood of constitutionalism in democratic societies. At least since *Marbury v. Madison*[112] the authority of courts functioning under a written democratic constitution takes within its sweep the power to declare unconstitutional even laws made by the legislature. It is a formidable authority necessarily implying an awesome responsibility. A wise exercise of such power requires an efficient and independent Judge (Judicial System). In the context, wisdom is to perceive with precision whether the legislative action struck the constitutionally demanded balance between the larger interests of society and liberties of subjects.

19. Independence of such fora rests on two integers - independence of the institution and of individuals who man the institution.

> "(Judicial independence) connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.
>
> * * *

[112] 5 U.S 137 (1803)

> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of Government."[113]

20. It is not really necessary for me to trace the entire history of development of the concept independence of the judiciary in democratic societies. It can be said without any fear of contradiction that all modern democratic societies strive to establish an independent judiciary. The following are among the most essential safeguards to ensure the independence of the judiciary – Certainty of tenure, protection from removal from office except by a stringent process in the cases of Judges found unfit to continue as members of the judiciary, protection of salaries and other privileges from interference by the executive and the legislature, immunity from scrutiny either by the Executive or the Legislature of the conduct of Judges with respect to the discharge of judicial functions except in cases of alleged misbehaviour, immunity from civil and criminal liability for acts committed in discharge of duties, protection against criticism to a great degree. Such safeguards are

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[113] Supreme Court of Canada in ***Valente*** *v.* ***Queen***, (1985) 2 SCR 673

provided with a fond hope that so protected, a Judge would be absolutely independent and fearless in discharge of his duties.

21. Democratic societies by and large recognize the necessity of the abovementioned protections for the judiciary and its members. Such protections are either entrenched in the Constitution or provided by legislation. A brief survey of the constitutions of a few democratic Republics to demonstrate the point;

22. Prior to 1701, the **British Crown** had the power to dismiss the judges at will. The Act of Settlement, 1701[114] removed from the Crown the power to dismiss Judges of the Superior Courts at will. It enabled the Monarch to remove Judges from office upon address of both Houses of Parliament. Interestingly till 1720 Judges ceased to hold office on the death of the Monarch who issued Commissions. A 1720 enactment provided that Judges should continue in office for six months after demise of the monarch. In 1761 a statute provided that commissions of the Judges shall remain in full force and effect during good behaviour notwithstanding the demise of His Majesty or of any of his heirs and

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[114] **"… judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them." This clause has been repealed by ____**

successors – thus granting a life tenure. According to Blackstone,

> "(I) In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any State unless the administration of common justice be in **some degree separated both from the legislative** and from **the executive power**."[115]

23. Article III (1)[116] of the **American** Constitution stipulates that Judges of the Supreme Court and also the inferior Courts established by Congress shall hold their office during good behavior and they cannot be removed except through the process of impeachment[117]. It also stipulates that they shall receive a compensation for their services which shall not be diminished during their continuance in office.

24. Section 72[118] of the Constitution of **Australia** stipulates that Judges of the High Court and other Courts created by

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[115] Sir William Blackstone's, *Commentaries on the Laws of England*, (1765) Vol. I p. 269

[116] **Article III Section I**. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall **hold their offices during good behaviour**, and shall, at stated times, receive for their services, a compensation, which **shall not be diminished during their continuance in office**.

[117] **Article II Section 4**. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

[118] **Section 72**. Judges' appointment, tenure, and remuneration:

The Justices of the High Court ….

(ii) **shall not be removed except** …… **on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity**;

(iii) **shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office**.

Parliament shall be appointed for a term expiring upon the Judge attaining the age of seventy years and shall not be removed except on an address from both Houses of the Parliament in the same session praying for removal of the Judge on the ground of proved misbehaviour or incapacity. It also stipulates that remuneration of Judges shall not be diminished during their continuance in office.

25. When India became a Sovereign Republic, we did not adopt the British Constitutional system in its entirety - though India had been a part of the British Empire Ever since, the British Crown started asserting sovereignty over the territory of India, the British Parliament made Acts which provided legal framework for the governance of India from time to time known as Government of India Acts. The last of which was of 1935. Canada[119] and Australia[120] which were also part of the British Empire continue to be governed by Constitutions enacted by the British Parliament. We framed a new Constitution through a Constituent Assembly.

26. Members of the Constituent Assembly in general and the Drafting Committee in particular were men and women of

[119] The British North America Act, 1867 renamed by the Amendment in 1982 as the Constitution Act, 1867
[120] Commonwealth of Australia Constitution Act, 1900.

great political experience, deep insight into human nature, and a profound comprehension of the complex problems of Indian Society. They spearheaded the freedom movement. They were well versed in history, law, political sciences and democratic practices. They examined the various constitutional systems in vogue in different democratic societies inter alia American, Australian, British and Canadian and adopted different features from different constitutional systems after suitably modifying them to the needs of Indian society.

27. Framers of the Constitution had the advantage of an intimate knowledge of the functioning of the Federal Court, the High Courts and the Subordinate Courts of this country under the Government of India Act, 1935[121]. Though there several distinctions in the architecture of the judicial systems under each of the above-mentioned regimes, one feature common to all of them is that appointment of Judges is by the Executive.

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[121] The existing constitution and organization of constitutional courts in this country is discussed in some detail by Justice Verma in the *Second Judges case* at paras 444, 445, 446.

444. The Government of India Act, 1919 provided in Section 101 for the Constitution of High Courts; and the appointment of the Chief Justice and the permanent Judges was in the absolute discretion of the Crown, subject only the prescribed conditions of eligibility. The tenure of their office, according to Section 102, was dependent entirely on the Crown's pleasure.

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445. Then, in the Government of India Act, 1935, provision for the establishment and Constitution of the Federal Court was made in Section 200, while the Constitution of High Courts was provided for in Section 220.

xxxxx xxxxxx xxxxxx xxxxx

446. Thus, even under the Government of India Act, 1935, appointments of Judges of the Federal Court and the High Courts were in the absolute discretion of the Crown or, in other words, of the executive, with no specific provision for consultation with the Chief Justice in the appointment process.

Such constitutional design is essentially a legacy of the British constitutional system where the Executive had (till 2006) the absolute authority to appoint Judges.

28. Judges, in any country, are expected to maintain a higher degree of rectitude compared to the other public office holders. The expectation with respect to the Indian Judiciary is no different. The Constitution therefore provides extraordinary safeguards and privileges for Judges of CONSTITUTIONAL COURTS to insulate them substantially from the possibility of interference by the political-executive as well as elected majorities of the people's representatives[122].

I. a Judge's appointment and continuance in office is not subject to any election process;

II. the termination of judicial appointment (during subsistence of the tenure) is made virtually impossible.

The Constitution prescribes that a Judge of CONSTITUTIONAL COURT shall not be removed from office except by following an elaborate procedure of impeachment prescribed under Article 124(4)[123] which is

[122] *L Chandra Kumar & Ors* v. *Union of India & Ors.*, (1997) 3 SCC 261, para 78

[123] **Article 124(4)** A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground

applicable even for High Court Judges by virtue of Article 217(1)(b)[124].

III. The salaries, privileges, allowances and rights in respect of leave of absence and pension of Judges of the CONSTITUTIONAL COURTS may be determined by or under law made by Parliament. But, they cannot be varied to the disadvantage of the Judge[125] after the appointment.

IV. The salary, allowances and pension payable to Judges of CONSTITUTIONAL COURTS are charged on the Consolidated Fund of India or the Consolidated Fund of the concerned State[126]. Further under Articles 113(1)[127] and 203(1)[128], the expenditure charged upon the Consolidated Fund of India or the State as the case may be shall not be submitted to vote.

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of proved misbehaviour or incapacity.

[124] **Article 217(1)(b)** A Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;

[125] Under the proviso to Article 125(2) and proviso to Article 221(2) respectively.

[126] **Article 112(3)(d)** – (3) The following expenditure shall be expenditure charged on the Consolidated Fund of India –

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(i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court;

Article 202(3)(d) – (3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State –

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(d) expenditure in respect of the salaries and allowances of Judges of any High Court;

[127] **113(1)** - So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.

[128] **203 (1)** - So much of the estimates as relates to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly, but nothing in this clause shall be construed as preventing the discussion in the Legislature of any of those estimates.

29. Unscrupulous litigants constantly keep searching for ways to influence judges. Attitude of the State or its instrumentalities (largest litigants in modern democracies) would be no different[129]. Such temptation coupled with the fact that the State has the legal authority to make laws including the laws that determine the process of selection of judges and their service conditions can pose the greatest threat to the independence of the judiciary if such law making authority is without any limitations. Therefore, extraordinary safeguards to protect the tenure and service conditions of the members of the judiciary are provided in the Constitution; with a fond hope that men and women, who hold judicial offices so protected will be able to discharge their functions with absolute independence and efficiency.

30. However, any amount of legal and institutional protection will not supply the necessary independence and efficiency to individuals if inherently they are lacking in them. Where every

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Fali S. Nariman, *Before Memory Fades: An Autobiography,* [First Edition Hay House (2010), p.348]

"I once knew a fine, independent judge in South Africa during the days of apartheid – Judge-President John Milne of the Natal Supreme Court. We used to correspond, and Milne said something similar. Milne wrote to me on one occasion (in despair) :

> It seems that however much they may pay lip service to the idea that the Judiciary is totally independent of the Executive, politicians throughout the ages and throughout the world would actually much prefer to have executive minded lackeys and are considerably irritated by independent Judges functioning in an independent manner."

aspect of judge's service is protected by the Constitution, the only way governments can think of gaining some control over the judiciary is by making an effort to appoint persons who are inherently pliable. There are various factors which make a Judge pliable. Some of the factors are - individual ambition, loyalty-based on political, religious or sectarian considerations, incompetence and lack of integrity. Any one of the above-mentioned factors is sufficient to make a Judge pliable. A combination of more than one of them makes a Judge more vulnerable. Combination of incompetence and ambition is the worst. The only way an ambitious incompetent person can ascend a high public office is by cringing before men in power. It is said that men in power promote the least of mankind with a fond hope that those who lack any accomplishment would be grateful to their benefactor. History is replete with examples - though proof of the expected loyalty is very scarce. Usually such men are only loyal to power but not to the benefactor.

31. In order to ensure that at least in the matter of appointment of Judges, such aberrations are avoided, democracies all over the world have adopted different strategies for choosing the 'right people' as Judges. The

procedures adopted for making such a choice are widely different. To demonstrate the same, it is useful to examine the judicial systems of some of the English speaking countries.

32. The Constitution of the United States of America empowers the President to appoint Judges of the Supreme Court[130] with the advice and consent of the Senate[131]. Insofar as the appointment of the Judges of the highest court in United States is concerned, neither the Chief Justice of America nor the Supreme Court is assigned any role. The Head of the Executive is conferred with exclusive power to make the choice of the Judges of the highest court subject to the advice and consent of the Senate. A check on the possibility of arbitrary exercise of the power by the President.

33. The Canadian legal system depicts another interesting model. The Supreme Court of Canada is not established by the Constitution i.e. the Constitution Act of 1867. Chapter VII of the Act deals with the judicature. Section 101[132] only

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[130] **Article II Section 2**

The President "shall have power … to .. nominate and by and with the advise and consent of the Senate .. appoint .. Judges of the Supreme Court .."

In the case of the appointment of Judges of the other Statutory Federal Courts, the Congress can by law entrust the power to the Supreme Court itself.

[131] The Federal Legislature of America is called the Congress of the United States consisting of two chambers – Senate and House of Representatives.

[132] **Section 101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

authorises the Parliament of Canada to provide for the constitution, maintenance and organisation of a general court of appeal of Canada and for the establishment of any additional courts for the better administration of the laws of Canada. It is in exercise of such power, the Parliament of Canada in 1875 by a statute, (the Supreme and Exchequer Courts Act, 1875[133]) established the Supreme Court of Canada. The Supreme Court of Canada's existence, its composition and jurisdiction depend upon an ordinary federal statute and these underwent many changes over time. In theory, the Court could be abolished by unilateral action of the Federal Parliament. Judges of the Supreme Court are appointed by the Governor in Council (the federal cabinet) in exercise of the power conferred under Section 2 of the Supreme Court Act (supra). There is no requirement in Canada that such appointments be ratified by the Senate or the House of Commons.

34. In Australia, the highest Federal Court is called the High Court of Australia established under Section 71[134] of the

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[133] Now replaced by Supreme Court Act, 1985.

[134]

Section 71. **Judicial power and Courts**

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Australian Constitution. It consists of a Chief Justice and other Judges not less than two as the Parliament prescribes. Judges of the High Court are appointed by the Governor General in Council.

35. Neither Canada nor Australia provide the Chief Justice or Judges of the highest court any role in the choice of Judges of the Constitutional Courts. In Australia, unlike the American model, there is no provision in the Constitution requiring consent of the federal legislature for such appointments.

36. England is unique in these matters. It has no written constitution as understood in India, US, Canada and Australia. Till 2006, appointments of Judges were made exclusively by the Lord Chancellor of the Exchequer who is a member of the Cabinet.

37. The makers of the Indian Constitution after a study of the various models mentioned above among others, provided that in making appointment of the Judges of the CONSTITUTIONAL COURTS, the CJI and the Chief Justices of the concerned High Court are required to be consulted by the President who is the appointing authority of Judges of these Courts. The text of

the Constitution clearly excluded any role either for the Parliament or for the State Legislatures.

38. Dr. Ambedkar explained the scheme of the Constitution insofar as it pertains to appointment of Judges of the CONSTITUTIONAL COURTS and the competing concerns which weighed with the drafting committee for adopting such model:

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

> personally feel no doubt that the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, **to allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice** which **we are not prepared to vest in the President or the Government of the day**. I therefore, think that that is also a dangerous proposition[135]."
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> (emphasis supplied)

The following are salient features of Dr. Ambedkar's statement:

1. That the judiciary must be both independent and competent.

2. It is dangerous to confer an unchecked power of choosing or appointing Judges on the executive. The concurrence of the legislature is also not desirable as it leads to a possibility of appointments being influenced by political considerations or under political pressure.

3. (a) Requiring concurrence of the Chief Justice is also a dangerous proposition.

   (b) That, the Chief Justice is also a human being and is a man with all the failings, sentiments and prejudices which common people are supposed to have[136].

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[135] Constituent Assembly Debates, 24th May 1949 (Vol. VIII)

[136] Recall the words of Jackson, J. in *Sacher v. United States* 343 US 1 (1952) "Men who make their way to the Bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."

(c) Providing for the concurrence of CJI would be conferring a power of veto on the CJI which in substance means transferring the power of appointment to the CJI without any limitation, which the Constituent Assembly thought it imprudent to confer on the President.

4. That, the Drafting Committee thought the arrangements, specified under Articles 124 and 217 (as they stood prior to the AMENDMENT), would ensure requisite independence and competence of the judiciary and such arrangements would be sufficient for the "moment".

39. Till 1977, the true meaning and amplitude of the expression consultation occurring in Articles 124 and 217 of the Constitution of India troubled neither the executive nor the judiciary. There had always been a consultation between the constitutional functionaries. Appointments were made without much controversy. This Court in *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4

SCC 441 (hereinafter referred to as the *Second Judges case*) recorded so[137].

40. Article 222[138] authorises the President to transfer High Court Judges in consultation with the CJI. Till 1975, that power was very rarely exercised by the President. In 1976[139], the power under Article 222 was invoked to make a mass transfer of 16 High Court Judges[140]. One of the 16 Judges, though complied with the order of transfer but challenged the transfer by filing a petition *pro bono publico* to assert and vindicate the independence of the Judiciary[141]. It was in the context of that case, for the first time, the true

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[137] Para 371

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(iii) All the appointments to the Supreme Court from 1950 to 1959 were made with the concurrence of the Chief Justice of India. 210 out of 211 appointments made to the High Courts during that period were also with the concurrence of the Chief Justice of India.

(iv) Mr. Gobind Ballabh Pant, Home Minister of India, declared on the floor of the Parliament on November 24, 1959 that appointment of Judges were virtually being made by the Chief Justice of India and the Executive was only an order - issuing authority.

(v) Mr. Ashok Sen, the Law Minister reiterated in the Parliament on November 25,1959 that almost all the appointments made to the Supreme Court and the High Courts were made with the concurrence of the Chief Justice of India.

(vi) Out of 547 appointments of Judges made during the period January 1, 1983 to April 10, 1993 only 7 were not in consonance with the views expressed by the Chief Justice of India."

[138] **Article 222** - Transfer of a Judge from one High Court to another

(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court

(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 the 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

[139] During the subsistence of a (partially controversial) declaration of emergency.

[140] *Union of India v. Sankalchand Himatlal Sheth & Anr.*, (1977) 4 SCC 193 (Bhagwati, J. – para 46)

[141] Para 47 of *Sankalchand case*, Bhagwati, J.

meaning of the expression consultation occurring under Article 222(1) fell for the consideration of this Court. The matter, *Union of India v. Sankalchand Himatlal Sheth & Anr.,* (1977) 4 SCC 193 (for short *Sankalchand case*) was heard by five Judges. Four separate judgments were delivered by Chandrachud, Bhagwati, Krishna Iyer, and Untwalia, JJ. Justice Chandrachud opined that "consultation" in the context means an effective consultation and sharing of complete data on the basis of which transfer is sought to be effected but concluded that – 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, not his concurrence with the proposed transfer[142]. After recording such a conclusion, His Lordship went on to observe as follows:

> "41. …….. But it is necessary to reiterate what Bhagwati and Krishna Iyer JJ. said in Shamsher Singh (supra) that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India and that the Court will have an 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 practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." (page 873). It is hoped that these words will not fall on deaf ears and since normalcy has now been restored, the differences, if any, between the executive and the judiciary will be resolved by mutual deliberation each, party treating the views of the other with respect and consideration."

[142] Para 41 of *Sankalchand case* – Chandrachud, J.

41. Justice Bhagwati, was entirely in agreement with what has been said by Krishna Iyer in his judgment.[143]

42. Justice Krishna Iyer spoke for himself and for Justice Fazal Ali. Justice Krishna Iyer, while reiterating the views expressed by this Court in two earlier judgments, i.e. *Chandramouleshwar Prasad v. Patna High Court and Ors.*, (1969) 3 SCC 56 and *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192, opined that although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government …….[144] with a caveat:

> "115. ……. It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India. It seems to us that the word 'consultation' has been used in Article 222 as a matter of constitutional courtesy in view of the fact that two very high dignitaries are concerned in the matter, namely, the President and the Chief Justice of India. Of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly."

Justice Untwalia agreed with the views expressed by Justice Chandrachud on the question of consultation with the Chief Justice of India and added:

> "125. …… The Government, however, as rightly conceded by Mr. Seervai, is not bound to accept and act upon the advice of the Chief Justice. It may differ from him and for cogent reasons may

[143] Para 62 of *Sankalchand case* – Bhagwati, J.
[144] Para 115 of *Sankalchand case* – Krishna Iyer, J.

> take a contrary view. In other words, as held by this Court in the case of *Chandramouleshwar Prasad* v. *Patna High Court and Ors*. [1970]2SCR666 , the advice is not binding on the Government invariably and as a matter of compulsion in law. Although the decision of this Court in Chandramouleshwar Prasad's case was with reference to the interpretation of Articles 233 and 235 of the Constitution, on principle there is hardly any difference."

43. One interesting factor that is required to be noted from the abovementioned case is that all the 16 transfers were made in consultation with the then CJI. Within a year thereafter, in March 1977, general elections took place and a new political party came to power. The Government on a re-examination of the matter opined that there was no justification for transferring Justice Sheth from Gujarat. It is a matter of history that all 16 Judges who were transferred during emergency, were sent back to their parent High Courts along with Justice Sheth[145]. This fact is significant in the context of the argument that permitting the executive to have any say in the matter of appointment of Judges to Constitutional Courts would be destructive of independence of the judiciary.

44. Within three years thereafter, another significant event in the constitutional history of this country occurred. The then Law Minister of the Government of India sent a circular dated

[145] Per Fazal Ali, J. – *S.P. Gupta case,* p.403 - "It is true that there were, quite a few transfers during the emergency which were not in consonance with the spirit of Article 222 and that is why the Government had conceded this fact and took steps to revoke the transfers by retransferring, almost all the Judges to the High Courts from where they had been transferred."

18th March 1981 to Chief Ministers of various States. Chief Ministers were requested to obtain from all the Additional Judges (working in the concerned High Courts) consent to be appointed as permanent Judges in any other High Court in the country. It also advised Chief Ministers to obtain similar consent letters from persons who have already been or may in future be proposed for initial appointment as Judges of the High Court. The said letter was challenged in *S.P. Gupta case* on the ground it was a direct attack on the independence of the judiciary which is a basic feature of the Constitution[146] (Para 2). The matter was heard by seven Judges of this Court. Seven separate judgments were delivered. One of the questions before this Court was whether the opinion of CJI be given primacy over the opinion of other constitutional functionaries. Substantially, this Court took the same view as was taken in *Sankalchand case*[147].

45. Growth of population, increasing awareness of legal rights in the population, expansion of the scope of judicial review as a consequence of a change in the understanding of the amplitude of various fundamental rights and their inter-relationship, a sea change in the law on the procedural

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[146] Para 2 of *S.P. Gupta case* - Bhagwati, J.

[147] See paras 30 & 31 – Bhagwati, J.; Para 134 – Gupta, J., Para 632 – Tulzapurkar, J.; Para 726 – Desai, J. Paras 890 & 891 – Pathak, J.; Paras 1031 & 1032 – E S Venkataramaiah,J

limitations in the exercise of the jurisdiction under Article 32 and 226 led to the explosion of dockets of the CONSTITUTIONAL COURTS of this country. But, the Judge strength remained relatively stagnant. By 80s, the problem became more acute and complex. Government of India did not undertake the requisite exercise to make a periodic assessment of the need to increase the judge strength. In the case of some High Courts, there was even a reduction[148]. Even, the appointment process of High Court Judges was taking unreasonably long periods on legally untenable grounds[149]. A three Judge Bench of this Court in *Subhash Sharma v. Union of India* (1991) Supp.1 SCC 574 (for short *Subhash Sharma case*) took note of such a situation.

46. There was a turmoil with regard to appointment of Judges of CONSTITUTIONAL COURTS in 1970s and 1980s. Senior Judges were superceded for appointment to the office of CJI. Perhaps, emboldened by judgments of this Court in

[148] *Subhash Sharma v. Union of India, 1991 Supp (1) SCC 574*, at page 586 **:**

Para 18. "We gather that the Kerala High Court where the sanctioned strength has been reduced by 2, has a sanctioned strength of 22 while its pendency as on January 1, 1990 being 34,330 cases justifies a Judge strength of almost 50 on the basis of the measure of 650 cases per Judge per year. We intend to indicate that there was no justification for reduction of the sanctioned strength."

[149] **Para 19**. "For the present we suggest to government that the matter should be reviewed from time to time and steps should be taken for determining the sanctioned strength in a pragmatic way on the basis of the existing need. If there be no correlation between the need and the sanctioned strength and the provision of Judge-manpower is totally inadequate, the necessary consequence has to be backlog and sluggish enforcement of the Rule of Law. ……"

Sankalchand and *S.P. Gupta* the executive (at the National as well as the State level) resorted to unhealthy manipulation of the system. **The Informal Constitution** : **Unwritten Criteria in Selecting Judges for the Supreme Court of India**[150] records some instances of such manipulations based on news items published in print media of some reputation by Commentators of well established credentials on Contemporary issues and scholars. It appears that out of 53 appointments of Judges to some High Courts made in 1984-85, 32 were made on the recommendations of acting Chief Justices. It is believed that the senior most Judges of some High Courts (from where the said 32 recommendations had originated) who initiated those recommendations as acting Chief Justices, were made permanent Chief Justices only after they agreed to recommend names suggested by the Executive. A particular Additional Judge was not confirmed as a permanent Judge for several years notwithstanding the recommendations for his confirmation by three successive Chief Justices of the High Court and three CJIs allegedly on the ground that the Judge had delivered a judgment not palatable to the State Government. It appears that the Government headed by Prime

[150] Abhinav Chandrachud, *The Informal Constitution : Unwritten Criteria in Selecting Judges for the Supreme Court of India*, (Oxford University Press, United Kingdom 2014) See Pages 113 to 120

Minister V.P. Singh had stalled appointments of 67 persons recommended by the Chief Justices of various High Courts. Charges were freely traded against each other by the constitutional functionaries who are part of the appointment process of the CONSTITUTIONAL COURTS. It appears that a Law Minister for the Union of India complained that State Governments were trying to pack High Courts with their 'own men'[151]. The basic facts are verifiable, inferences therefrom are perhaps contestable. Unfortunately, the correspondence between the Government and the CJI and the record of the consultation process are some of the best guarded secrets of this country.

47. The question is not whether the various statements made in the above-mentioned book are absolutely accurate. The observations made by this Court in *Subhash Sharma case* can lead to a safe conclusion, that there must be some truth in the various statements made in the book. The above scenario whether true or partially true formed the backdrop of the observations made in *Subhash Sharma case* (supra). As a

[151] From 1978, Governments at the State level and the Union level ceased to be necessarily of the same political party. Regional parties in parts of the country had captured power putting an end to one party rule at both the levels.

consequence, the Bench thought it fit that the correctness of *S.P. Gupta case* should be considered by a larger Bench.

> "49. …….. majority view in S.P. Gupta's case should be considered by a larger Bench we direct the papers of W.P. No. 1303 of 1987 to be placed before the learned Chief Justice for constituting a Bench of nine Judges to examine the two questions we have referred to above, namely, the position of the Chief Justice of India with reference to primacy and, secondly, justiciability of fixation of Judge strength……."

48. This led to the *Second Judges case*. The matter was heard by nine Judges. Five separate judgments were delivered. Justice Verma spoke for five of them. Justice Pandian and Justice Kuldip Singh wrote separate judgments but agreed with the conclusions of Justice Verma, but Justice Ahmadi and Justice Punchhi did not. One proposition on which all nine Judges were unanimous is that under the scheme of the Constitution, independence of judiciary is indispensable. Justice Verma categorically held that it is a part of the basic structure of the Constitution[152]. The point of disagreement between the majority and minority is only

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[152]**Para 421 -** These questions have to be considered in the context of the independence of the judiciary, as a part of the basic structure of the Constitution, to secure the 'rule of law', essential for the preservation of the democratic system. The broad scheme of separation of powers adopted in the Constitution, together with the directive principle of 'separation of judiciary from executive' even at the lowest strata, provides some insight to the true meaning of the relevant provisions in the Constitution relating to the composition of the judiciary. The construction of these provisions must accord with these fundamental concepts in the constitutional scheme to preserve the vitality and promote the growth essential for retaining the Constitution as a vibrant organism.

regarding the mode by which the establishment and continuance of such an independent judiciary can be achieved.

49. Textually, provisions which indicate that the judiciary is required to be independent of the executive are Article 50[153] and the form of oath required to be taken by the Judges of CONSTITUTIONAL COURTS prescribed in Forms IV[154] and VIII[155] under the Third Schedule to the Constitution of India.

50. However, structurally there are many indications in the scheme of the Constitution which lead to an unquestionable inference that the Framers of the Constitution desired to have a judiciary which is absolutely independent of the Executive and insulated from vagaries of transient and shifting majoritarian dynamics. Under the scheme of the Constitution, State Legislatures have absolutely no role in matters pertaining to the establishment of CONSTITUTIONAL COURTS of

[153] **Article 50**. **Separation of judiciary from executive** – "The State shall take steps to separate the judiciary from the executive in the public services of the State."

[154] **Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India**:—

"I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do swear in the name of God that I will bear true faith and solemnly affirm faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

[155] **Form of oath or affirmation to be made by the Judges of a High Court:—**

"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of) ……-….. do swear in the name of God that I will bear solemnly affirm true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."

this country. Parliament alone is authorized to deal with certain aspects of the establishment of the CONSTITUTIONAL COURTS and their administration such as fixation of the strength of the courts, salaries and other service conditions of the judges etc. Termination of an appointment made to a CONSTITUTIONAL COURT can be done only through the process of impeachment by Parliament, the only legislative body authorised to impeach by following a distinct legislative process only on the ground of 'proved misbehaviour or incapacity'. Such a process is made more stringent by a constitutional stipulation under Article 124(5)[156] that the procedure for investigation and proof of misbehaviour or incapacity of a Judge must be regulated by law. Even after misbehaviour or incapacity is established removal of a Judge is not automatic but subject to voting and approval by a special majority of the Parliament specified under Article 124(4)[157]. Prior to the AMENDMENT, the power to appoint Judges of CONSTITUTIONAL COURTS vested in the President to be exercised in consultation with the various constitutional functionaries mentioned under

[156] **Article 124(5)**. 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 under clause (4).

[157] **Article 124(4).** A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

Articles 124 and 217, as the case may be. Consultation with the CJI was mandatory for the appointment of Judges of all CONSTITUTIONAL COURTS. Consultation with the Chief Justices of High Courts was mandatory for appointment of Judges of High Courts.

51. In the backdrop of such scheme, a question arose whether the appointment process, in any way, impacts independence of the judiciary, which, admittedly, formed a part of the basic structure of the Constitution. Majority of the Judges opined that it does[158]. Their Lordships drew support for

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[158] **(per Hon. Pandian, J.) - Para 49**. "one other basic and inseparable vital condition is absolutely necessary for timely securing the independence of judiciary; and that concerns the methodology followed in the matter of sponsoring, selecting and appointing a proper and fit candidate to the (Supreme Court or High Court) higher judiciary. The holistic condition is a major component that goes along with other constitutionally guaranteed service conditions in securing a complete independence of judiciary. To say differently, a healthy independent judiciary can be said to have been firstly secured by accomplishment of the increasingly important condition in regard to the method of appointment of judges and, secondly, protected by the fulfilment of the rights, privileges and other service conditions. The resultant inescapable conclusion is that only the consummation or totality of all the requisite conditions beginning with the method and strategy of selection and appointment of judges will secure and protect the independence of the judiciary. Otherwise, not only will the credibility of the judiciary stagger and decline but also the entire judicial system will explode which in turn may cripple the proper functioning of democracy and the philosophy of this cherished concept will be only a myth rather than a reality."

(per Hon. Kuldip Singh, J.) – Para 335. "Then the question which comes up for consideration is, **can there be** an **independent judiciary when the power of appointment of judges vests in the executive**? To say yes, would be illogical. The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. 'Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the Framers of the Constitution could have never intended to give this power to the executive. Even otherwise the Governments — Central or the State — are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication before the Apex Court. The executive — in one form or the other — is the largest single litigant before the courts. In this view of the matter the judiciary being the mediator — between the people and the executive — the Framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the executive."

(per Hon. Verma, J.) – Para 447. "When the Constitution was being drafted, there was **general agreement** that **the appointments of Judges** in the **superior judiciary should not be left to the absolute discretion** of the **executive**, and this was the reason for the provision made in the Constitution imposing the obligation to consult the Chief Justice of India and the Chief Justice of the High Court. This was done to achieve independence of the Judges of the superior judiciary even at the time of their appointment, instead of confining it only to the provision of security of tenure and other conditions of

such conclusion from history and debates in the Constituent Assembly apart from the observations made in the cases of *Sankalchand* and *S.P. Gupta.* Their Lordships also took note of the fact that the Constituent Assembly consciously excluded any role to the Parliament in the process of appointments, a conscious departure from the American Constitutional model where Federal Judicial appointments are subject to consent of the Senate.

52. In the background of such an analysis, consultation with the Chief Justice of India in Articles 124 and 217 was interpreted as conferring primacy to the opinion of CJI. Consultation with the CJI was part of a design of the Constituent Assembly to deny unfettered authority (to the union executive) to appoint Judges of the CONSTITUTIONAL COURTS. The Constituent Assembly did not choose to vest such controlling power in the Parliament to which the Executive is otherwise accountable

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service after the appointment was made. It was realised that the independence of the judiciary had to be safeguarded not merely by providing security of tenure and other conditions of service after the appointment, **but also by preventing the influence of political considerations in making the appointments**, if left to the absolute discretion of the executive as the appointing authority. It is this reason which impelled the incorporation of the obligation of consultation with the Chief Justice of India and the Chief Justice of the High Court in Articles 124(2) and 217(1). The Constituent Assembly Debates disclose this purpose in prescribing for such consultation, even though the appointment is ultimately an executive act."

under the scheme of the Constitution. This Court, therefore, concluded that without primacy to the opinion of CJI the whole consultation process contemplated under Articles 124 and 217 would only become ornamental enabling the executive to make appointments in its absolute discretion, most likely based on considerations of political expediency. Such a process would be antithetical to the constitutional goal of establishing an independent judiciary. However, Justice Verma categorically declared–

> "438. **The debate on primacy is intended** to determine, who amongst the constitutional functionaries involved in the **integrated process of appointments** is best equipped to discharge the greater burden attached to the role of primacy, **of making the proper choice**; and this debate is **not to determine who between them is entitled to greater importance or is to take the winner's prize at the end of the debate.** The task before us has to be performed with this perception.
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> 450. ……. The indication is, that in the choice of a candidate suitable for appointment, **the opinion of the Chief Justice of India should have the greatest weight**; the selection should be made as a result of a **participatory consultative process** in which **the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose**. Thus, the **executive element** in the appointment process is **reduced to the minimum** and any **political influence is eliminated**. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely **to indicate** that **absolute discretion was not given to any one, not even to the Chief Justice of India** as individual, **much less to the executive**, which earlier had absolute discretion under the Government of India Acts."
>
> [emphasis supplied]

53. This Court also indicated the circumstances on which the President of India would be constitutionally justified in not

acting in accordance with the opinion expressed by the CJI. This Court never held that consultation means concurrence as is sought to be interpreted in some quarters and I regret to say even in the stated objects and reasons for the AMENDMENT.

> "As regards the appointment of Judges of the Supreme Court and High Courts, the Supreme Court, in the matters of the Supreme Court Advocates-on-Record Association v. Union of India and its Advisory Opinion 1998 in Third Judges case, **had interpreted** articles 124(2) and 217(1) of the Constitution **with respect to the meaning** of "**consultation**" as "**concurrence**". It was also held that the consultation of the Chief Justice of India means collegium consisting of the Chief Justice and two or four Judges, as the case may be. This has resulted in a Memorandum of Procedure laying down the process which is being presently followed for appointment of Judges to both the High Courts and the Supreme Court. The Memorandum of Procedure confers upon the Judiciary itself the power for appointment of Judges."
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> [emphasis supplied]

54. There are conflicting opinions[159] regarding the jurisprudential soundness of the judgment of *Second Judges case*. I do not think it necessary to examine that aspect of the matter for the purpose of determining the present controversy.

55. After some 20 years of the working of the regime created under the *Second Judges case*, serious questions arose whether the regime emanating as a consequence of the interpretation placed by this Court in the *Second Judges case*, yielded any constitutionally aspired result of the establishment of an independent and efficient judiciary – the CONSTITUTINONAL COURTS. Answer regarding the independence

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[159] See the articles of Lord Templeman's favourable opinion and the critical view of Lord Cooke of Thorndon published in the book titled Supreme but not Infallible – Oxford University Press – 2000 A.D.

> "Article 124 of the Constitution empowers the President (acting on the advice of the Prime Minister and Cabinet) to appoint the judges of the Supreme Court. The President is given a discretion about consulting judges of the Supreme Court and High Courts but in the case of appointments of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. Similarly, Article 217 requires the Chief Justice of India to be consulted concerning the appointment of a judge of the High Court of a state. In 1993, in the *Supreme Court Advocates on Record Association* case the Supreme Court by a majority held that, having regard to the independence of the judiciary and the separation of powers which the Court held to be implicit in the Constitution, the views of the Chief Justice of India expressed when he was consulted must be supreme. The Court also laid down guidelines governing the appointment and duration of office of temporary acting judges. The majority decision has been criticized as an extension of the meaning of the word 'consultation'. However, having regard to the earlier experience in India of attempts by the executive to influence the personalities and attitudes of members of the judiciary, and having regard to the successful attempts made in Pakistan to control the judiciary and having regard to the unfortunate results of the appointment of Supreme Court judges of the United States by the President subject to approval by Congress, the majority decision of te Supreme Court of India in the *Advocates on Record* case marks a welcome assertion of the independence of the judiciary and is the best method of obtaining appointments of integrity and quality, a precedent method which the British could follow such advantage." ---- Lord Templeman

> "All in all, the opinion of the Supreme Court in the third *Judges* case must be one of the most remarkable rulings ever issued by a supreme national appellate court in the coomon law world. Since, in some respects, I have had to voice respectful doubts about the soundness of the constitutional foundations of that opinion…." ---- Lord Cooke of Thorndon

can be subjective, and efficiency perhaps may not be very pleasant.

56. Within a few years doubts arose regarding the true purport of the *Second Judges case*. The President of India invoked Article 143 and sought certain clarifications on the judgment of the *Second Judges case* leading to the opinion of this Court reported in *Special Reference No.1 of 1998*, (1998) 7 SCC 739 (hereinafter referred to as '*Third Judges case*'). Unfortunately, the factual matrix on which doubts were entertained by the Government of India are not recorded in the opinion. But para 41 of the *Third Judges case* records:

> "41. …We take the optimistic view that successive Chief Justices of India shall henceforth act in accordance with the *Second Judges case* and this opinion."

57. No wonder, gossip and speculations gather momentum and currency in such state of affairs. If a nine-Judge Bench of this Court takes an optimistic view that successive Chief Justices of India **shall henceforth** act in accordance with the ***Second Judges case***, the only logical inference that can be drawn is that the law laid down by the *Second Judges case* was not faithfully followed by the successive Chief Justices, if not in all at least in some cases

attracting comments. Instead of Ministers, Judges patronised.[160]

58. In the next one and a half decade, this nation has witnessed many unpleasant events connected with judicial appointments - events which lend credence to the speculation that the system established by the *Second* and *Third Judges cases* in its operational reality is perhaps not the best system for securing an independent and efficient judiciary.[161]

59. Two events are part of the record of this Court and can be quoted without attracting the accusation of being irresponsible and unconcerned about the sanctity of the institution. These events led to the decisions reported in *Shanti Bhushan & Another v. Union of India & Another,* (2009) 1 SCC 657, *P.D. Dinakaran (1) v. Judges Inquiry Committee & Others,* (2011) 8 SCC 380, *P.D. Dinakaran (2) v. Judges Inquiry Committee & Another,* (2011) 8 SCC 474.

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[160] Iyer, V.R. Krishna, *Judiciary : A reform agenda –II*, The Hindu (online edition) 15.08.2002

[161] "*An Independent Judiciary*" – speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture on 10th November 2011.

"As I have said elsewhere 'the process by which a judge is appointed to a superior court is one of the best kept secrets in this country. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system."

While the 1st of the said two events pertains to the appointment of a Judge of the Madras High Court, the 2nd pertains to the recommendation made by the CJI (Collegium) regarding elevation of the Chief Justice of a High Court to this Court.

60. The dispute in *Shanti Bhushan case* (supra) was regarding appointment of a permanent Judge to the Madras High Court. The allegation appears to be that the procedure indicated in the *Second* and *Third Judges cases* had not been followed. I use the expression appears to be because it is difficult to identify what was the exact pleading in the case[162]. It is only by inference such a conclusion can be reached. Even the conclusion recorded by this Court does not really throw any light. In para 22 of the judgment of this Court it is recorded as follows:

> "22. The position is almost undisputed that on 17.3.2005 the then Chief Justice of India recommended for extension of term of 8 out of 9 persons named as Additional Judges for a further period of four months w.e.f. 3.4.2005. On 29.4.2005 the collegium including the then Chief Justice of India was of the view that name of Respondent 2 cannot be recommended along with another Judge for confirmation as permanent Judge. Since it is crystal clear that the **Judges are not concerned with any political angle** if there be any in the matter of appointment as Additional Judge or permanent Judge; the then Chief

[162] *Shanti Bhushan* (supra) - Para 2. The primary ground urged is that the opinion of the Chief Justice of India has to be formed collectively after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of opinion and no appointment can be made unless it is in conformity with the final opinion of the Chief Justice of India formed in the aforesaid manner. …. It is, therefore, submitted that the appointment of Respondent No.2 as a permanent Judge as notified on 2.2.2007 has no sanctity in law.

> Justice should have stuck to the view expressed by the collegium and **should not have been swayed by the views of the Government** to recommend extension of the term of Respondent 2 for one year; as it amounts to surrender of primacy by jugglery of words."
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> [emphasis supplied]

Even if I choose to ignore the controversial statements made (in the recent past) with regard to the appointment in question in the case, by persons who held high constitutional offices and played some role in the appointment process including former Members of this Court, the judgment leaves sufficient scope for believing that all did not go well with the appointment. It appears to have been a joint venture in the subversion of the law laid down by the *Second* and *Third Judges* cases by both the executive and the judiciary which neither party is willing to acknowledge.

61. The grievance of the petitioners in that case appears to be that "…. Collegium was not consulted. … ." Unfortunately, there is no precise finding in this regard in the said judgment. On the other hand, the content of para 22 of the judgment leaves me with an uncomfortable feeling that there was some departure from the law perhaps under some political pressure. I wish that I were wrong.

62. The second event is a recommendation made by the then CJI apparently with the concurrence of the Collegium for elevation of the petitioner. [See: *P.D. Dinakaran (1)* (supra); *P.D. Dinakaran (2)* (supra)]. The recommendation did not fructify. Serious allegations of unsuitability of the candidate whose name was recommended surfaced leading to a great deal of public debate. It is unpleasant to recount those allegations. They are recorded in the abovementioned two judgments. There is no allegation of any failure on the part of the Collegium to comply with the procedure laid down in *Second* and *Third Judges cases* in making the ill-fated recommendation. But, the recommendation certainly exposed the shallowness (at least for once) of the theory propounded by this Court in the trilogy of cases commencing from *S.P. Gupta* and ending with the *Third Judges* case that the CJI and the Collegium are the most appropriate authorities to make an assessment of the suitability of candidates for appointment as Judges of CONSTITUTIONAL COURTS in this country. A few more instances were mentioned at the bar during the course of hearing to demonstrate not only the shallowness of the theory but also the recommendations by the Collegium have not necessarily always been in the best interests of the institution

and the nation. It is not really necessary to place on record all the details but it is sufficient to mention that the earlier mentioned two cases are not certainly the only examples of the inappropriate exercise of the power of the Collegium.

63. I am aware that a few bad examples of the improper exercise of the power does not determine the character of the power. Such inappropriate exercise of the power was resorted to also by the Executive already noticed earlier. Both branches of government are accusing each other of not being worthy of trust.[163] At least a section of the civil society believes that both are right. The impugned AMENDMENT came in the backdrop of the above-mentioned experience.

64. Independence of the judiciary is one of the basic features of the Constitution. A seven-Judge Bench of this Court in *L Chandra Kumar* v. *Union of India & Ors.*, (1997) 3 SCC 261 already held that the power of judicial review of legislative action by the CONSTITUTIONAL COURTS is part of the basic

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[163] Mehta, Pratap Bhanu, '*Whom do you trust', The Indian Express*, May 14, 2015 – "The implicit constitutional accusation is this. The judiciary had, through improvisation, created a method of appointing judges that effectively sidelined other branches of government. This arrangement was tolerated, not because it conformed to a constitutional text or some hallowed principle, but because it seemed to maintain judicial independence. The experience of the 1970s made the prospect of political packing of the judiciary a live fear. This arrangement is being challenged, not because we have discovered a new principle, but because the credibility of the judiciary has declined. We are, in effect, saying that any arrangement that relies solely on the judiciary has proved untrustworthy. Those challenging the NJAC are relying on the ghost of the 1970s: Do you really want the political class to have a greater say in appointments? Both branches of government are accusing each other of not being worthy of trust. In the process, they have dragged each other down. The problem is that both are right."

structure of the constitution and the exercise of such important function demands the existence of an independent judiciary.

> "78. The legitimacy of **the power of courts** within constitutional democracies **to review legislative action** has been questioned since the time it was first conceived. **The Constitution of India**, being alive to such criticism, has, **while conferring such power upon the higher judiciary, incorporated important safeguards**. An analysis of the manner in which the **Framers of our Constitution** incorporated provisions relating to the judiciary would indicate that they **were very greatly concerned with securing the independence of the judiciary**. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While **the Constitution** confers the power to strike down laws upon the High Courts and the Supreme Court, it also **contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges** as well as **the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions**. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. **The constitutional safeguards which ensure the independence of the Judges of the superior judiciary**, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. **We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded**."
>
> [emphasis supplied]

This aspect of the matter is not in issue. None of the respondents contested that proposition. The text of the Constitution bears ample testimony for the proposition that the Constitution seeks to establish and nurture an independent judiciary. The makers of the Constitution were eloquent about it. Various Articles of the Constitution seek to protect independence of the judiciary by providing appropriate safeguards against unwarranted interference either by the Legislature or the Executive, with the Judges conditions of service and privileges incidental to the membership of the CONSTITUTIONAL COURTS, such as, salary, pension, security of tenure of the office etc. The scheme of the Constitution in that regard is already noticed.[164] Such protections are felt necessary not only under our Constitution, but also several other democratic Constitutions (the details of some of them are already noticed in paras 25 to 27). Such protections are incorporated in the light of the experience and knowledge of history. Various attempts made by Governments to subvert the independence of the judiciary were known to the makers of those Constitutions and also the makers of our Constitution.

[164] See para 31 (supra)

65. Articles 124 and 217 deal with one of the elements necessary to establish an independent judiciary - the appointment process. The Constituent Assembly was fully conscious of the importance of such an element in establishing and nurturing an independent judiciary. It examined various models in vogue in other countries. Dr. Ambedkar's speech dated 24th May 1949[165] (quoted supra) is proof of such awareness. The Constituent Assembly was fully appraised of the dangers of entrusting the power of appointment of members of the CONSTITUTIONAL COURTS exclusively to the Executive. At the same time, the Constituent Assembly was also sensitised to the undesirability of entrusting such a power exclusively to the CJI or allowing any role to the Parliament in the matter of the judicial appointments. The probable consequences of assigning such a role were also mentioned by Dr. Ambedkar. The Constituent Assembly was informed of the various models and institutional mechanisms in vogue under various democratic Constitutions for appointment of the members of the superior judiciary. The Constituent Assembly was told by Dr. Ambedkar that the model, such as the one contained in Articles 124 and 217 (as they stood prior to the

[165] Constituent Assembly Debates, 24th May 1949 (Vol. VIII)

AMENDMENT) - may be regarded as sufficient for the moment. Various alternative models suggested by the members were not accepted.[166] The legislative history clearly indicates that the members of the Constituent Assembly clearly refused to vest an absolute and unfettered power to appoint Judges of the CONSTITUTIONAL COURTS in any one of the 3 branches of the Constitution. Constituent Assembly declined to assign any role to the Parliament. It declined to vest an unbridled power in the executive. At the same time did not agree with the

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[166] On 24th May 1949 while draft Article 103 of the draft Constitution was being discussed corresponding to present Article 124, four members, Prof. Shibban Lal Saksena and Prof. K.T. Shah, who represented the United Provinces of Bihar and Mr. B. Pocker Sahib and Mr. Mahboob Ali Beig Sahib, who represented Madras Provinces suggested amendments to Article 103, the relevant portions of which read as follows:

"**Prof. Shibban Lal Saksena:**

That for clause (2) of article 103, the following clauses be substituted-

(2) The Chief Justice of Bharat, who shall be the Chief Justice of the Supreme Court, shall be appointed by the President subject to confirmation by two-thirds majority of Parliament assembled in a joint session of both the Houses of Parliament."

"**Prof. K.T. Shah:**

Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with the Council of States and such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose and shall hold office until he attains the age of sixty-five years."

"**Mr. B. Pocker Sahib**:

That for clause (2) and the first proviso of clause (2) of article 103, the following be substituted-

(2) Every judge of the Supreme Court other than the Chief Justice of India shall be appointed by the President by warrant under his hand and seal after consultation with the concurrence of the Chief Justice of India; and the Chief Justice of India shall be appointed by the President by a warrant under his hand and seal after consultation with the judges of the Supreme Court and the Chief Justices of the High Court in the States and every judge of the Supreme Court."

"**Mr. Mahboob Ali Beig Sahib:**

That in the first proviso to clause (2) of article 103, for the words 'the Chief Justice of India shall always be consulted' the words 'it shall be made with the concurrence of the Chief Justice of India' be substituted."

proposal that the CJI's concurrence is required for any appointment.

66. The system of Collegium the product of an interpretative gloss on the text of Articles 124 and 217 undertaken in the *Second* and *Third Judges case* may or may not be the best to establish and nurture an independent and efficient judiciary. There are seriously competing views expressed by eminent people[167], both on the jurisprudential soundness of the judgments and the manner in which the Collegium system operated in the last two decades.

67. Neither the jurisprudential correctness of the concept of Collegium nor how well or ill the Collegium system operated in the last two decades is the question before us. The question is – whether such a system is immutable or is Parliament competent to amend the Constitution and create an alternative mechanism for selection and appointment of the members of CONSTITUTIONAL COURTS of this country.

68. The basic objection for the impugned AMENDMENT is that it is destructive of the Constitutional objective of establishment of an independent judiciary, and consequently the basic

[167] See Footnote 50 (supra)

structure of the Constitution. Therefore, it falls foul of the law laid down by this Court in *Bharati case*.

69. To decide the correctness of the submission, it is necessary:

(1) to identify the *ratio decidendi* of *Bharati case* where the theory of "basic structure" and "basic features" originated.

(2) Whether the expressions "basic features" and "basic structure" of the Constitution are synonyms or do they convey different ideas or concepts? If so, what are the ideas they convey?

(3) Have they been clearly identified by earlier decisions of this Court?

(4) Are there any principles of law laid down by this Court to identify the basic features of the Constitution?

(5) If the two expressions "basic features" and "basic structure" mean two different things, is it the destruction of any one of them which renders any Constitutional amendment void or should such an amendment be destructive of both of them to become void.

(6) When can a Constitutional amendment be said to destroy or abrogate either a "basic feature" of the Constitution or the "basic structure" of the Constitution?

70. In *Bharati* case, one of the questions was – whether Article 368 confers unbridled power on the Parliament to amend the Constitution. That question arose in the background of an earlier decision of this Court in *I.C. Golak Nath & Others v. State of Punjab & Another,* (1967) 2 SCR 762[168] wherein it was held that Article 368 conferred on Parliament a limited power to amend the Constitution. A Constitutional amendment is 'law' within the meaning of Article 13(3)(a)[169]. Any Constitutional amendment which seeks to take away or even abridge any one of the rights guaranteed under Part-III of the Constitution would be violative of the mandate contained under Article 13(2)[170] and therefore illegal.

71. The correctness of *I.C. Golak Nath* was one of the questions which fell for consideration of the larger Bench of this Court in *Bharati* case. Eleven opinions were rendered.

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[168] Heard by a Bench of 11 Judges and decided by a majority of 6:5

[169] **Article 13(3)(a).** "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

[170] **Article 13(2)**. The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

This Court by majority held that every Article of the Constitution including the articles incorporating fundamental rights are amenable to the amendatory power of the Parliament[171] under Article 368 which is a constituent power

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(Per Sikri, CJ) – Para 292, "fundamental rights cannot be abrogated but reasonable abridgements of fundamental rights can be effected in public interest". … "That every provision of the Constitution can be amended provided in the result the **basic foundation** and **structure of the Constitution** remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;
(2) Republican and Democratic form of Government;
(3) Secular character of the Constitution;
(4) Separation of powers between the legislature, the executive and the judiciary;
(5) Federal character of the Constitution."

(Per Shelat, J. who spoke for himself and Grover, J.) – Paras 582, 583, "there can be no difficulty in discerning that the following can be regarded as the **basic elements** of the constitutional structure. These cannot be catalogued but can only be illustrated:

(1) The supremacy of the Constitution.
(2) Republican and Democratic form of government and sovereignty of the country.
(3) Secular and federal character of the Constitution.
(4) Demarcation of power between the Legislature, the executive and the judiciary.
(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
(6) The unity and the integrity of the Nation."

and, therefore, "the power under Article 368 is wide enough to permit amendment of each and every article … so long as its basic elements are not abrogated or denuded of their identity".

(Per Hegde, J, who also spoke for Mukherjea, J.) – Para 666, "Parliament has no power to abrogate or emasculate the **basic elements** or **fundamental features** of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens." … and "mandate to build a welfare State and egalitarian society."

(Per P. Jaganmohan Reddy, J.) – paras 1159, 1162, "A sovereign democratic republic. Parliamentary democracy, the three organs of the State … constitute the basic structure." He further held that "without either the fundamental rights or directive principles it cannot be democratic republic. Therefore, the power of amendment under Article 368 ….. is not wide enough to totally abrogate ….. any one of the fundamental rights or other **essential elements of the basic structure** of the Constitution and destroy its identity".

(Per Khanna, J.) – para 1426,, "the power under Article 368 does not take within its sweep the power to destroy the old Constitution" … means "the retention of the **basic structure** or **framework** of the old Constitution" … "it is not permissible to touch the foundation or to alter the basic institutional pattern." According to Justice Khanna, "such limitations are inherent and implicit in the word "amendment"."

but such power does not enable Parliament to alter the **basic structure** or framework of the Constitution.[172]

72. That is the origin of the theory of basic structure of the Constitution. Justice Shelat and Grover, J. used the expression basic elements and held that they cannot be abrogated or denuded of their identity. Justice Hegde and Mukherjea, J. used the expression basic elements or fundamental features and held that they cannot be abrogated or emasculated. Justice Jaganmohan Reddy used the expression essential elements of the basic structure and held that they cannot be abrogated thereby destroying the identity of the Constitution. Justice Sikri and Khanna, J. employed the expressions basic structure or framework, foundation, the basic institutional pattern, which is beyond the power of the Parliament under Article 368 of the Constitution. Some of the learned Judges mentioned certain features which according to them constitute basic or essential features etc. of the Constitution. All of them were cautious to make it explicit that such features or elements mentioned by them are only illustrative but not exhaustive. In *Minerva Mills Ltd. & Ors. v. Union of India & Ors.*, (1980) 3 SCC

[172] See the summary of the majority of the judgment signed by 9 Judges, p. 1007 of (1973) 4 SCC 225.

625, Justice Chandrachud, speaking for the majority of the Constitution Bench, observed that para No.2 of the summary signed by the nine Judges correctly reflects the majority view.

> "12. **The summary of** the various judgments in Kesavananda **Bharati** (Supra) was signed by nine out of the thirteen Judges. Paragraph 2 of the summary reads to say that according to the majority, "**Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution**". Whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it **correctly reflects the majority view**."
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> [emphasis supplied]

73. Again in *Waman Rao & Ors. etc. etc. v. Union of India & Ors.*, (1981) 2 SCC 362, Chief Justice Chandrachud speaking for another Constitution Bench observed:

> "The judgment of the majority to which seven out of the thirteen Judges were parties, struck a bridle path by holding that in the exercise of the power conferred by Article 368, the Parliament cannot amend the Constitution so as to **damage or destroy the basic structure** of the **Constitution**." (Para 15)
>
> [emphasis supplied]

By then Justice Chandrachud had already expressed his opinion in *Indira Nehru Gandhi v. Raj Narain, (*1975) Supp SCC 1 as follows:

> **"663.** There was some discussion at the Bar as to which features of the Constitution form the basic structure of the Constitution according to the majority decision in the *Fundamental Rights case*. That, to me, is an inquiry both fruitless and irrelevant. **The ratio of the majority decision is not that some named features of the Constitution are a part of its basic structure but that the power of amendment cannot be exercised so as to damage or destroy the essential elements or the basic structure of the Constitution**, whatever **these expressions may comprehend**."
>
> [emphasis supplied]

The above passages, indicate that it is not very clear from *Bharati case* whether the expression basic structure, basic features and essential elements convey the same idea or different ideas. Therefore, it is necessary to examine some decisions where the legality of the constitutional amendments was considered by this Court subsequent to *Bharati case*.

74. The earliest of them is *Indira Nehru Gandhi case* (supra). By the Constitution 39th Amendment Article 329A was inserted. Clauses (4) and (5) of the said Article sought to exclude the complaints of violation of the provisions of The Representation of the People Act, 1951 from scrutiny of any forum whatsoever in so far as such complaints pertain to the election of the Prime Minister or the Speaker of the Lok Sabha. The question whether such an amendment violated any one of the basic features of the Constitution arose. It was argued that the amendment was violative of four basic features of the Constitution. They are : (1) Democratic form of Government; (2) Separation of Powers between the legislature, the executive and the judiciary; (3) the principle of Equality of all before the law; and (4) the concept of the rule of law. A Constitution Bench of this Court held that the impugned clauses were

beyond the competence of the Parliament's power under Article 368.[173]

75. Four out of the five Judges agreed upon the conclusion that the impugned amendment was destructive of the basic structure of the Constitution. Each one of the Judges opined that the impugned provision violated a distinct basic feature of the Constitution leading to the destruction of the basic structure of the Constitution.

76. In *Minerva Mills case* (supra), this Court once again was confronted with the problem of "basic structure of the Constitution".[174] By the Constitution (42nd Amendment) Act among other things, Clauses (4) and (5) came to be added in Article 368 and Article 31-C came to be amended by

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[173] The judgment in *Indira Nehru Gandhi case* (supra) is neatly summarised by Chandrachud, J. in *Waman Rao case* at para 15:

> "15……. in *Indira Gandhi* v. *Raj Narain* Article 329-A(4) was held by the Court to be beyond the amending competence of the Parliament since, by making separate and special provisions as to elections to Parliament of the Prime Minister and the speaker, it destroyed the basic structure of the Constitution. Ray, C.J. based his decision on the ground that the 39th Amendment by which Article 329-A was introduced violated the Rule of Law (p. 418) (SCC p. 44); Khanna, J. based his decision on the ground that democracy was a basic feature of the Constitution, that democracy contemplates that elections should be free and fair and that the clause in question struck at the basis of free and fair elections (pp. 467 and 471) (SCC pp. 87 and 91); Mathew, J. struck down the clause on the ground that it was in the nature of legislation ad hominem (p. 513) (SCC p. 127) and that it damaged the democratic structure of the Constitution (p. 515) (SCC p. 129); while one of us, Chandrachud, J., held that the clause was bad because it violated the Rule of Law and was an outright negation of the principle of equality which is a basic feature of the Constitution (pp. 663-65) (SCC p. 257)."

[174] Para **13.** The question which we have to determine on the basis of the majority view in *Kesavananda Bharati* is whether the amendments introduced by Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 **damage the basic structure of the Constitution** by **destroying any** of its **basic features** or **essential elements**.

substituting certain words in the original Article. Chief Justice Chandrachud spoke for the majority of the Court and declared Sections 4 and 55 of the Constitution (42nd Amendment) Act to be violative of the basic structure of the Constitution. Dealing with the amendment to Article 368, this Court held:

> "Para 16. ….. The majority (in ***Bharati case***) conceded to the Parliament the right to make alterations in the Constitution so long as they are within its basic framework. And what fears can that judgment raise or misgivings generate if it only means this and no more. The **preamble assures** to the people of India a **polity whose basic structure is described therein as a Sovereign Democratic Republic**; **Parliament may make any amendments** to the Constitution as it deems expedient **so long as they do not damage or destroy India's sovereignty and its democratic, republican character**. Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice — social, economic and political; Liberty of thought, expression, belief, faith and worship; and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of "fraternity assuring the dignity of the individual and the unity of the nation". The newly introduced clause (5) of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever". No constituent power can conceivably go higher than the sky-high power conferred by clause (5), for it even empowers the Parliament to "repeal the provisions of this Constitution", that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy is not a power to amend."
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> [emphasis supplied]

The issue arising from the amendment to Article 31-C was identified to be – whether the directive principles of the State Policy contained in Part-IV can have primacy over the fundamental rights contained in Part-III of the

Constitution – because the 42nd amendment sought to subordinate the fundamental rights conferred by Articles 14 and 19 to the directive principles. This Court formulated the question – whether such an amendment was within the amendatory power of the Parliament in view of the law laid down by this Court in *Bharati* case. The Court propounded that:

> "**41.** ….. It is only if the rights conferred by these two Articles are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment. If they are a part of the basic structure, they cannot be obliterated out of existence in relation to a category of laws described in Article 31-C or, for the matter of that, in relation to laws of any description whatsoever, passed in order to achieve any object or policy whatsoever. This will serve to bring out the point that a total emasculation of the essential features of the Constitution is, by the ratio in *Kesavananda Bharati*, not permissible to the Parliament."

The Court finally reached the conclusion that the Parts III and IV of the Constitution are like two wheels of a chariot both equally important and held:

> "56. ….. To give absolute primacy to one over the other is to disturb the harmony of the **Constitution**. This harmony and balance between the fundamental rights and directive principles is an **essential feature of the basic structure of the Constitution**."
>
> [emphasis supplied]

This Court concluded that the amendment to Article 31C is destructive of the basic structure as it abrogated the protection of Article 14 & 19 against laws which fall within the ambit of the description contained in Article 31C.

77. In *Waman Rao case* (supra), Article 31-A(1)(a) which came to be introduced by the Constitution (First Amendment) Act was challenged on the ground that it damages the basic structure of the Constitution. The said Article made a declaration that no law providing for acquisition by the State of any 'estate' or of 'any rights therein' etc. shall be deemed to be void on the ground that such law violated Articles 14, 19 and 31 of the Constitution. In other words, though Articles 14, 19 and 31 remain on the statute book, the validity of the category of laws described in Article 31-A(1)(a) cannot be tested on the anvil of Articles 14, 19 and 31. Dealing with the permissibility of such an amendment, the Court held as follows:

> "In any given case, what is decisive is whether, insofar as the impugned law is concerned, the rights available to persons affected by that law under any of the articles in Part III are totally or substantially withdrawn and not whether the articles, the application of which stands withdrawn in regard to a defined category of laws, continue to be on the statute book so as to be available in respect of laws of other categories. We must therefore conclude that the withdrawal of the application of Articles 14, 19 and 31 in respect of laws which fall under clause (*a*) is total and complete, that is to say, the application of those Articles stands abrogated, not merely abridged, in respect of the impugned enactments which indubitably fall within the ambit of clause (*a*). We would like to add that every case in which the protection of a fundamental right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. **The question as to whether the basic structure is damaged or destroyed** in any given case would **depend upon which particular Article of Part III is in issue** and **whether** what is withdrawn **is quintessential to the basic structure of the Constitution**." (Para 14)
>
> [emphasis supplied]

But this Court finally reached the conclusion that the Amendment did not damage or destroy the basic structure and, therefore, upheld the Amendment[175]. Such a conclusion was reached on the basis of the logic –

> "29. The First Amendment is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot damage or destroy the basic structure of the Constitution. It is impossible for any government, howsoever expertly advised, socially oriented and prudently managed, to remove every economic disparity without causing some hardship or injustice to a class of persons who also are entitled to equal treatment under the law. ….."

This Court held that though the protection of Articles 14 and 19 is totally abrogated, the withdrawal or abrogation of such protection does not necessarily result in damage or destruction of the basic structure of the Constitution. In other words, this Court held that if in the process of seeking to achieve a larger constitutional goal of removing social and economic disparities in the agricultural sector and effectuating the twin principles contained in Article 39(b) and (a) if new inequalities result marginally and incidentally they cannot be said to be destructive of the basic structure of the Constitution.

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[175] **Para 31**. For these reasons, we are of the view that the Amendment introduced by Section 4 of the Constitution (First Amendment) Act, 1951 does not damage or destroy the basic structure of the Constitution. The Amendment must, therefore, be upheld on its own merits.

78. Both *Minerva Mills* and *Waman Rao* dealt with the abrogation of Articles 14 and 19 or absolute withdrawal of the protection of those fundamental rights with reference to certain classes of legislation. This Court held in the first of the above mentioned cases that such withdrawal amounted to abrogation of a basic feature and, therefore, destructive of the basic structure of the Constitution and in the second case this Court carved out an exception to the rule enunciated in *Minerva Mills* and held that such abrogation insofar as the law dealing with agrarian reforms did not destroy the basic structure. These cases only indicate that; (i) the expressions 'basic structure' and 'basic features' convey two different ideas, (ii) the basic features are COMPONENTS of basic structure. It also follows from these cases that either a particular Article or set of Articles can constitute a basic feature of the Constitution. Amendment of one or some of the Articles constituting a basic feature may or may not result in the destruction of the basic structure of the Constitution. It all depends on the context.

79. This Court in *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, recognised the concept of secularism as one of the basic

features of the Constitution not because any one of the Articles of the Constitution made any express declaration to that effect but such a conclusion followed from the scheme of the various provisions of the Constitution.[176]

80. This Court in *M. Nagaraj & Others v. Union of India & Others*[177], (2006) 8 SCC 212, deduced the principle that the process of identifying the basic features of the Constitution lies in the identification of some concepts which are beyond the words of any particular provision but pervade the scheme of the Constitution. Some of these concepts may be so important and fundamental as to qualify to be called essential features of the Constitution or part of the basic structure of the Constitution therefore not open to the amendment.

This Court specified the process by which the basic features of the Constitution are to be identified. The Court held:

> "23. …. Therefore, **it is important to note that the recognition of a basic structure** in the context of amendment **provides an insight that there are**, beyond the words of particular provisions, **systematic principles underlying and connecting the provisions of the Constitution**. These principles give coherence to the Constitution and make it an organic whole. These principles are

[176] See paras 25 to 29 – Ahmadi, J., para 145 – Sawant, J., paras 183 to 186 – Ramaswamy, J., para 304 – Jeevan Reddy, J.

[177] In this case, this Court had to decide the validity of the Constitution (Eighty Fifth) Amendment Act 2001 by which Article 16(4A) was amended in the Constitution with retrospective effect. It provided a rule of reservation in the context of the promotion in the Government service. Such an amendment was challenged to be violative of the basic structure of the Constitution.

part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as "essential features" or part of the "basic structure" of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.

24. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.

25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. **To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature**. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure."

[emphasis supplied]

81. In *I.R. Coelho (Dead) By LRs v. State of T.N.* (2007) 2 SCC 1, this Court ruled;

"129. **Equality**, **rule of law**, **judicial review** and **separation of powers form parts of the basic structure** of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

> 130. Realising that it is necessary to secure the enforcement of the fundamental rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality, which is a part of the basic structure, can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether **any particular feature of the Constitution is part of the basic structure** - rule of law, separation of powers - the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure."
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> [emphasis supplied]

82. An analysis of the judgments of the abovementioned cases commencing from *Bharati* case yields the following propositions:

(i) Article 368 enables the Parliament to amend any provision of the Constitution;

(ii) The power under Article 368 however does not enable the Parliament to destroy the basic structure of the Constitution;

(iii) None of the cases referred to above specified or declared what is the basic structure of the Constitution;

(iv) The expressions "basic structure" and "basic features" convey different ideas though some of the learned Judges used those expressions interchangeably.

(v) The basic structure of the Constitution is the sum total of the basic features of the Constitution;

(vi) Some of the basic features identified so far by this Court are democracy, secularism, equality of status, independence of judiciary, judicial review and some of the fundamental rights;

(vii) The abrogation of any one of the basic features results normally in the destruction of the basic structure of the Constitution subject to some exceptions;

(viii) As to when the abrogation of a particular basic feature can be said to destroy the basic structure of the Constitution depends upon the nature of the basic feature sought to be amended and the context of the amendment. There is no universally applicable test vis-à-vis all the basic features.

83. Most of the basic features identified so far in the various cases referred to earlier are not emanations of any single Article of the Constitution. They are concepts emanating from

a combination of a number of Articles each of them creating certain rights or obligations or both (for the sake of easy reference I call them "ELEMENTS"). For example,

(a) when it is said that the democracy is a basic feature of our Constitution, such a feature, in my opinion, emerges from the various articles of the Constitution which provide for the establishment of the legislative bodies[178] (Parliament and the State Legislatures) and the Articles which prescribe a periodic election to these bodies[179] based on adult franchise[180]; the role assigned to these bodies, that is, to make laws for the governance of this Country in their respective spheres[181]; and the establishment of an independent machinery[182] for conducting the periodic elections etc.;

(b) the concept of secularism emanates from various articles contained in the fundamental rights chapter like Articles 15 and 16 which prohibits the State from practicing any kind of discrimination on the ground of religion and Articles 25 to 30 which guarantee certain

[178] Articles 79-84 and 168-173
[179] Articles 83 and 172
[180] Article 326
[181] Articles 245 and 246 etc.
[182] Article 324

fundamental rights regarding the freedom of religion to every person and the specific mention of such rights with reference to minorities.

84. The abrogation of a basic feature may ensue as a consequence of the amendment of a single Article in the cluster of Articles constituting the basic feature as it happened in *Minerva Mills case* and *Indira Nehru Gandhi case*.

85. On the other hand, such a result may not ensue in the context of some basic features. For example, Article 326 prescribes that election to Lok Sabha and the Legislative Assemblies shall be on the basis of adult suffrage. Adult suffrage is explained in the said Article as:

> "… that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."

One of the components is that the prescription of the minimum age limit of 18 years. Undoubtedly, the right created under Article 326 in favour of citizens of India to participate in the election process of the Lok Sabha and the Legislative

Assemblies is an integral part (for the sake of convenience, I call it an ELEMENT) of the basic feature i.e. democracy. However, for some valid reasons, if the Parliament were to amend Article 326 fixing a higher minimum age limit, it is doubtful whether such an amendment would be abrogative of the basic feature of democracy thereby resulting in the destruction of the basic structure of the Constitution. It is worthwhile remembering that the minimum age of 18 years occurring under Article 326 as on today came up by way of the Constitution (Sixty-first Amendment) Act, 1988. Prior to the amendment, the minimum age limit was 21 years.

86. As held by this Court in *Minerva Mills case,* the amendment of a single article may result in the destruction of the basic structure of the Constitution depending upon the nature of the basic feature and the context of the abrogation of that article if the purpose sought to be achieved by the Article constitutes the quintessential to the basic structure of the Constitution.

87. In my opinion, these cases also are really of no help for determining the case on hand as they do not lay down any general principle by which it can be determined as to when can

a constitutional amendment be said to destroy the basic structure of the Constitution. In the case on hand, the identity of the basic feature is not in dispute. The question is whether the AMENDMENT is abrogative of the independence of judiciary – (a basic feature) resulting in the destruction of the basic structure of the Constitution.

88. By the very nature of the basic feature with which we are dealing, it does not confer any fundamental or constitutional right in favour of individuals. It is only a means for securing to the people of India, justice, liberty and equality. It creates a collective right in favour of the polity to have a judiciary which is free from the control of the Executive or the Legislature in its essential function of decision making.

89. The challenge to the AMENDMENT is required to be examined in the light of the preceding discussion. The petitioners argued that (i) Independence of the judiciary is a basic feature (COMPONENT) of the basic structure of the Constitution; (ii) the process of appointment of members of constitutional courts is an essential ingredient (ELEMENT) of such COMPONENT; (iii) the process prescribed under unamended Articles 124 and 217, as interpreted by this Court in the

Second and *Third Judges cases*, is a basic feature and was so designed by framers of the Constitution for ensuring independence of the judiciary, by providing for primacy of the opinion of the CJI (Collegium); and not of the opinion of the President (the Executive); (iv) the AMENDMENT dilutes such primacy and tilts the balance in favour of the Executive, thereby abrogating a basic feature, leading to destruction of the basic structure.

90. The prime target of attack by the petitioners is Section 2(a) of the AMENDMENT by which the institutional mechanism for appointment of judges of constitutional courts is replaced. According to the petitioners, the AMENDMENT is a brazen attempt by the Executive branch to grab the power of appointing Judges to CONSTITUTIONAL COURTS. Such shift of power into the hands of Executive would enable packing of the CONSTITUTIONAL COURTS with persons who are likely to be less independent.

91. It is further argued that the principles laid down in the *Second* and *Third Judges cases* are not based purely on the interpretation of the text of the Constitution as it stood prior to the impugned AMENDMENT but also on the basis of a

fundamental Constitutional principle that an independent judiciary is one of the basic features of the Constitution. The procedure for appointment of the Judges of the CONSTITUTIONAL COURTS is an important element in the establishment and nurturing of an independent judiciary. Such conclusion not only flows from the text of the Articles 124 and 217 as they stood prior to the impugned AMENDMENT but flow from a necessary implication emanating from the scheme of the Constitution as evidenced by Articles 32, 50, 112(3)(d), 113(1), 203(1), 125(2), 221(2) etc.

92. Mr. Nariman, learned Senior Counsel appearing for one of the petitioners emphatically submitted that he is not against change of the mechanism provided under Articles 124 and 217. He submitted that this aspect of the matter fell for consideration of Justice M.N. Venkatachaliah Commission[183], which also recommended creation of a National Judicial Appointments Commission but with a slightly different composition[184]. If really Parliament wanted to change in the

[183] The National Commission to Review the Working of the Constitution (NCRWC), 2002 chaired by Justice M.N. Venkatachaliah

[184] **7.3.7** "The matter relating to manner of appointment of judges had been debated over a decade. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced on 18th May, 1990 (9th Lok Sabha) providing for the institutional frame work of National Judicial Commission for recommending the appointment of judges to the Supreme Court and the various High Courts. Further, it appears that latterly there is a movement throughout the world to move this function away from the exclusive fiat of the executive and involving some institutional frame work whereunder consultation with the judiciary at some level is provided for before making such appointments. The system of consultation in some form is already

mechanism for the selection of the members of the superior judiciary, the model recommended by the Justice M.N. Venkatachaliah Commission could well have been adopted. According to Mr. Nariman the model identified by Venkatachaliah Commission is more suitable for preservation of independence of the judiciary than the model adopted in the AMENDMENT. Mr. Nariman further argued that no reasons are given by the Union of India explaining why recommendations of the Justice M.N. Venkatachaliah Commission were not accepted.

93. On the other hand, it is submitted by the learned Attorney General and other senior counsel appearing for various respondents;

(i) Parliament's power to amend the Constitution is plenary subject only to the limitation that it

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available in Japan, Israel and the UK. The Constitution (Sixty-seventh Amendment) Bill, 1990 provided for a collegium of the Chief Justice of India and two other judges of the Supreme Court for making appointment to the Supreme Court. However, it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.

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

1.	The Chief Justice of India	Chairman
2.	Two senior most judges of the Supreme Court:	Member
3	The Union Minister for Law and Justice:	Member
4	One eminent person nominated by the President after consulting the CJI	Member

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

cannot abrogate the basic structure of the Constitution. The AMENDMENT in no way abrogates the basic structure of the Constitution.

(ii) Independence of judiciary is not the only objective envisaged by the Constitution, it also envisages an efficient judiciary. To achieve such twin objects, Parliament in its wisdom thought that the selection process of the members of the CONSTITUTIONAL COURTS as it existed prior to the AMENDMENT required modification. The wisdom of Parliament is not amenable to the scrutiny of this Court, even in the context of ordinary legislation. Logically, a constitutional amendment therefore should enjoy a greater degree of immunity.

In other words, where the goal sought to be achieved by Parliament is constitutionally legitimate, the legislation by which such a goal is sought to be achieved can be questioned only on limited grounds. They are (i) lack of legislative competence, (ii) the legislation violates any one of the fundamental rights enumerated in Part III of the Constitution, or

is in contravention of some other express prohibition of the Constitution. Absent such objectionable features, the possibility that the goal sought to be achieved by the legislation can be achieved through modes other than the one chosen by the legislation can never be a ground for invalidating even an ordinary legislation as has been consistently held by this Court. In the case of a constitutional amendment question of legislative competence in the above-mentioned sense and conflict with the other provisions of the Constitution are irrelevant and does not arise.

(iii) Checks and balances of powers conferred by the Constitution on the three great branches of governance – Legislature, Executive and Judiciary is the most basic feature of all democratic constitutions. Absolute independence of any one of the three branches is inconsistent with core democratic values and the scheme of our Constitution. This Court by an interpretative process of the Constitution as it stood prior to the

AMENDMENT disturbed such balance. The AMENDMENT only seeks to restore such balance and therefore cannot be said to be destructive of the basic structure of the Constitution.

(iv) That the law laid down by this Court in *Second* and *Third Judges case* is no more relevant in view of the fact that the text of the Constitution which was the subject matter of interpretation in the said cases stands amended. In the light of well settled principles of interpretation of statutes the law laid down in those two cases is no more a good law. It is further argued that in the event this Court comes to the conclusion that the law laid down in the abovementioned two judgments has some relevance for determining the constitutional validity of the AMENDMENT and also the correctness of the principles laid down in those judgments requires reconsideration by a Bench of appropriate strength. According to the Attorney General and other learned counsel for respondents, the abovementioned two judgments are contrary to the text of the

Constitution as it stood then and in complete disregard of the constitutional history and background of the relevant provisions. It is further submitted that under the scheme of the Constitution, neither this Court nor High Courts are conferred unqualified autonomy though a large measure of autonomy is conferred under various provisions. For example the salaries, privileges and allowances, pension etc. could still be regulated by law made by Parliament under Article 125 and 221, 137, 140, 145 etc.

(v) It is submitted that independence of the judiciary is indisputably a basic feature of the Constitution. An essential element of this basic feature is that the President (Executive) should not have an unfettered discretion in such appointment process but not that the opinion of the CJI (Collegium) should have primacy or dominance. The judgments of this Court in the *Second* and *Third Judges cases* are not only counter textual but also plainly contrary to the intent of the Constituent

Assembly and clearly beyond limits of judicial power, it is an exercise of constituent authority in the disguise of interpretation. Under the AMENDMENT, the President has **no** discretion in the matter of appointment of Judges of **CONSTITUTIONAL COURTS**. He is bound by the recommendation of the NJAC wherein members of the judiciary constitute the single largest group. Parliament exercising constituent power (under Article 368) considered it appropriate that representatives of the Civil Society should be accorded a participatory role in the process of appointments to CONSTITUTIONAL COURTS and that their presence would be a check on potential and consequently ruinous 'trade offs'; (i) between and amongst the three members representing the judiciary and (ii) between the judiciary and the executive; and would accentuate transparency to what had hitherto been an opaque process. Such wisdom of the Parliament in not open to question. It is an established and venerated principle that the Court would not sit in judgment over the wisdom of Parliament **even** in respect of an

ordinary legislation; a constitutional amendment invites a greater degree of deference.

(vi) Even under the scheme of the AMENDMENT, judiciary has a pre-dominant role. The apprehension that, under the new dispensation, Executive would have the opportunity of packing the CONSTITUTIONAL COURTS of this country with cronies is illogical and baseless. The presence of three senior most Judges of this Court in the NJAC is a wholesome safeguard against such possibility. Any two of the three Judges can stall such an effort, if ever attempted by the Executive.

(vii) The fact that a Commission headed by Justice M.N.Venkatachaliah made certain recommendations need not necessarily mean that the model suggested by the Commission is the only model for securing independence of the judiciary or the best model. At any rate, the choice of the appropriate model necessarily involves a value judgment. The model chosen by the Parliament in exercise of its constituent powers cannot be held to be

unconstitutional only on the ground that in the opinion of some, there are better models or alternatives. Such a value judgment is exclusively in the realm of the Parliament's constituent powers. It is also argued that the mechanism for selection of members of the constitutional courts as expounded in the *Second* and the *Third Judges cases*, even according to Mr. Nariman's opinion is not the best. Mr. Nariman is on record stating so in one of the books authored by him "Before Memory Fades : An Autobiography"[185].

94. Any appointment process established under the Constitution must necessarily be conducive for establishment of not only an independent judiciary but also ensure its efficiency. Two qualities essential for preservation of liberty.

> "In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be **essential to the preservation of liberty**, it is evident that **each department** should have a will of its own, and

[185] Fali S. Nariman, *Before Memory Fades – An Autobiography*,

p. 389 – "If there is one important case decided by the Supreme Court of India in which I appeared and won, and which I have lived to regret, it is the decision that goes by the title – *Supreme Court Advocates-on-Record Association vs Union of India.* It is a decision of the year 1993 and is better known as the *Second Judges Case*."

p.400 - "I don't see what is so special about the first five judges of the Supreme Court. They are only the first five in seniority of appointment – not necessarily in superiority of wisdom or competence. I see no reason why all the judges in the highest court should not be consulted when a proposal is made for appointment of a high court judge (or an eminent advocate) to be a judge of the Supreme Court. I would suggest that the closed-circuit network of five judges should be disbanded. They invariably hold their 'cards' close to their chest. They ask no one. They consult no one but themselves."

> consequently **should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others**. Were this principle rigorously adhered to, **it would require that all the appointments** for the supreme executive, legislative, and judiciary magistracies **should be drawn from the same fountain of authority, the people**, through channels having no communication whatever with one another. Some difficulties, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. **In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications**."[186]
>
> [emphasis supplied]

Judges who could decide causes brought before them expeditiously and consistent with applicable principles of jurisprudence, generate confidence, in litigants and the polity that they indeed dispense justice. Whether the appointment process prior to the AMENDMENT yielded such appointments has been deeply contentious. As submitted by the learned Attorney General, the history of appointments to CONSTITUTIONAL COURTS in our Republic could be divided into two phases – pre and post *Second Judges case*. No doubt during both phases, the appointment process yielded mixed results, on the index of both independence and efficiency. Some outstanding and some not so outstanding persona came to be appointed in both phases. Allegations of seriously

[186] See Federist No.51 – (Hamilton or Madison) (1788)

unworthy appointments abound but our system provides for no mechanism for audit or qualitative analysis. Such systemic deficit has pathological consequences.

95. Parliament representing the majoritarian will was satisfied that the existing process warrants change and acted in exercise of its constituent power and concomitant discretion. Such constituent assessment of the need is clearly off limits to judicial review. Whether curative ushered in by the AMENDMENT transgresses the permissible limits of amendatory power is certainly amenable to Judicial Review because of the law declared in *Bharati case* and followed consistently thereafter.

96. The text and scheme of the AMENDMENT excludes discretion to the President in making appointments to CONSTITUTIONAL COURTS and the President is required to accept recommendations by the NJAC. The amended Articles stipulate that judges of CONSTITUTIONAL COURTS shall be appointed by the President ……. on the recommendation of the NJAC.

97. Prior to the **AMENDMENT**, there were only two parties to the appointment process, the Executive and the Judiciary.

The relative importance of their roles varied from time to time. The AMENDMENT makes three important changes - (i) primacy of judiciary is whittled down; (ii) role of the executive is also curtailed; and (iii) representatives of civil society are made part of the mechanism.

98. Primacy of the opinion of judiciary in the matter of judicial appointments is not the **only** means for the establishment of an independent and efficient judiciary. There is abundance of opinion (in discerning and responsible quarters of the civil society in the legal fraternity, jurists, political theorists and scholars) that primacy to the opinion of judiciary is not a normative or constitutional fundamental for establishment of an independent and efficient judiciary. Such an assumption has been proved to be of doubtful accuracy. It is Parliament's asserted assumption that induction of civil society representation will bring about critically desirable transparency, commitment and participation of the ultimate stakeholders – the people. The fountain of all constitutional authority, to ensure appointment of the most suitable persons with due regard to legitimate aspirations of the several competing interests. Various democratic societies have and

are experimenting with models involving association of civil society representation in such selection process. Assessment of the product of such experiments are however inconclusive. The question is not whether the model conceived by the AMENDMENT would yield a more independent and efficient judiciary. The question is whether Parliament's wisdom and authority to undertake such an experiment by resort to constituent power is subject to curial audit.

99. As rightly pointed out by the Attorney General, the basic feature of the Constitution is not primacy of the opinion of the CJI (Collegium) but lies in non investiture of absolute power in the President (Executive) to choose and appoint judges of **CONSTITUTIONAL COURTS**. That feature is not abrogated by the AMENDMENT. The Executive may at best only make a proposal through its representative in the NJAC, i.e. the Law Minister. Such proposal, if considered unworthy, can still be rejected by the other members of the NJAC. The worth of a candidate does not depend upon who proposes the name nor the candidate's political association, if any, should be a disqualification.

> "……, even party men can be fiercely independent after being appointed judges, as has been proved by some judges who were

> active in politics. Justice K.S. Hegde served as a member of Rajya Sabha from 1952 to 1957 and was elevated as a High Court judge directly from Rajya Sabha. Though he was a congress MP, he proved to be so independent that he was superseded in 1973 in the appointment of the CJI by his own party's government. Justice Tekchand was also a member of Rajya Sabha before becoming a judge. He was appointed when he was a sitting MP, but he proved to be a fine judge whose report on prohibition is a landmark. Another prominent example is Justice V.R. Krishna Iyer who was made a judge of the Kerala High Court in 1968, though he had not only been an MLA but also a minister in the Namboodiripad government (1957-59) in Kerala. In 1973, Justice S.M. Sikri, the CJI, was totally opposed to the elevation of Justice Iyer to the apex court on the ground that he had been a politician who held the office of a cabinet minister in Kerala. It was A.N. Ray who cleared his elevation, and Justice Iyer proved to be a luminous example of what a judge ought to be. He was one of the finest judges who ever sat on the bench of the Supreme Court who tried to bridge the gap between the Supreme Court and the common people. There is also the example of Justice Bahrul Islam who served as a member of Rajya Sabha for 10 years before being appointed a High Court judge. He was subsequently elevated to the Supreme Court. He absolved Jagannath Mishra, the Chief Minister of Bihar, in the urban cooperative bank scandal, and immediately thereafter resigned to contest the Lok Sabha election as a Congress(I) candidate from Barpeta – he never enjoyed a clean reputation. So, it is not proper to make any generalization. People of impeccable rectitude have to be handpicked." [187]

100. Critical analysis of Articles 124, 217 and 124-A and 124-B leads to the position that the Executive Branch of Government cannot push through an 'undeserving candidate' so long as at least two members representing the Judicial Branch are united in their view as to unsuitability of that candidate. Even one eminent person and a single judicial member of NJAC could effectively stall entry of an unworthy appointment. Similarly, the judicial members also cannot

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[187] Sudhanshu Ranjan, '*Justice, Judocracy and Democracy in India : Boundaries and Breaches'*, p.185-186

push through persons of their choice unless at least one other member belonging to the non-judicial block supports the candidate proposed by them.

101. A democratic form of government is perhaps the best institution invented for preservation of liberties. At least that is the belief of societies which adopt this model of governance. True, there are many variants of democracy. Analysis of the variants is outside the scope of this judgment. Under any constitutional model, primary responsibility to preserve liberties of the people is entrusted to the legislative and executive branches. Such entrustment is predicated on the structural and empirical assumption that legislators chosen periodically would strive to protect the liberties of their "only masters – the people". This is for two reasons operating in tandem. They are the obligation to discharge the trust reposed and the fear of losing the glory of being the chosen representative. An in built possibility in the system of periodic elections.

102. To assume or assert that judiciary alone is concerned with the preservation of liberties and does that job well, is an assumption that is dogmatic, bereft of evidentiary basis and

historically disproved. Eminent constitution jurist and teacher Laurence H. Tribe has the following to say in the context of the American experience.

> "No one should assume that the Supreme Court need always strike down laws and executive actions in order to protect our liberties. On the contrary, sometimes the Court best guarantees our rights by deferring to, rather than overruling, the political branches. When the Supreme Court, from 1900 to 1937, struck down dozens of child labor laws, minimum wage laws, working condition regulations, and laws protecting workers; rights to organize unions, on the ground that such rules infringed on property rights and violated "liberty of contract," the only rights the Court really vindicated were the rights to be overworked, underpaid, or unemployed. The Court eventually reversed itself on these issues when it recognized that, in twentieth-century America, such laws are not intrusions upon human freedom in any meaningful sense, but are instead entirely reasonable and just ways of combating economic subjugation. In upholding a minimum wage law in the watershed case of *West Coast Hotel v. Parrish*, the Supreme Court concluded in 1937 that, in the light of "recent economic experience", such statutes were justified because they prevent "the exploitation of a class of workers in ways detrimental to their health and well being."
>
> Naturally, in this imperfect world, the Supreme Court has not always guarded our liberties as jealously as it should. During the First World War and again in the McCarthy era, the Court often shrank from the affirmation of our rights to think and speak as we believe. And in the war hysteria following bombing of Pearl Harbor, the Supreme Court in *Korematsu v. United States* upheld the imprisonment of thousands of Americans of Japanese ancestry who had committed no crime. In light of such lapses, some have argued that when it comes to protecting fundamental rights, the Supreme Court is essentially redundant: on most occasions the Congress and the President will adequately safeguard our rights, and in those difficult times when the political branches cannot be counted on, neither can the Court."[188]

103. Our experience is not dissimilar. Judgments in *A.K. Gopalan*[189], *Sankalchand*[190] and *ADM Jabalpur*[191] (to mention a

[188] Laurence H. Tribe, *God Save this Honorable Court*, First Edition, p.10-11
[189] *A.K. Gopalan v. State of Madras* AIR 1950 SC 27
[190] *Union of India v. Sankalchand Himatlal Sheth & Anr.*, (1977) 4 SCC 193
[191] *ADM Jabalpur Vs. S.S. Shukla Etc. Etc.* AIR 1976 SC 1207

few) should lead to an identical inference that in difficult times when political branches cannot be counted upon, neither can the Judiciary. The point sought to be highlighted is that judiciary is not the ONLY constitutional organ which protects liberties of the people. Accordingly, primacy to the opinion of the judiciary in the matter of judicial appointments is not the only mode of securing independence of judiciary for protection of liberties. Consequently, the assumption that primacy of the Judicial Branch in the appointments process is an essential element and thus a basic feature is empirically flawed without any basis either in the constitutional history of the Nation or any other and normatively fallacious apart from being contrary to political theory.

104. I now deal with the submission that presence of the law minister in the NJAC undermines independence of judiciary. According to the petitioners, the presence of a member of the Executive invariably has the effect of shifting the power dynamics. The presence of the Law Minister in the NJAC which confers 1/6 of the voting power *per se* undermines the independence of the judiciary. The submission is untenable. The Executive with a vast administrative machinery under its

control is capable of making enormous and valuable contribution to the selection process. The objection is justified to some extent on the trust deficit in the Executive Branch in the constitutional sense[192], to be a component of the NJAC. The same logic applies a fortiari to the Judicial branch, notwithstanding the belief that it is the least dangerous branch. The Constituent Assembly emphatically declined to repose exclusive trust even in the CJI. To wholly eliminate the Executive from the process of selection would be inconsistent with the foundational premise that government in a democracy is by chosen representatives of the people. Under the scheme of our Constitution, the Executive is chartered clear authority to administer critical areas such as defence of the realm, internal security, maintenance of public order, taxation, management of fiscal policies and a host of other

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[192] Laurence H. Tribe (American Constitutional Law) Second Edition, Page 2 of Chapter 1 "Approaches to Constitutional Analysis" - "**That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet** of American **constitutionalism**. At the outset, only a small number of explicit substantive limitations on the exercise of governmental authority were thought essential; in the main, it was believed that personal freedom could be secured more effectively by decentralization than by express command. From the **thought of seventeenth century English liberals**, particularly, as elaborated in **eighteenth century France by Montesquieu**, the Constitution's framers had derived **the conviction** that **human rights could best be preserved** by inaction and indirection-shielded **behind the lay of deliberately fragmented centers of countervailing power**, in a vision almost Newtonian in its inspiration. In this first model, **the centralized accumulation of power in any man or single group of men meant tyranny; the division and separation of powers, both vertically (along the axis of federal, state and local authority) and horizontally (along the axis of legislative, executive and judicial authority) meant liberty**. It was thus **essential that no department, branch, or level of government be empowered to achieve dominance on its own**. If the legislature would punish, it must enlist the cooperation of the other branches-the executive to prosecute, the judicial to try and convict. So too with each other center of governmental power; exercising the mix of functions delegated to it by the people **in the social compact that was the Constitution, each power center would remain dependent upon the others for the final efficacy of the social designs**."

aspects, touching every aspect of the administration of the Nation and lives of its people. In this context, to hold that it should be totally excluded from the process of appointing judges would be wholly illogical and inconsistent with the foundations of the theory of democracy and a doctrinal heresy. Such exclusion has no parallel in any other democracy whose models were examined by the Constituent Assembly and none other were brought to our notice either. Established principles of constitutional government, practices in other democratic constitutional arrangements and the fact that the Constituent Assembly provided a role for the Executive clearly prohibit the inference that Executive participation in the selection process abrogates a basic feature. The Attorney General is right in his submission that exclusion of the Executive Branch is destructive of the basic feature of checks and balances – a fundamental principle in constitutional theory.

105. That takes me to the second provision which is under challenge. Article 124A.(1)(d) which stipulates that the NJAC should consist of two eminent persons[193]. Considerable debate

[193] Article **124A. National Judicial Appointments Commission**.- (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely-

xxx xxx xxx xxx

(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People-Members.

took place during the course of hearing regarding validity of this provision, the gist of which is captured in the judgment of Khehar, J. The attack is again on the ground that the provision is utterly without guidance regarding the choice of eminent persons. Petitioners argued that (i) there could be bipartisan compromise between the party in power and the opposition, resulting in sharing the two slots earmarked for eminent persons. Such possibility would eventually enable political parties to make appointments purely on political considerations, thereby destroying independence of judiciary; (ii) even assuming that the two eminent persons nominated are absolute political neutrals, but are strangers to the judicial system, they would not be able to make any meaningful contribution to the selection process, as they would have no resources to collect appropriate data relevant for the decision making process; (iii) the possibility of two eminent persons vetoing the candidature of a person approved unanimously by the three judicial members of the NJAC itself is destructive of the basic structure.

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women.

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

106. Transparency is a vital factor in constitutional governance. This Court in innumerable cases noted that constitutionalism demands rationality in every sphere of State action. In the context of judicial proceedings, this Court held in *Naresh Shridhar Mirajkar & Ors. v. State of Maharashtra & Anr.*[194]:

> **"20.** …….Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in open and must permit the public admission to the court-room. As Bentham has observed:
>
> > "In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial (in the sense that) the security of securities is publicity."

Transparency is an aspect of rationality. The need for transparency is more in the case of appointment process. Proceedings of the collegium were absolutely opaque and inaccessible both to public and history, barring occasional leaks. Ruma Pal , J. is on record -

> "Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous

[194] AIR 1967 SC 1, para 20.

> consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system."[195]

One beneficial purpose the induction of representatives of civil society would hopefully serve is that it acts as a check on unwholesome trade-offs within the collegium and incestuous accommodations between Judicial and Executive branches. To believe that members of the judiciary alone could bring valuable inputs to the appointment process requires great conceit and disrespect for the civil society. Iyer, J. cautioned -

> "74. …… And when criteria for **transfers** of Judges are put forward by the **President** which may upset past practices we must, as democrats, remember Learned Hand who once said that the spirit of liberty is "the spirit which is not too sure that it is right". That great Judge was fond of recalling Cromwell's statement : "I beseech ye in the bowels of Christ, think that ye may be mistaken." He told a Senate Committee. "**I should like to have that written over the portals of every church, every school and every court-house, any may I say, of every legislative body in the United States. I should like to have every court begin "I beseech ye in the bowels of Christ, think that we may be mistaken**." (Yale Law Journal : Vol.71 : 1961, November part)."[196]
>
> [emphasis supplied]

Replace "transfers" and "President" with "appointments" and "Parliament" and Iyer, J's admonition is custom made to answer the objections (ii) and (iii) of the petitioners.

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[195] "*An Independent Judiciary*" – speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture on 10.11.2011

[196] *Sankalchand case* (supra) para 78.

107. There is a possibility that the apprehension expressed by the petitioners might come true. The possibility of abuse of a power conferred by the Constitution is no ground for denying the authority to confer such power. Bachawat, J. in *I.C. Golak Nath* (supra) opined as follows:

> "235. It is said that the Parliament is abusing its power of amendment by making too many frequent changes. If the Parliament has the power to make the amendments, the choice of making any particular amendment must be left to it. Questions of policy cannot be debated in this Court. The possibility of abuse of a power is not the test of its existence. In Webb v. Outrim [1907] A.C. 81, Lord Hobhouse said, "If they find that on the due construction of the Act a legislative power falls within S. 92, it would be quite wrong of them to deny its existence because by some possibility it may of be abused, or limit the range which otherwise would be open to the Dominion Parliament". With reference to the doctrine of implied prohibition against the exercise of power ascertained in accordance with ordinary rules of construction, Knox C.J., in the Amalgamated Society of Engineers v. The Adelaide Steamship Company Limited 129 C.L.R. 151, said, "It means the necessity of protection against the aggression of some outside and possibly hostile body. It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of power is no reason in British law for limiting the natural force of the language creating them".

However, it was a dissenting opinion. But this Court in *I.R. Coelho* (supra), Sabharwal, J. speaking for a unanimous Bench of nine Judges, held as follows:

> "76. It is also contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of Article 31B is not in question before us. **Further, mere possibility of abuse is not a relevant test to determine the validity of a provision**. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same

> manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power."
>
> [emphasis supplied]

In the final analysis, all power could be misused including judicial power. The remedy is not to deny grant of power but to structure it so as to eliminate the potential for abuse. The power to nominate two eminent persons is conferred upon three high constitutional functionaries – the Prime Minister, the Leader of the Opposition and the CJI. It is elementary political knowledge that the Prime Minister and the Leader of Opposition would always have conflicting political interests and would rarely agree upon any issue. Nonetheless, possibility of a bipartisan compromise cannot be ruled out. Though, the presence of CJI in the Committee should normally be a strong deterrent, the possibility of the CJI failing to perceive a political compromise or helplessness in the event of such compromise, cannot be ruled out.

108. It is incontestable that nomination of eminent persons is not immune to judicial review. There is thus possibility of delay in functioning of NJAC and inevitably the process of appointments to CONSTITUTIONAL COURTS. It is, therefore,

essential that there must be an entrenched process of nomination of eminent persons which eliminates risk of possible bipartisan compromises. The only conceivable curative is to incorporate another tier of scrutiny in the process of nomination. In my considered view, the following safeguard would bring this process within permissible contours of the basic feature simultaneously eliminating the 'delay factor'. The Committee contemplated under Article 124-A(1)(a) should prepare a panel of three members for each of the two categories of the nominees (for eminent persons) – in all a panel of six persons. Such panel should be placed before the full house of the Supreme Court for voting. Nominees securing the highest vote in each of the two categories should eventually be nominated as eminent members of the NJAC. Such procedure would still preserve the choice of eminent persons primarily with the Committee contemplated under Article 124-A, while incorporating sufficient safeguard against possible abuse of the power by the Committee.

109. The third provision whose validity is under attack is Article 124 B(c), which obligates NJAC to ensure that the person recommended is of ability and integrity. The challenge is on the ground

that the AMENDMENT does not lay down any guidelines to be followed by the NJAC for assessing ability and integrity. Even in the absence of any express declaration, such an obligation is inherent and implied, having regard to functional responsibilities entrusted to the NJAC. The precision is only an *abundanti cautela*. Perhaps prompted by certain bad experiences of the past, both pre and post *Second Judges case*.

110. Having regard to the nature (i) of the document by which such obligation is created; (ii) the composition of the body (NJAC) upon which the obligation is cast; and (iii) the nature of the assignment, the argument is required to be rejected. NJAC is a constitutional authority created to perform an important constitutional function. Its charter is the Constitution itself. Notwithstanding, the prolixity of our Constitution, a constitution is not expected or required to spell out every minute detail regarding administration of the State. In the context of the American Constitution, it is said that the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices. Constitutions enumerate structural arrangements of Government and specify the outer limits of powers of each

organ of the State. Within such limits, how the various organs of the State ought to discharge their allocated functions is a matter of detail, either to be provided by law or convention. All written democratic Constitutions are full of abstract moral commands!

111. Three members of the highest judicial body of this country, a member of the Union Cabinet and two eminent persons chosen by a Committee consisting of three exalted office holders under the Constitution constitute the NJAC. To suggest that the NJAC requires detailed guidelines expressly spelt out in the text of the Constitution amounts to judicially mandating inflexible standards for constitutional drafting. The task of expounding a Constitution is crucially different from that of construing a statute.

112. Provisions of the Constitution are not to be interpreted in a broad and liberal way. They are not to be construed in the manner in which a piece of subordinate legislation or, for that matter, even a statute is required to be interpreted. This Court in *S.R. Bommai* had an occasion to consider this question. Dealing with the authority of the President under Article 356 of the Constitution of India and whether the exercise of such authority by the President is amenable to judicial review on the

parameters enunciated by this Court in *Barium Chemicals Ltd.* v. *Company Law Board,* AIR 1967 SC 295, rejected the submission.

> "35. ……. The test laid down by this Court in *Barium Chemicals Ltd.* v. *Company Law Board* and subsequent decisions for adjudging the validity of administrative action can have no application for testing the satisfaction of the President under Article 356. It must be remembered that the power conferred by Article 356 is of an extraordinary nature to be exercised in grave emergencies and, therefore, the exercise of such power cannot be equated to the power exercised in administrative law field and cannot, therefore, be tested by the same yardstick. …….
>
> 255. …….. The exercise of the power under Article 356 is a constitutional exercise of the power. The normal subjective satisfaction of an administrative decision on objective basis applied by the courts to administrative decisions by subordinate officers or quasi-judicial or subordinate legislation does not apply to the decision of the President under Article 356.
>
> 373. …….. So far as the approach adopted by this Court in *Barium Chemicals*[6] is concerned, it is a decision concerning subjective satisfaction of an authority created by a statute. The principles evolved then cannot *ipso facto* be extended to the exercise of a constitutional power under Article 356. Having regard to the fact that this is a high constitutional power exercised by the highest constitutional functionary of the Nation, it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities — nor at any rate, in their entirety."

113. Such a test is relevant only for bodies created by statutes and subordinate legislation. The functioning of any constitutional body is only disciplined by appropriate legislation. Constitution does not lay down any guidelines for the functioning of the President and Prime Minister nor the Governors or the Chief Ministers. Performance of

constitutional duties entrusted to them is structured by legislation and constitutional culture. The provisions of the Constitution cannot be read like a last will and testament lest it becomes one. Even prior to the AMENDMENT, the constitutional text had no express guidelines for the President and the CJI to follow. It is however nobody's case that the pre-AMENDMENT selection scenario conferred any uncanalised discretion and therefore resulted in some undesirable judicial appointments. If in practice, occasionally personal preferences outweighed concerns of public interest resulting in undesirable appointments, it is not because of constitutional silences in this area but because of shortcomings in the ethical standards of the participants in the selection process. After the AMENDMENT, the obligation is unvaried. The only change is in the composition of the players to whom the task is entrusted and the mode of performing the task is altered with a view to achieve greater degree of transparency in the selection process. To contend that the AMENDMENT is destructive of the basic structure since it does not lay down any guidelines tantamounts to holding that the design of the Constitution as originally enacted is defective!

114. The next submission which is required to be dealt is that Section 6(6) of the ACT which stipulates that if any two members of the NJAC do not agree with the recommendation proposed by the NJAC, the NJAC shall not recommend such candidate. In the opinion of the petitioners, it is a provision which confers veto power on two members of the NJAC to scuttle proposals. It is submitted that though the provision is facially innocuous, in practice, this would result in giving the Executive a power of veto to reject the proposals made by the three judicial members of the NJAC. Such a provision is violative of the basic structure of the Constitution. It is further argued that though the provision is not part of the AMENDMENT, since the AMENDMENT and the ACT are made simultaneously and the ACT being complementary to the AMENDMENT, the ACT must be understood to be a part of the design of the AMENDMENT and, therefore, Section 6(6) is required to be struck down on the ground it is violative of the basic structure of the Constitution.

115. The respondents submitted that Section 6(6) of the ACT only prescribes a special majority for sanctifying the recommendations of NJAC. Prescription of special majorities

in law is a known phenomenon. The Constitution itself prescribes special majorities in certain cases. For example, Article 368(2) prescribes a special majority for amending the Constitution. Similarly, Article 124(4) prescribes a special majority for the impeachment of judges of the CONSTITUTIONAL COURTS. It is argued that the petitioners presumption that only Government could take advantage of the prescription under Section 6(6) is totally baseless. In a given case it may happen that two judicial members of the NJAC can turn down the proposal of the NJAC. Learned Attorney General also submitted that such a prescription of a special majority is also a part of the regime created under *Second Judges case* and, therefore, there is nothing constitutionally objectionable in such a prescription.

116. The question whether the content of Section 6(6) confers a power of veto or prescribes a special majority is only of semantic relevance. Whatever name we call it, the result is the same. The two members of the NJAC can override the opinion of the other four and stall the recommendation. I do not find anything inherently illegal about such a prescription. For the purpose of the present case, I do not even want to

embark upon an enquiry whether the constitutional fascination for the basic structure doctrine be made a Trojan horse to penetrate the entire legislative camp. For my part, I would like to examine the question in greater detail before answering the question. There are conflicting views of this Court on this proposition.[197] In my opinion, such an enquiry is not required in this case in view of the majority decision that the AMENDMENT is unsustainable. Some of the learned counsel for the petitioners placed reliance on *S.R. Bommai case* as a justification for the invocation of the doctrine of basic structure.

117. Only to indicate but not determine conclusively the scope of the enquiry to answer the submission of the petitioners, I examine *S.R. Bommai case*. The question before this Court was whether the action of the President in invoking the powers under Article 356 was constitutionally tenable? In other words, whether the material on which the President acted was constitutionally relevant for the invocation of powers under Article 356. The submission of the petitioners before this Court was that the exercise of powers under Article 356 was inconsistent with two features of the Constitution, i.e. the

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[197] *Maharao Sahib Shri Bhim Singhji* v. *Union of India & Ors.*, (1981) 1 SCC 166, Krishna Iyer, J. –
"20. The question of basic structure being breached cannot arise when we examine the vires of an ordinary legislation as distinguished from a constitutional amendment."

democracy and federalism, therefore, destructive of the basic structure, as the Presidential action under Article 356 resulted in the super session of the democratically elected State Governments by the Union Government.

118. Repelling the contention, this Court held that secularism is also one of the basic features of the Constitution. The conscious inaction of the various State Governments and consequential failure to prevent certain activities which in the opinion of the petitioners (endorsed by this court by the judgment) would ultimately result in the destruction of the secular fabric of the Constitution has certainly a relevant consideration for the exercise of extraordinary powers vested in the President under Article 356. Because Article 356 obligates the President to resort to the action contemplated thereunder only if the President is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Failure of the State Government to prevent activities which are bound to destroy the communal harmony between people following different religions is certainly inconsistent with the constitutional obligation of the State to upheld the Constitution of which secularism is a basic feature.

S.R. Bommai case is no authority for the proposition that the validity of a legislation is amenable to judicial review on the ground of the basic structure doctrine.

119. The fiasco created in *Dinakaran case* (supra) and *Shanti Bhushan case* (supra) would justify the participation of the members of the civil society in the process to eliminate from the selection process the maladies involved in the process pointed out by Ruma Pal, J. The abovementioned two are not the only cases where the system failed. It is a matter of public record that in the last 20 years, after the advent of the collegium system, number of recommendations made by the collegia of High Courts came to be rejected by the collegium of the Supreme Court. There are also cases where the collegium of this Court quickly retraced its steps having rejected the recommendations of a particular name made by the High Court collegium giving scope for a great deal of speculation as to the factors which must have weighed with the collegium to make such a quick volteface. Such decisions may be justified in some cases and may not in other cases. There is no accountability in this regard. The records are absolutely beyond the reach of any person including the judges of this

Court who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or good for the people of this country.

120. For all the abovementioned reasons, I would upheld the AMENDMENT. However, in view of the majority decision, I do not see any useful purpose in examining the constitutionality of the ACT.

121. Only an independent and efficient judicial system can create confidence in the society which it serves. The ever increasing pendency of matters before various CONSTITUTIONAL COURTS of this country is clearly not a certificate of efficiency. The frequency with which the residuary jurisdiction of this Court under Article 136 is invoked seeking correction of errors committed by the High Courts, some of which are trivial and some profound coupled with bewildering number of conflicting decisions rendered by the various benches of this Court only indicate that a comprehensive reform of the system is overdue. Selection process of the Judges to the CONSTITUTIONAL COURTS is only one of the aspect of such reforms. An attempt in that direction, unfortunately, failed to secure the approval of this

Court leaving this Court with the sole responsibility and exclusive accountability of the efficiency of the legal system. I only part with this case recollecting the words of Macaulay – "reform that you may preserve"[198]. Future alone can tell whether I am rightly reminded of those words or not.

.....J.
(J. Chelameswar)

New Delhi;
October 16, 2015.

[198] Thomas Babington Macaulay's address on 2nd March 1831 in the House of Commons on Parliamentary Reforms

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTON

WRIT PETITION (CIVIL) NO.13 OF 2015

Supreme Court Advocates-on-Record-

Association and another ...Petitioners

Versus

Union of India ..Respondent

WITH

WRIT PETITION (CIVIL) NO. 14 OF 2015

WRIT PETITION (CIVIL) NO. 18 OF 2015

WRIT PETITION (CIVIL) NO. 23 OF 2015

WRIT PETITION (CIVIL) NO. 24 OF 2015

WRIT PETITION (CIVIL) NO. 70 OF 2015

WRIT PETITION (CIVIL) NO. 83 OF 2015

TRANSFER PETITION (CIVIL) NO. 391 OF 2015

WRIT PETITION (CIVIL) NO. 108 OF 2015

WRIT PETITION (CIVIL) NO. 124 OF 2015

WRIT PETITION (CIVIL) NO. 209 OF 2015

O R D E R

Madan B. Lokur, J.

1. I have had the benefit of going through the draft order prepared by my learned brothers Justice Khehar, Justice Chelameswar and Justice Kurian Joseph. While endorsing the view expressed by my learned brothers Justice Khehar and Justice Chelameswar, I would like to add a few words on the procedural aspect of dealing with an application for recusal.

2. Justice Khehar has mentioned in Paragraph 17 of the draft order as follows:-

> "The decision to remain as a member of the reconstituted Bench was mine, and mine alone."

3. In my respectful opinion, when an application is made for the recusal of a judge from hearing a case, the application is made to the concerned judge and not to the Bench as a whole. Therefore, my learned brother Justice Khehar is absolutely correct in stating that the decision is entirely his, and I respect his decision.

4. In a detailed order pronounced in ***Court on its own motion* v. *State & Others***[199] reference was made to a decision of the Supreme Court of the United States in ***Jewell Ridge Coal Corporation* v. *Local No. 6167, United Mine Workers***

[199] MANU/DE/9073/2007

***of America*[200], wherein it was held that a complaint as to the qualification of a justice of the Supreme Court to take part in the decision of a cause cannot properly be addressed to the Court as a whole and it is the responsibility of each justice to determine for himself the propriety of withdrawing from a case.

5. This view was adverted to by Justice Rehnquist in **Hanrahan v. Hampton**[201] in the following words:-

> "Plaintiffs-respondents and their counsel in these cases have moved that I be recused from the proceedings in this case for the reasons stated in their 14-page motion and their five appendices filed with the Clerk of this Court on April 3, 1980. The motion is opposed by the state-defendant petitioners in the action. Since generally the Court as an institution leaves such motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer, see Jewell Ridge Coal Corp. v. Mine Workers, 325 U.S. 897 (1945) (denial of petition for rehearing) (Jackson, J., concurring), I shall treat the motion as addressed to me individually. I have considered the motion, the Appendices, the response of the state defendants, 28 U.S.C. 455 (1976 ed. And Supp. II), and the current American Bar Association Code of Judicial Conduct, and the motion is accordingly denied."

6. The issue of recusal may be looked at slightly differently apart from the legal nuance. What would happen if, in a Bench of five judges, an application is moved for the recusal of Judge A and after hearing the application Judge A decides to recuse from the case but the other four judges disagree and express the opinion that there is no justifiable reason for Judge A to recuse from the hearing? Can Judge A

[200] 325 US 897 (1945)
[201] 446 US 1301 (1980)

be compelled to hear the case even though he/she is desirous of recusing from the hearing? It is to get over such a difficult situation that the application for recusal is actually to an individual judge and not the Bench as a whole.

7. As far as the view expressed by Justice Kurian Joseph that reasons should be given while deciding an application for recusal, I would prefer not to join that decision. In the first place, giving or not giving reasons was not an issue before us. That reasons are presently being given is a different matter altogether. Secondly, the giving of reasons is fraught with some difficulties. For example, it is possible that in a given case, a learned judge of the High Court accepts an application for his/her recusal from a case and one of the parties challenges that order in this Court. Upon hearing the parties, this Court comes to the conclusion that the reasons given by the learned judge were frivolous and therefore the order is incorrect and is then set aside. In such an event, can this Court pass a consequential order requiring the learned judge to hear the case even though he/she genuinely believes that he/she should not hear the case?

8. The issue of recusal from hearing a case is not as simple as it appears. The questions thrown up are quite

significant and since it appears that such applications are gaining frequency, it is time that some procedural and substantive rules are framed in this regard. If appropriate rules are framed, then, in a given case, it would avoid embarrassment to other judges on the Bench.

.....J

New Delhi (Madan B. Lokur)
October 16, 2015

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 13 OF 2015

Supreme Court Advocates-on-Record Association & Anr. …Petitioners

versus

Union of India …Respondent

WITH

WRIT PETITION (C) NO. 23 OF 2015	WRIT PETITION (C) NO. 70 OF 2015
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WRIT PETITION (C) NO. 108 OF 2015	WRIT PETITION (C) NO. 124 OF 2015
WRIT PETITION (C) NO. 14 OF 2015	WRIT PETITION (C) NO. 18 OF 2015
WRIT PETITION (C) NO. 24 OF 2015	WRIT PETITION (C) NO. 209 OF 2015
WRIT PETITION (C) NO. 309 OF 2015	WRIT PETITION (C) NO. 310 OF 2015
WRIT PETITION (C) NO. 323 OF 2015	TRANSFER PETITION (C) NO. 971 OF 2015
WRIT PETITION (C) NO. 341 OF 2015	

J U D G M E N T

Madan B. Lokur, J.

1. The questions for consideration are: Firstly, whether the Constitution (Ninety-ninth Amendment) Act, 2014 which substitutes and replaces the extant procedure for the appointment of judges of the Supreme Court and the High Courts with a radically different procedure impinges on the independence of the judiciary and violates the basic structure of the Constitution; Secondly, whether the National Judicial Appointments

Commission Act, 2014 is a constitutionally valid legislation.

2. In my opinion, the Constitution (Ninety-ninth Amendment) Act, 2014 (for short the 99th Constitution Amendment Act) alters the basic structure of the Constitution by introducing substantive changes in the appointment of judges to the Supreme Court and the High Courts and rewriting Article 124(2) and Article 217(1) of the Constitution, thereby seriously compromising the independence of the judiciary. Consequently, the 99th Constitution Amendment Act is unconstitutional. Since the 99th Constitution Amendment Act is unconstitutional, the National Judicial Appointments Commission Act, 2014 (for short the NJAC Act) which is the child of the 99th Constitution Amendment Act cannot independently survive on the statute books. Even otherwise, it violates Article 14 of the Constitution by enabling substantive arbitrariness in the appointment of judges to the Supreme Court and the High Courts.

3. Having had the benefit of reading the draft judgment of Justice Khehar, Justice Kurian Joseph and Justice Adarsh Kumar Goel, I am in respectful agreement with the conclusions arrived at with regard to the constitutional validity of the 99th Constitution Amendment Act but prefer to supplement them with additional reasons. I am in respectful disagreement with the view of Justice Chelameswar. I believe all the submissions made by various learned counsel led by Mr. Fali S. Nariman on behalf of the petitioners and by Mr. Mukul Rohatgi the learned Attorney-General on

behalf of the respondents have been noted and dealt with by Justice Khehar in his draft judgment and in respect of some of them, I have nothing to add to what has already been said.

Historical background

4. George Santayana, philosopher, essayist, poet and novelist is believed to have said something to the effect that: 'Those who do not remember their past are condemned to repeat their mistakes.' Keeping this in mind, it is essential to appreciate the evolution of the process for the appointment of judges in the Indian judiciary, the various alternatives discussed and debated and then to consider and analyze the solution given by the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014. This is important for another reason – some of the 'mistakes' made before Constituent Assembly accepted the Constitution of India, have been revived and enacted, even though the Constituent Assembly debated and rejected them.

5. Section 101 of the **Government of India Act, 1919** provided for the appointment of the Chief Justice and judges of the High Court and Section 102 provided for their tenure. It was provided that the appointment shall be made by His Majesty and the judge shall hold office 'during His Majesty's pleasure.' Since the appointment process and the tenure of a judge depended upon the Crown's pleasure, perhaps the issue of the independence of the judiciary was not the subject of discussion in India.

In any event, nothing was pointed out in this regard one way or the other during the submissions made by learned counsel.

6. The **Government of India Act, 1935** partially changed the procedure for the appointment of judges to the High Courts and introduced a procedure for the appointment of judges to the Federal Court constituted by the said Act. Section 200 and 201 dealt with the appointment of judges of the Federal Court and while the Crown continued to make the appointments (apparently without any formal consultation process), their tenure was fixed at the age of 65 years. Removal of a judge was possible only on the ground of misbehavior or of infirmity of mind or body. Section 201 provided for the salary, allowances, leave and pension of a judge and this could not be varied to his/her disadvantage after appointment. Section 220 and 221 related to the appointment of a judge of the High Court and the provisions thereof were more or less similar to the appointment of a judge of the Federal Court.

7. The Government of India Act, 1935 gave a semblance of an independent judiciary in that it provided some basic requirements of independence such as eligibility for appointment, security of tenure including the removal process, assurance of salary, allowances and pension etc. Again, nothing specific was shown to us, one way or the other, which could throw light on the contemporaneous practice regarding the appointment process or the independence of the judiciary. A general practice on the appointment of judges was, however, subsisting and this has been

adverted to by the Supreme Court of Pakistan in ***Al-Jehad Trust v. Federation of Pakistan***.[202] It was observed that ever since 1911 when the Indian High Courts Act was enacted and certainly from 1915/1919 onwards when the Government of India Act was enacted, the recommendation of the Chief Justice for the appointment of a judge was accepted even though the appointment of a judge was a matter of the pleasure of the Crown. It was said:

> "Act of appointment of a Chief Justice or a Judge in the superior Court is an executive act. No doubt this power is vested in the Executive under the relevant Articles of the Constitution, but the question is, as to how this power is to be exercised. Conventions can be pressed into service while construing a provision of the Constitution and for channelising and regulating the exercise of power under the Constitution: whereas under the Islamic Jurisprudence, a convention which is termed as Urf has a binding force on the basis of various Islamic sources, it has been a consistent practice which has acquired the status of convention during pre-partition days of India as well as post-partition period that the recommendations of the Chief Justice of a High Court and the Chief Justice of the Supreme Court in India as well as in Pakistan have been consistently accepted and acted upon except in very rare cases. The practice of consultation of the Chief Justice of a High Court and the Indian Federal Court was obtaining even under the Indian High Courts Act [1911] as well as under the Government of India Act 1915, though the appointment of Judges of superior Courts in India was a matter of pleasure vested in the Crown. The recommendations of the Chief Justices even in those days were accepted as a matter of course."

Sapru Committee

8. The issue of the appointment of judges (for Independent India) first came up for discussion (as it appears) before the Sapru Committee. A Report prepared by this Committee in 1945 dealt with the Legislature, the Executive and the Judiciary in Chapter V thereof. The relevant paragraphs pertaining to

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202 PLD 1996 SC 324 (Five Judges Bench)

the appointment of judges are paragraphs 259, 261 and 268.[203] The Committee was of the opinion that the independence of the judiciary is of 'supreme importance for the satisfactory working of the Constitution and nothing can be more detrimental to the well-being of a Province or calculated to undermine public confidence than the possibility of executive interference with the strength and independence of the highest tribunal of the Province.' It was clear that it desired to secure the 'absolute independence' of the High Court and to put the judges above party politics or influences. The Committee proposed a limited consultative system of appointment of judges completely leaving out the Legislature and the Executive. The Committee proposed consultation only between the Head of the State and the Chief Justice of India for appointments to the Supreme Court and for the High Courts, in addition, the Head of the Unit (Province) and the Chief Justice of the High Court. The relevant paragraphs of the Report read as follows:

> "259. In our Recommendation No.13 we first recommend that there shall be a Supreme Court for the Union and a High Court in each of the units. Then in the second clause we recommend that the strength of judges in each of these Courts at the inception of the Union as well as the salaries to be paid to them shall be fixed in the Constitution Act and no modification in either shall be made except on the recommendation of the High Court, the Government concerned and the Supreme Court and with the sanction of the Head of the State, provided, however, that the salary of no judge shall be varied to his disadvantage during his term of office. In sub-clause (3) we recommend:-
>
> > "(a) The Chief Justice of India shall be appointed by the Head of the State and the other judges of the Supreme Court shall be appointed by the Head of the State in consultation with the Chief Justice of India."
> > "(b) The Chief Justice of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit and the Chief Justice of India."

[203] https://archive.org/stream/saprucommittee035520mbp/saprucommittee035520mbp_djvu.txt

> "(c) Other judges of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit, the Chief Justice of the High Court concerned and the Chief Justice of India."
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> 261. Our main object in making these recommendations is to secure the absolute independence of the High Court and to put them above party politics or influences. Without some such safeguards, it is not impossible that a Provincial Government may under political pressure affect prejudicially the strength of the High Court within its jurisdiction or the salary of its Judges. If it is urged that the High Court and the Government concerned will be more or less interested parties in the matter, the intervention of the Supreme Court and of the Head of the State would rule out all possibility of the exercise of political or party influences. The imposition of these conditions, may, on a superficial view, seem to be inconsistent with the theoretical autonomy of the Provinces, but, in our opinion, the independence of the High Court and of the judiciary generally is of supreme importance for the satisfactory working of the Constitution and nothing can be more detrimental to the well-being of a Province or calculated to undermine public confidence than the possibility of executive interference with the strength and independence of the highest tribunal of the Province.
>
> 268. We now come to the method of appointment of Judges. Under the existing law Judges of High Courts and of the Federal Court are appointed by the Crown. We have recommended that the Chief Justice of India should be appointed by the Head of the State. In this connection we would refer to our discussion of the phrase 'Head of the State' in Chapter VI. Similarly we have recommended that the other Judges of the Supreme Court shall be appointed by the Head of the State in consultation with the Chief Justice of India. The Chief Justice of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit and the Chief Justice of India, and the other judges of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit, the Chief Justice of the High Court concerned and the Chief Justice of India. We have deliberately placed the appointment of these Judges, including Judges of the Provincial High Courts outside the purview of party politics, and we make the same observations as above in justification of this provision notwithstanding its seeming interference with the theoretical autonomy of the Provinces."

9. As mentioned, 'Head of State' was discussed in Chapter VI of the Report and in so far as the judiciary is concerned, the Head of State was expected to act 'on his own' as the occupant of the office of Head of State and not on the advice of the Federal Ministry. More specifically, the Head of

State was to act on his/her own in the matter of appointment and removal of judges. This is what was said in the Report:

> "The Union will be a democratic federal State and the Head of the State who will replace both the Governor-General and the Crown Representative and might be given a suitable indigenous designation, if necessary should exercise such functions as are given to him only on the advice of his Federal Ministry, barring a few very exceptional cases, to be specifically mentioned in the Constitution Act, where discretion is given to him to act on his own or on advice other than that of the Federal Ministry (1) for avoiding political or communal graft, or (2) for taking the initiative in the national interest, especially in exceptional and fast moving situations such as exist at the present day. Under exception (1) will fall the suggestions we have made under paragraph 13 of our recommendations as regard the alteration of the strength of High Courts and the appointment and removal of judges of the Supreme Court and the High Courts."[204]

Ad hoc Committee on the Supreme Court

10. After the Constituent Assembly was formed, an Ad hoc Committee on the Supreme Court was set up which presented its Report of 21st May, 1947 to the Constituent Assembly. Paragraph 14 of the Report is of relevance to the issue of appointment of judges of the Supreme Court. It accepted, in principle, the qualification for the appointment of judges to the Supreme Court, as mentioned in the Government of India Act, 1935 but found it inexpedient 'to leave the power of appointing judges of the Supreme Court to the unfettered discretion of the President of the Union.' It made two suggestions in the appointment procedure, both of which necessitated consultation between the President and the Chief Justice of India and the opinion of a panel of 11 (eleven) persons comprising of, inter alia, some Chief Justices of the High Courts, some members of both the Houses of the Central Legislature and some law officers of the Union. It was

[204] Paragraph 288

proposed that the executive be kept out of the appointment process. The said paragraph reads as follows:

> "14. The qualifications of the judges of the Supreme Court may be laid down on terms very similar to those in the Act of 1935 as regards the judges of the Federal Court, the possibility being borne in mind (as in the Act of 1935) that judges of the superior courts even from the States which may join the Union may be found fit to occupy a seat in the Supreme Court. We do not think that it will be expedient to leave the power of appointing judges of the Supreme Court to the unfettered discretion of the President of the Union. We recommend that either of the following methods may be adopted. One method is that the President should in consultation with the Chief Justice of the Supreme Court (so far, as the appointment of puisne judges is concerned) nominate a person whom he considers fit to be appointed to the Supreme Court and the nomination should be confirmed by a majority of at least 7 out of a panel of 11 composed of some of the Chief Justices of the High Courts of the constituent units, some members of both the Houses of the Central Legislature and some of the law officers of the Union. The other method is that the panel of 11 should recommend three names out of which the President, in consultation with the Chief Justice, may select a judge for the appointment. The same procedure should be followed for the appointment of the Chief Justice except of course that in this case there will be no consultation with the Chief Justice. To ensure that the panel will be both independent [and] command confidence the panel should not be an ad hoc body but must be one appointed for a term of years."[205]

11. There was clearly a divergence of opinion between the Sapru Committee and the Ad hoc Committee on the consultation process for the appointment of judges. The Sapru Committee felt that the appointment of judges should be left to the Head of State acting on his/her own while the Ad hoc Committee did not approve of the appointment process being left to the 'unfettered discretion of the President' but suggested it to be broad-based involving a panel.

12. However, what is apparent from both the Report of the Sapru Committee and the Report of the Ad hoc Committee is that the executive was

[205] http://164.100.47.132/LssNew/constituent/vol4p6.html

not to be involved at all in the process of appointment of judges. This is of considerable significance.[206]

Memorandum on the Union Constitution and Draft Clauses

13. On 30th May, 1947 the Constitutional Advisor to the Constituent Assembly, Sir B.N. Rau submitted a Memorandum on the Union Constitution and Draft Clauses. The Memorandum provided in Chapter VI (The Union Judicature) that there shall be a Supreme Court 'with powers and jurisdiction as recommended by the *ad hoc* Committee on the Union Judiciary.'[207] In the draft clauses of the Union Constitution appended to the Memorandum, it was provided that every judge of the Supreme Court shall be appointed by the President with the approval of not less than 2/3rd of the members of the Council of State.[208] In this regard, the Law Commission of India notes in its 80th Report as follows:

> "The Constitutional Adviser, in his memorandum dated May 30th, 1947 suggested that the appointment of Judges should be made by the President with the approval of at least two-thirds of the Council of State. The Council of State, according to him, was to be a body in the nature of a Privy Council for advising the President on certain matters on which decisions were required on independent non-party lines. The Council of State was to include the Chief Justice of India among its members and its composition was to be such as to secure freedom from party bias. Such a Council of State, it was suggested by the Constitutional Adviser, would be a satisfactory substitute for the panel recommended by the Special Committee.
>
> The Union Constitution Committee did not accept the proposal of the Constitutional Adviser for setting up of a Council of State, and suggested that the procedure for the appointment of judges should be that the

[206] Lay persons were also not included in the consultation process.
[207] B. Shiva Rao: 'The Framing of India's Constitution' Select Documents, Volume II page 486
[208] B. Shiva Rao: 'The Framing of India's Constitution' Select Documents, Volume II page 519

> President should consult the Chief Justice and such other judges of the Supreme Court as might be necessary."[209]

14. It appears that by this time, the independence of the judiciary was taken for granted, the only question being the procedure for the appointment of judges – whether it should be the exclusive responsibility of the President or it should be broad-based involving a panel or a Council of State. In any event, the exclusion of the executive in the appointment process appears to have been taken as accepted.

Union Constitution Committee

15. The Union Constitution Committee which presented a Report to the Constituent Assembly on 4th July, 1947 did not adopt the proposal for setting up a Council of State. Consequently, an alternative procedure for the appointment of a judge of the Supreme Court was suggested, namely, for the appointment by consultation between the President and the Chief Justice of the Supreme Court and such other judges of the Supreme Court and judges of the High Court as may be necessary. In other words, the limited consultative process as originally envisaged by the Sapru Committee (between the President and the Chief Justice of India) was accepted though with modifications. Chapter IV paragraph 18 of the Report concerns itself with the appointment of judges of the Supreme Court and this reads as follows:

> "**18. Supreme Court.**--There shall be a Supreme Court with the constitution, powers and jurisdiction recommended by the *ad hoc* Committee on the Union Judiciary, except that a judge of the Supreme

[209] Paragraphs 4.4 and 4.5

> Court shall be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also judges of the High Courts as may be necessary for the purpose.
>
> [NOTE - The *ad hoc* Committee on the Supreme Court has observed that it will not be expedient to leave the power of appointing judges of the Supreme Court to the unfettered discretion of the President of the Federation. They have suggested two alternatives, both of which involve the setting up of a special panel of eleven members. According to one alternative, the President, in consultation with the Chief Justice, is to nominate a person for appointment as puisne judge and the nomination has to be confirmed by at least seven members of the panel. According to the other alternative, the panel should recommend three names, out of which the President, in consultation with the Chief Justice, is to select one for the appointment. The provision suggested in the above clause follows the decision of the Union Constitution Committee.]"[210]

Again, the executive had no role to play in the appointment of judges, specifically of the Supreme Court.

Provincial Constitution Committee

16. With regard to the High Courts, a Report of 27th June, 1947 was submitted to the Constituent Assembly by the Provincial Constitution Committee. Part II thereof pertained to the Provincial Judiciary and the recommendations made for the appointment of judges of the High Court incorporated the provisions of the Government of India Act, 1935 and the recommendations made by the Union Constitution Committee. These read as follows:

> "The Provincial Judiciary
>
> 1. The provisions of the Government of India Act, 1935, relating to the High Court should be adopted mutatis mutandis; but judges should be appointed by the President of the Federation in consultation with the Chief Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court of the Province (except when the Chief Justice of the High Court himself is to be appointed).
>
> 2. The judges of the High Court shall receive such emoluments and allowances as may be determined by Act of the Provincial Legislature and until then such as are prescribed in Schedule.....

[210] B. Shiva Rao: 'The Framing of India's Constitution' Select Documents, Volume II page 583

> 3. The emoluments and allowances of the judges shall not be diminished during their term of office."[211]

The above discussion indicates that the executive was to be kept out of the process of appointing judges to the Supreme Court and the High Courts. This is clear from the views of: (1) The Sapru Committee; (2) The Ad hoc Committee on the Supreme Court; (3) The Union Constitution Committee, and (4) The Provincial Constitution Committee. This will have some bearing when the composition of the National Judicial Appointments Commission is examined.

17. In this background pertaining to the judiciary, the first draft of the Constitution was placed before the Drafting Committee in October, 1947. This was followed by another (revised) draft submitted to the President of the Constituent Assembly on 21st February, 1948. There was no significant change between these two drafts as far the appointment process for the Federal Judicature (or the High Courts in the Provinces/States) is concerned. But, it is important to note that the Drafting Committee did not throw overboard the view of any of the committees mentioned above, that is, to keep the executive out of the process of appointment of judges.

Conference of Chief Justices

18. Wide publicity was given to the Draft Constitution to enable interested persons to express their views through comments and suggestions. The views

[211] B. Shiva Rao: 'The Framing of India's Constitution' - Select Documents, Volume II page 662

expressed by the Conference of Chief Justices (the Chief Justice of the Federal Court and Chief Justices of the High Courts), the Minorities Sub-Committee and the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas are important since they explain the interplay between the Executive and the Judiciary in the matter of appointment of judges.

19. These views also make it clear that almost immediately after Independence (or thereabouts) the executive began to interfere in the appointment of judges of the High Courts. This interference by the executive (or in the present day language, the political executive) is the genesis of the problem that we are grappling with even today.

20. The Conference of Chief Justices was held on 26th and 27th March, 1948 to consider the proposals in the Draft Constitution concerning the judiciary. A Memorandum representing the views of the Federal Court and of the Chief Justices representing all the Provincial High Courts of the Union of India was prepared and submitted by the Conference.[212] This Memorandum is of immense importance in understanding the prevailing appointment process.

21. Very briefly, in what may be described as the 'preamble' to the Memorandum, a few salient points were assumed and noticed. It was assumed that the independence and integrity of the judiciary is of the

[212] The text of the Memorandum is available in B. Shiva Rao: 'The Framing of India's Constitution' - Select Documents, Volume IV page 193

'highest importance' not only to the judges but to the citizens seeking resort from a court of law against the high handed and illegal exercise of power by the executive. It was noticed that there is a tendency to whittle down the powers, rights and authority of the judiciary which, if allowed to continue, would be 'most unfortunate'. Therefore, there was a need to counteract this tendency which was likely to grow with greater power being placed in the hands of the political parties. It was said:

> "We have assumed that it is recognized on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive. Thanks to the system of administration of justice established by the British in this country, the judiciary until now has, in the main, played and independent role in protecting the rights of the individual citizen against encroachment and invasion by the executive power. Unfortunately, however, a tendency has, of late, been noticeable to detract from the status and dignity of the judiciary and to whittle down their powers, rights an authority which if unchecked would be most unfortunate. While we recognize that the Draft Constitution proposes to liberalize in some respects the existing safeguards against executive interference and to enlarge their present powers, it is felt that further provision should be made in the same direction in order effectively to counteract the aforesaid tendency which is bound to become more pronounced as more power passes into the hands of political parties who will control and dominate the governmental machinery in the years to come. In making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independent, incorruptible and efficient judiciary has been steadily kept in view."

The Memorandum specifically pointed out (sadly) that after 15th August, 1947 the appointment of judges to the High Courts, on merit, was not always assured in view of the practice followed (by some States). Also, recommendations by the Chief Justice of the High Court were not always forwarded to the Central Government, implying thereby that some other

recommendations were forwarded. In this regard it was said:

> "Discussions at the conference revealed that the procedure followed after 15th August 1947 does not in practice always ensure appointment being made purely on merit without political, communal and party considerations being imported into the matter. Though it is acknowledged readily enough in principle that such considerations should not influence the appointment, this is not always kept in view in working the procedure in practice. The Chief Justice sends his recommendation to the Premier who consults his Home Minister. The recommendation of the Premier is then forwarded to the Home Ministry at the Centre without even sending the recommendation of the Chief Justice along with it, the prescribed procedure being apparently understood as not rendering it obligatory for the Premier to do so."

22. Consequently, a modified procedure for making recommendations was unanimously recommended by the Conference which would ensure that the recommendation of the Chief Justice reaches the President and that the appointment be made with the concurrence of the Chief Justice of India to avoid any political pressures. It was said:

> "The Chief Justice should send his recommendation in that behalf directly to the President. After consultation with the Governor the President should make the appointment with the concurrence of the Chief Justice of India. This procedure would obviate the need for the Chief Justice of the High Court discussing the matter with the Premier and his Home Minister and "justifying" his recommendations before them. It would also ensure the recommendation of the Chief Justice of the High Court being always placed before the appointing authority, namely, the President. The necessity for obtaining the "concurrence" of the Chief Justice of India would provide a safeguard against political and party pressure at the highest level being brought to bear in the matter."

23. Significantly, the Memorandum tacitly and implicitly acknowledged that apart from a recommendation for the appointment of a judge of a High Court originating from the Chief Justice of the High Court, recommendations were being made by or at the instance of the political executive. Whether such a procedure was right or wrong was not considered but it was suggested that in the event of such a recommendation being made, the concurrence of

the Chief Justice of India should be obtained before the appointment is made. The Memorandum proposed that Article 193(1) of the Draft Constitution concerning the appointment of a judge of a High Court should read as under:

> "Every judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India …"

The Memorandum acknowledged that a recommendation for the appointment of a judge of the High Court could also be made by the President (in an individual capacity). In the event of such a proposal (by the President), there was no likelihood of the Chief Justice of India not accepting it and, therefore, the concurrence of the Chief Justice of India was not required to be incorporated in the Constitution. It was, therefore, noted:

> "We do not think it necessary to make any provision in the Constitution for the possibility of the Chief Justice of India refusing to concur in an appointment proposed by the President. Both are officers of the highest responsibility and so far no case of such refusal has arisen although a convention now exists that such appointments should be made after referring the matter to the Chief Justice of India and obtaining his concurrence. If per chance such a situation were ever to arise it could of course be met by the President making a different proposal, and no express provision need, it seems to us, be made in that behalf.
> The foregoing applies *mutatis mutandis* to the appointment of the judges of the Supreme Court, and article 103(2) may also be suitably modified….."

24. The significance of this Memorandum cannot be overemphasized and it can be summarized as follows: (1) The independence and integrity of the judiciary was of the highest importance. (2) A tendency had developed in the executive to whittle down the power and authority of the judiciary. (3) It was noted that recommendations for the appointment of a judge of a High Court originate from the Chief Justice of the High Court. Occasionally, such

recommendations are suppressed by the executive at the provincial level. It was proposed that recommendations made by the Chief Justice ought to be forwarded directly to the President for being processed so that the political executive at the provincial level cannot suppress it. (4) It was acknowledged that the political executive at the provincial level also makes recommendations (though not always on merits) directly to the Central Government, without the knowledge of the Chief Justice of the High Court. Such recommendations ought to be accepted only with the concurrence of the Chief Justice of India, and this should be taken care of in the Draft Constitution. (5) It was acknowledged that a recommendation for the appointment of a judge of a High Court (or the Supreme Court) could be made by the President (personally – 'Both are officers of the highest responsibility…..'). This would normally be accepted by the Chief Justice of India and therefore no provision for the concurrence of the Chief Justice of India was required to be made in this regard in the Draft Constitution. However, if the Chief Justice of India were to refuse to accept the recommendation, the situation could be met by the President making a different proposal. This is because, it was noted, that 'a convention now exists that such appointments should be made after referring the matter to the Chief Justice of India and obtaining his concurrence.'

Amendments to Article 61 and Article 62 of the Draft Constitution

25. The Minorities Sub-Committee and the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas adverted to and considered Article 61 and Article 62 (amongst others) of the Draft Constitution. Article 61 and Article 62 of the Draft Constitution pertain to the Council of Ministers to aid and advice the President and other provisions as to Ministers. In this regard, Shiva Rao mentions in his excellent effort 'The Framing of India's Constitution – A Study' as follows:

> "There was considerable discussion in the Minorities Sub-Committee and in the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas on the need for the inclusion of minority representatives in the Union and State Cabinets…….. They considered that it would be sufficient if, following the precedent furnished by the Government of India Act of 1935, an Instrument of Instructions was drawn up, to be included as a schedule to the Constitution, enjoining the Governors and the President as far as practicable to include members of the minority communities in their Ministries. In the Draft Constitution of February 1948, however, an Instrument of Instructions for this purpose was drawn up only for Governors but not for the President. Possibly in order to rectify this omission, the Drafting Committee decided, on further consideration of the articles relating to the Council of Ministers, that an Instrument of Instructions for the President would also be necessary"[213]

26. Apparently, pursuant to this, the Drafting Committee gave a notice in October 1948 of an amendment to Article 62 proposing to add the following clause:

> "In the choice of his Ministers and the exercise of his other functions under this Constitution, the President shall be generally guided by the Instructions set out in Schedule III-A, but the validity of anything done by the President shall not be called in question on the ground that it was done otherwise than in accordance with such Instructions."

27. Schedule III-A incorporated the Instrument of Instructions to the President and this is important and it reads as follows:

New Schedule III-A

[213] Page 373-374

[Article 62(5a)]

INSTRUCTIONS TO THE PRESIDENT

(3) In these instructions, unless the context otherwise requires, the term "President" shall include every person for the time being discharging the functions, of, or acting as, the President according to the provisions of this Constitution.

(4) xxx

(5) xxx

■ (1) The President shall make rules for the constitution of an Advisory Board consisting of not less than fifteen members of the Houses of Parliament to be elected by both Houses in accordance with the system of proportional representation by means of the single transferable vote for the purpose of advising the President in the matter of making certain appointments under this Constitution and shall take all necessary steps for the due constitution of such Board as soon as may be after the commencement of this Constitution.

(2) Such rules shall provide that the Leader of the Opposition, if any, in either House of Parliament shall, if he is not elected to the Advisory Board, be nominated to the Board by the President.

(3) Such rules shall also define the terms of office of the members of the Advisory Board and its procedure and may contain such ancillary provisions as the President may consider necessary.

5. (1) In making any appointment of –

(a) the Chief Justice of India or any other judge of the Supreme Court;

(b) the Chief Justice or any other judge of a High Court;

(c) an Ambassador in a foreign State;

(d) the Auditor-General of India;

(e) the Chairman or any other member of the Union Public Service Commission;

(f) any member of the Commission to superintend, direct and control all elections to Parliament and elections to the offices of President and Vice-President,

The President shall consult the Advisory Board constituted under paragraph 4.

(2) The President shall also consult the Advisory Board so constituted in making appointment by virtue of the powers conferred on him by this Constitution to any other office under the Government of India or the Government of a State other than the office of Governor of a State, if Parliament by resolutions passed by both Houses recommend to the President that the Advisory Board shall be consulted in making appointment to such office.

6. (1) In making appointment of judges of the Supreme Court and of the High Courts, the President shall before obtaining the advice of the Advisory Board shall follow the following procedure:

(a) In the case of appointment of the Chief Justice of India, he shall consult the judges of the Supreme Court and the Chief Justices of the High Courts within the territory of India except the States for the time being specified in Part III of the First Schedule.

(b) In the case of appointment of a judge of the Supreme Court other than the Chief Justice of India, he shall consult the Chief Justice of India and

> the other judges of the Supreme Court and also the Chief Justices of the High Courts within the territory of India except the States for the time being specified in Part III of the First Schedule.
> (c) In the case of appointment of the Chief Justice of a High Court, he shall consult the Governor of the State in which the High Court has its principal seat, and the Chief Justice of India.
> (d) In the case of appointment of a judge of a High Court other than the Chief Justice, he shall consult the Governor of the State in which the High Court has its principal seat, the Chief Justice of India and the Chief Justice of the High Court.
> (2) The President shall place the recommendations of the authorities consulted by him under sub-paragraph (1) before the Advisory Board at the time of obtaining the advice of that Board with regard to any appointment referred to in that sub-paragraph.
> 7. xxx
> 8. xxx"[214]

28. It is significant that the Instrument of Instructions also kept the executive completely out of the picture in so far as the appointment of judges is concerned. No one from the executive was to be consulted or involved in the appointment process.

29. The Drafting Committee also proposed, apparently in view of the insertion of Schedule III-A that Article 103(2) of the Draft Constitution (relating to the appointment of judges of the Supreme Court and corresponding to Article 124(2) of the Constitution of India)[215] be modified as follows:

> "(i) the words "after consultation with such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose" be deleted in clause (2); and
> (ii) the first proviso to clause (2) be deleted ."[216]

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[214] The Framing of India's Constitution – Select Documents, Volume –IV, Page 84.
[215] Article 103(2) of the Draft Constitution reads: "Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a judge, other than the Chief Justice, the Chief Justice of India shall always be consulted."
[216] The Framing of India's Constitution – Select Documents, Volume – IV, Page 147.

30. In other words, the President was not expected to consult the Council of Ministers at all or to act on its advice but was to consult the Chief Justice of India and other judges and then take the advice of the Advisory Board. This was a mixture of the Sapru Committee recommendation of the Head of State (or President as the high office came to be designated) acting on his/her own and yet the President not having 'unfettered discretion' in the appointment of judges.

31. All the proposals, including those given by the Conference of Chief Justices, the Minorities Sub-Committee and the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas, were considered by the Drafting Committee and on 4th November, 1948 the second draft of the Constitution was introduced in the Constituent Assembly by Dr. B.R. Ambedkar, Chairman of the Drafting Committee. However, the decision of the Drafting Committee taken in October, 1948 was not incorporated in the Draft Constitution. Therefore, Dr. Ambedkar moved an amendment in the Constituent Assembly on 31st December, 1948 to insert clause (5)a in Article 62 of the Draft Constitution. The amendment proposed by Dr. Ambedkar reads as follows:

> "That after clause 5 of Article 62 the following new clause be inserted:-
> (5)a In the choice of his Ministers and the exercise of his other functions under this Constitution, the President shall be generally guided by the instructions set out in Schedule III-A, but the validity of anything done by the President shall not be called in question on the ground that it was done otherwise than in accordance with such instructions."

32. The amendment was discussed briefly and adopted by the Constituent

Assembly on the same day. Although the decision of the Drafting Committee was to insert clause (5)a in Article 62 of the Draft Constitution and simultaneously delete a part of clause (2) of Article 103 of the Draft Constitution, the amendment relating to the deletion of clause (2) of Article 103 of the Draft Constitution was apparently not moved by Dr. Ambedkar. It is not clear why. As far as the Instrument of Instructions is concerned, it is pointed out by Granville Austin that it was not actually, but implicitly, adopted by the Constituent Assembly.[217]

33. A combined reading of the views of the Drafting Committee read with the Instrument of Instructions and the insertion of clause (5)a in Article 62 of the Draft Constitution indicates that the thinking at the time was that in the matter of appointment of judges the President was to act in his/her individual capacity. This is very significant otherwise there was absolutely no need for an Instrument of Instructions or an Advisory Board to be set up or for the complete exclusion of the Council of Ministers or the executive in the appointment of judges. However, this thinking was later on given up.

Constituent Assembly Debates

34. This historical background has an impact on understanding the subsequent debate in the Constituent Assembly that took place on 23rd and 24th May, 1949 when Article 103 of the Draft Constitution was considered and debated in the Constituent Assembly. It needs to be emphasized at this stage that when the debate took place on 23rd and 24th May, 1949 it was in the

[217] Indian Constitution – Cornerstone of a Nation by Granville Austin at page 126, footnote 39

backdrop of the fact that clause (5)a had already been inserted in Article 62 of the Draft Constitution to the effect that in respect of several matters, including the appointment of judges, the President would act in his/her individual capacity and the Council of Ministers was not even in the picture. The debate will be referred to a little later.

35. After a few months, on 11th October, 1949 the President of the Constituent Assembly was informed by Mr. T.T. Krishnamachari that Schedule III-A is not being moved and that it could be taken out of the list. He also moved for the deletion of Schedule IV from the Draft Constitution. Explaining the move to delete Schedule IV from the Draft Constitution it was stated that the matter should be left entirely to convention rather than be put in the body of the Constitution as a Schedule in the shape of an Instrument of Instructions and that there is a fairly large volume of opinion which favours that idea.

36. Dr. Ambedkar added as follows:

> "Sir, with regard to the Instrument of Instructions, there are two points which have to be borne in mind. The purpose of the Instrument of Instructions as was originally devised in the British Constitution for the Government of the colonies was to give certain directions to the head of the States as to how they should exercise their discretionary powers that were vested in them. Now the Instrument of Instructions were effective in so far as the particular Governor or Viceroy to whom these instructions were given was subject to the authority of the Secretary of State. If in any particular matter which was of a serious character, the Governor for instance, persistently refused to carry out the Instrument of Instructions issued to him, it was open to the Secretary of State to remove him, and appoint another and thereby secure the effective carrying out of the Instrument of Instructions. So far as our Constitution is concerned, there is no functionary created by it who can see that these Instruments of Instructions is carried out faithfully by the Governor.
> Secondly, the discretion which we are going to leave with the Governor under this Constitution is very very meagre. He has hardly any discretion

> at all. He has to act on the advice of the Prime Minister in the matter of the selection of Members of the Cabinet. He has also to act on the advice of the Prime Minister and his Ministers of State with respect to any particular executive or legislative action that he takes. That being so, supposing the Prime Minister does not propose, for any special reason or circumstances, to include in his Cabinet members of the minority community, there is nothing which the Governor can do, notwithstanding the fact that we shall be charging him through this particular Instrument of Instructions to act in a particular manner. It is therefore felt, having regard under the Constitution who can enforce this, that no such directions should be given. They are useless and can serve no particular purpose. Therefore, it was felt in the circumstances it is not desirable to have such Instrument of Instructions which really can be effective in a different set of circumstances which can by no stretch of imagination be deemed to exist after the new Constitution comes into existence. That is the principal reason why it is felt that this Instrument of Instructions is undesirable."[218]

37. On the basis of the above discussion, Schedule IV to the Draft Constitution was deleted and a motion to that effect was adopted.

38. Thereafter on 14th October, 1949 an amendment was moved by Mr. T.T. Krishnamachari to omit clause (5)a of Article 62 of the Draft Constitution. It was stated that since Schedule III-A was not moved, this clause becomes superfluous and therefore its omission was moved. The amendment to omit clause (5)a of Article 62 of the Draft Constitution was adopted. In support of this, Dr. Ambedkar [perhaps the main advocate of clause (5)a] had this to say, while emphasizing constitutional obligations and constitutional conventions:

> "Every Constitution, so far as it relates to what we call parliamentary democracy, requires three different organs of the State, the executive, the judiciary and the legislature. I have not anywhere found in any Constitution a provision saying that the executive shall obey the legislature, nor have I found anywhere in any Constitution a provision that the executive shall obey the judiciary. Nowhere is such a provision to be found. That is because it is generally understood that the provisions of the Constitution are binding upon the different organs of the State. Consequently, it is to be presumed that those who work the Constitution, those who compose the Legislature and those who compose the executive

[218] http://parliamentofindia.nic.in/ls/debates/vol10p4.htm

> and the judiciary know their functions, their limitations and their duties. It is therefore to be expected that if the executive is honest in working the Constitution, then the executive is bound to obey the Legislature without any kind of compulsory obligation laid down in the Constitution.
> Similarly, if the executive is honest in working the Constitution, it must act in accordance with the judicial decisions given by the Supreme Court. Therefore my submission is that this is a matter of one organ of the State acting within its own limitations and obeying the supremacy of the other organs of the State. In so far as the Constitution gives a supremacy to that is a matter of constitutional obligation which is implicit in the Constitution itself.
> I remember, Sir, that you raised this question and I looked it up and I had with me two decisions of the King's Bench Division which I wanted one day to bring here and refer in the House so as to make the point quite clear. But I am sorry I had no notice today of this point being raised. But this is the answer to the question that has been raised.
> No constitutional Government can function in any country unless any particular constitutional authority remembers the fact that its authority is limited by the Constitution and that if there is any authority created by the Constitution which has to decide between that particular authority and any other authority, then the decision of that authority shall be binding upon any other organ. That is the sanction which this Constitution gives in order to see that the President shall follow the advice of his Ministers, that the executive shall not exceed in its executive authority the law made by Parliament and that the executive shall not give its own interpretation of the law which is in conflict with the interpretation of the judicial organ created by the Constitution.
> Shri H V. Kamath : If in any particular case the President does not act upon the advice of his Council of Ministers, will that be tantamount to a violation of the Constitution and will he be liable to impeachment ?
> The Honourable Dr. B. R. Ambedkar: There is not the slightest doubt about it."[219]

Referring to this extremely important exposition, Granville Austin concludes:

> "From this, one is forced to deduce that Ambedkar and the members of the Drafting Committee, perhaps under pressure from Nehru or Patel, had come to the conclusion that the written provisions of a non-justiciable Instrument of Instructions and the tacit conventions of cabinet government had equal value: both were legally unenforceable, but both provided a mechanism by which the legislature could control the Executive; and of the two, conventions were the tidiest and the simplest way of limiting Executive authority."[220]

Transposing this to the relationship between the Judiciary and the Executive, it is quite clear that Dr. Ambedkar and indeed the Constituent Assembly was

[219] http://parliamentofindia.nic.in/ls/debates/vol10p7c.htm
[220] Indian Constitution – Cornerstone of a Nation, pages 138-139

of the view that constitutional obligations and constitutional conventions must be respected, unwritten though they may be. And, one of these constitutional obligations and constitutional conventions is that the view of the judiciary must be respected by the executive not only with respect to judicial decisions but also in other matters that directly impact on the independence of the judiciary.

Debates on 23rd and 24th May, 1949

39. It is important to appreciate that the Constituent Assembly Debates (for short the CAD) to which our attention was drawn refer to the appointment of a judge of the Supreme Court and not specifically to the appointment of a judge of a High Court. But the sum and substance of the debate is equally applicable to the appointment of a judge of a High Court.

40. On 23rd and 24th May, 1949 three significant amendments to Article 103(2) of the Draft Constitution relating to the appointment of judges of the Supreme Court were considered in the Constituent Assembly. The first was moved by Prof. K.T. Shah (Bihar: General) who suggested that the appointment of a judge of the Supreme Court should be after consultation with the Council of State. This suggestion was intended to avoid political influence, party maneuvers and pressures in the appointment process. The second was moved by Prof. Shibban Lal Saksena (United Provinces: General) who suggested that the appointment of the Chief Justice of India be subject to confirmation by two-thirds majority of the total number of

Members of Parliament assembled in a joint session of both the Houses of Parliament. The third was moved by Mr. B. Pocker Sahib (Madras: Muslim) who suggested that the appointment of a judge of the Supreme Court should have the concurrence of the Chief Justice of India. In support of his amendment Mr. B. Pocker Sahib extensively referred to and relied on the Memorandum submitted by the Conference of Chief Justices. As he put it:

> "I submit, Sir, the views expressed by the Federal Court and the Chief Justice of the various High Courts assembled in conference are entitled to the highest weight before this Assembly, before this provision is passed. It is of the highest importance that the Judges of the Supreme Court should not be made to feel that their existence or their appointment is dependent upon political considerations or on the will of the political party. Therefore, it is essential that there should be sufficient safeguards against political influence being brought to bear on such appointments. Of course, if a Judge owes his appointment to a political party, certainly in the course of his career as a Judge, also as an ordinary human being, he will certainly be bound to have some consideration for the political views of the authority that has appointed him. That the Judges should be above all these political considerations cannot be denied. Therefore, I submit that one of the chief conditions mentioned in the procedure laid down, that is the concurrence of the Chief Justice of India in the appointment of the Judges of the Supreme Court, must be fulfilled. This has been insisted upon in this memo. and that is a very salutary principle which should be accepted by this House. I submit, Sir, that it is of the highest importance that the President must not only consult the Chief Justice of India, but his concurrence should be obtained before his colleagues, that is the Judges of the Supreme Court, are appointed. It has been very emphatically stated in this memo. that it is absolutely necessary to keep them above political influences. No doubt, it is said in this procedure that the Governor of the State also may be consulted; but that is a matter of minor importance. It is likely that the Governor may also have some political inclinations. Therefore, my amendment has omitted the name of the Governor. That the judiciary should be above all political parties and above all political consideration cannot be denied. I do not want to enter into the controversy at present, which was debated yesterday, as to the necessity for the independence of the judiciary so far as the executive is concerned. It is a matter which should receive very serious consideration at the hands of this House and I hope the Honourable the Law Minister will also pay serious attention to this aspect of the question, particularly in view of the fact that this recommendation has been made by the Federal Court and the Chief Justice of the other High Court assembled in conference. I do not think, Sir, that there can be any higher authority on this subject than this conference of the Federal Court and the Chief Justices of the various High

> Courts in India."[221]

Mr. Mahboob Ali Baig Sahib (Madras: Muslim) moved a somewhat similar amendment. The reason given by Mr. Mahboob Ali Baig Sahib was:

> "Under our proposed constitution the President would be the constitutional Head of the executive. And the constitution envisages what is called a parliamentary democracy. So the President would be guided by the Prime Minister or the Council of Ministers who are necessarily drawn from a political party. Therefore the decision of the President would be necessarily influenced by party considerations. It is therefore necessary that the concurrence of the Chief Justice is made a pre-requisite for the appointment of a Judge of the Supreme Court in order to guard ourselves against party influences that may be brought to bear upon the appointment of Judges."[222]

41. It is clear that both these Hon'ble Members made the 'concurrence' suggestion since they desired the appointment of a judge of the Supreme Court to be free from any sort of political or executive interference. It appears that these amendments were moved unmindful of the insertion of clause (5)a in Article 62 of the Draft Constitution and Schedule III-A thereto.

42. Be that as it may, there appears to have been some discordance in the views and perception of different persons on the exact role of the President in the process of appointment of judges. Is the President expected to act on the advice of the Council of Ministers or in his/her personal capacity?

43. One view, as expressed by Dr. Ambedkar was that the President would be guided by the Council of Ministers. The other view or perception was that with the insertion of clause (5)a in Article 62 of the Draft Constitution and Schedule III-A the President was to act in his/her individual capacity and not be guided by the Council of Ministers since the executive was to be kept

[221] http://parliamentofindia.nic.in/ls/debates/vol8p7a.htm
[222] http://parliamentofindia.nic.in/ls/debates/vol8p7a.htm

completely out of the appointment process. It is not clear which of the two views found favour with Mr. B. Pocker Sahib and Mr. Mahboob Ali Baig Sahib – but both were clear that the President could be put under political or party pressure in the recommendation of a person for appointment and that this should be avoided and the pressure could be negated by the requirement of the concurrence of the Chief Justice of India, an impartial person.

44. But what is more significant is that Mr. B. Pocker Sahib and Mr. Mahboob Ali Baig Sahib adverted only to a recommendation for the appointment of a judge by the President – hence the necessity of concurrence by the Chief Justice of India. They did not, quite obviously, advert to the recommendation for the appointment of a judge by the Chief Justice of India.

45. It is in this background of divergence of perceptions that the speech of Dr. Ambedkar on 24th May, 1949 should be appreciated. Replying to the debate, Dr. Ambedkar stated:

> "Now, Sir, with regard to the numerous amendments that have been moved, to this article, there are really three issues that have been raised. The first is, how are the Judges of the Supreme Court to be appointed? Now grouping the different amendments which are related to this particular matter, I find three different proposals. The first proposal is that the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice. That is one view. The other view is that the appointments made by the President should be subject to the confirmation of two-thirds vote by Parliament; and the third suggestion is that they should be appointed in consultation with the Council of States.
> With regard to this matter, I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, officers of the Supreme Court as well as other officers of the State shall be made [appointed] only

> with the concurrence of the Senate in the United States. It seems to me in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are *ex hypothesi*, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.
>
> With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that is also a dangerous proposition."[223]

46. Dr. Ambedkar was quite clear that there could be no difference of opinion that the judiciary should be independent of the executive, yet competent. He was of the view that it would be 'dangerous' to leave the appointment of judges to the President without any reservation or limitation, that is to say, merely on the advice of the executive of the day. Dr. Ambedkar seems to have lost sight of the existence of the Instrument of Instructions (or it was 'given up' by him) since that document mentioned the advice of the Advisory Board and not the executive and also that that document enabled the President to act on his/her own, and not on the advice of the executive.

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[223] http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm

47. If this dichotomy between the role of the President and the executive and the binding or non-binding effect of the advice of the executive on the President is appreciated, the views of Dr. Ambedkar become very clear. He was quite clear that the executive was not to have primacy in the appointment process nor did he want the President to have unfettered discretion to accept or reject the advice of the executive or act on his/her own. As far as the concurrence of the Legislature is concerned, Dr. Ambedkar felt that the process would be cumbrous with the possibility of political pressure and considerations. It is in this context that Dr. Ambedkar said that he was steering a middle course and was not prepared to grant a veto to the President (rejecting the advice of the executive or acting on his/her own) in the appointment of judges, executive primacy having already been rejected by him. Under the circumstances, he felt that 'this sort of provision [consultation with the Chief Justice of India] may be regarded as sufficient for the moment.'

48. With regard to the 'concurrence' of the Chief Justice of India (as against consultation with the Chief Justice of India) in the appointment of a judge of the Supreme Court, Dr. Ambedkar was of the opinion that the Chief Justice, despite his eminence, had all the failings, sentiments and prejudices of common people and to confer on him a power of veto, which is not vested in the President or the Government of the day (that is the executive), would be a 'dangerous proposition'.

49. Dr. Ambedkar was of the view that neither the President nor the Government of the day (the executive) nor the Chief Justice of India should have the final word in the matter of the appointment of judges. Who then would have the final say in the event of a difference of opinion between the President or the Government of the day or the Chief Justice of India on the appointment of a particular person as a judge? Dr. Ambedkar did not directly address this question since he did not visualize a stalemate arising in this regard.

50. A small diversion - apart from the reasons already mentioned for keeping the executive out of the decision-taking process in the appointment of judges, it would be of interest to know that, on a different topic altogether, while replying to the debate 'on acceptance of office by members of the judiciary after retirement' Dr. Ambedkar observed that the judiciary is very rarely engaged in deciding issues between citizens and the Government. He said:

> "The judiciary decides cases in which the Government has, if at all, the remotest interest, in fact no interest at all. The judiciary is engaged in deciding the issue between citizens and very rarely between citizens and the Government. Consequently the chances of influencing the conduct of a member of the judiciary by the Government are very remote, and my personal view, therefore, is that the provisions which are applied to the Federal Public Services Commission have no place so far as the judiciary is concerned."[224]

51. Times have changed dramatically since then and far from disputes 'very rarely' arising between citizens and the Government, today the Government is unashamedly the biggest litigant in the country. It has been

[224] http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm

noticed in ***Supreme Court Advocates on Record Association v. Union of India***[225] that:

> "No one can deny that the State in the present day has become the major litigant and the superior courts particularly the Supreme Court, have become centres for turbulent controversies, some of which with a flavour of political repercussions and the Courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to continue, the independence of judiciary in the long run will sink without any trace."[226]

52. Given this fact situation, since there was this reason in 1949 to insulate the judiciary and the appointment process from the direct or indirect influence of the executive and political or party pressures, there is all the more reason to do so today if the independence of the judiciary is to be maintained.

53. In England too the executive is the 'most frequent litigator' and the position seems to be no better than in our country. In a lecture on Judicial Independence, Lord Phillips[227] had this to say:

> "In modern society the individual citizen is subject to controls imposed by the executive in respect of almost every aspect of life. The authority to impose most of those controls comes, directly or indirectly, from the legislature. The citizen must be able to challenge the legitimacy of executive action before an independent judiciary. Because it is the executive that exercises the power of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts, it is from executive pressure or influence that judges require particularly to be protected."[228]

Summation

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[225] (1993) 4 SCC 441 (Nine Judges Bench)
[226] Paragraph 207 (Justice Pandian). A similar view was expressed by Justice Kuldip Singh in paragraph 327.
[227] Former President of the Supreme Court of the United Kingdom and Lord Chief Justice of England and Wales
[228] https://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf

54. The discussion leading up to the Constituent Assembly Debates and relating to the appointment of judges clearly brings out that:

(1) The independence of the judiciary was unflinchingly accepted by all policy and decision makers;

(2) The appointment of judges of the Supreme Court and the High Courts was to be through a consultative process between the President and the Chief Justice of India, neither of whom had unfettered discretion in the matter;

(3) In any event, the political executive had no role or a very little role to play in the decision-taking process. Notwithstanding this, the political executive did interfere in the appointment process as evidenced by the Memorandum prepared in the Conference of Chief Justices by, *inter alia*, recommending persons for appointment as judges of the High Court. Resultantly, the appointment of judges to the High Courts was not always on merit and sometimes without the recommendation of the Chief Justice of the High Court;

(4) A constitutional convention existed that the appointment of judges should be made in conformity with the views of the Chief Justice of India;

(5) The proposal for the appointment of a judge of the Supreme Court or a High Court could originate from the President (although it never did) or the Chief Justice of India and regardless of the origin, it would normally be

accepted. However, the possibility of the President giving in to political or party pressures was not outside the realm of imagination.

(6) Historically, the Chief Justice of India was always consulted in the matter of appointment of judges, and conventionally his concurrence was always taken regardless of whether a recommendation for appointment originated from the Chief Justice of the High Court or the political executive. It is in this light that the discussion in the Constituent Assembly on the issue of appointment of judges to the Supreme Court and the High Courts deserves to be appreciated.

(7) It remained a grey area whether in the appointment of judges, the President was expected to act on his/her own or on the advice of the political executive.

Views of the Law Commission of India

55. The issue of the appointment of judges of the Supreme Court and the High Courts was first addressed, after Independence, in the 14th Report of the Law Commission of India (for short the LCI), then in the 80th Report and finally in the 121st Report. (A reference was made in the 214th Report and the 230th Report but they are of no immediate consequence). The issue also came to be addressed in ***S.P. Gupta v. Union of India***[229] and in ***Subhash Sharma v. Union of India***.[230] It was also the subject matter of three Constitution amendment Bills and two other pronouncements of this Court rendered by larger Benches. This is mentioned only to highlight the complexity of the

[229] 1981 (Supp) SCC 87 (Seven Judges Bench)
[230] 1991 Supp (1) SCC 574

issue and the constant search for some stability and certainty in the appointment process in relation to the independence of the judiciary. It has been said with regard to the selection of judges in the United States, and this would equally apply to our country:

> "It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection."[231]

(a) 14th Report – 26.9.1958
Appointment of judges of the Supreme Court

56. Within less than a decade of the promulgation of the Constitution, the process of appointment of judges of the Supreme Court and the High Courts came in for sharp criticism from the LCI. Chapter 5 and Chapter 6 of the 14th Report of the LCI relating, inter alia, to the appointment of judges to the Supreme Court and judges to the High Courts respectively makes for some sad reading, more particularly since the Attorney-General for India was the Chair of the LCI.[232] It must be noted here that the LCI travelled through the length and breadth of the country for about one year and examined as many as 473 witnesses from a cross-section of society before giving its Report. It also adopted a novel procedure of co-opting two members from the States that were visited so as to understand the local problems. The monumental and authoritative work can only be admired.

57. The LCI observed that the Constitution endeavored to put judges of

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[231] Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems,* 10 WM & MARY BILL RTS J. 7, n.9 (2001) (quoting Philip Dubois).
[232] The Report is titled 'Reforms of the Judicial Administration'

the Supreme Court 'above executive control'. It very specifically acknowledged the importance of safeguarding the independence of the judiciary and observed that 'It is obvious that the selection of the Judges constituting a Court of such pivotal importance to the progress of the nation must be a responsibility to be exercised with great care.'[233]

58. Thereafter three central issues were adverted to – (1) Communal and regional considerations had prevailed in making the selection of judges. (2) The general impression was that executive influence was exerted now and again from the highest quarters in respect of some appointments to the Bench. (3) The best talent among the judges of the High Courts did not find its way to the Supreme Court.

59. The Report said:

> "It is widely felt that communal and regional considerations have prevailed in making the selection of the Judges. The idea seems to have gained ground that the component States of India should have, as it were, representation on the Court. Though we call ourselves a secular State, ideas of communal representation, which were viciously planted in our body politic by the British, have not entirely lost their influence. What perhaps is still more to be regretted is the general impression, that now and again executive influence exerted from the highest quarters has been responsible for some appointments to the Bench. It is undoubtedly true, that the best talent among the Judges of the High Courts has not always found its way to the Supreme Court. This has prevented the Court from being looked upon by the subordinate Courts and the public generally with that respect and indeed, reverence to which it by its status entitled."[234]

60. On the basis of its findings, the LCI recommended, inter alia, that 'communal and regional considerations should play no part in the making of appointments to the Supreme Court.' However, the LCI did not proffer any

[233] Chapter 5 paragraph 5
[234] Chapter 5 paragraph 6

solution to the vexed issue of making more satisfactory appointments to the Supreme Court.

Appointment of judges of the High Courts

61. Similarly, Chapter 6 of the Report concerning the appointment of judges to the High Courts makes for equally sad reading. The inadequacies in the appointments made were pointed out as: (1) The selections have been unsatisfactory and induced by executive influence. (2) There is no recognizable principle for making the appointments and considerations of political expediency or regional or communal sentiments have played a role. (3) Merit has been ignored in making appointments.

62. It was said that these inadequacies were well founded and there was acute public dissatisfaction with the appointments made:

> "We have visited all the High Court centres and on all hands we have heard bitter and reviling criticism about the appointments made to High Court judiciary give in recent years. This criticism has been made by Supreme Court Judges, High Court Judges, Retired Judges, Public Prosecutors numerous representatives, associations of the Bar, principals and professors of Law Colleges and very responsible members of the legal profession all over the country. One of the State Governments had to admit that some of the selections did not seem to be good and that careful scrutiny was necessary. The almost universal chorus of comment is that the selections are unsatisfactory and that they have been induced by executive influence. It has been said that these selections appears to have proceeded on no recognizable principle and seem to have been made out of consideration of political expediency or regional or communal sentiments. Some of the members of the Bar appointed to the Bench did not occupy the front rank in the profession either in the matter of legal equipment or of the volume of their practice at the bar. A number of more capable and deserving persons appear to have been ignored for reasons that can stem only from political or communal or similar grounds. Equally forceful or even more unfavourable comments have been made in respect of persons selected form the services. We are convinced that the views expressed to us show a well founded and acute public dissatisfaction at these appointments."[235]

[235] Chapter 6 paragraph 8

63. On the procedure followed for the appointment of a judge of the High Court and the administrative working of Article 217 of the Constitution, the LCI had this to say:

> "The Chief Justice forwards his recommendation to the Chief Minister who in turn forwards this recommendation in consultation with the Governor to the Minister of Home Affairs in the Central Government. If, however, the Chief Minister does not agree with the recommendation of the Chief Justice, he makes his own recommendation. It appears that in such a case, the Chief Justice is given an opportunity for making his comments on the recommendation made by the Chief Minister. This practice is not, however, invariably followed so that, in some cases it happens that the recommendation made by the Chief Minister does not come to the knowledge of the Chief Justice. The rival recommendations are then forwarded to the Minister of Home Affairs who, in consultation with the Chief Justice of India, advises the President as to the selection to be made. The person recommended by the Chief Minister may be, and occasionally is, selected in preference to the person recommended by the Chief Justice."[236]

64. The LCI recorded that no less a personage than the Chief Justice of India had this to say about executive interference in the appointment of judges to the High Courts (for reasons other than merit):

> "The Chief Minister now has a hand direct or indirect in the matter of the appointment to the High Court Bench. The inevitable result has been that the High Court appointments are not always made on merit but on extraneous considerations of community, caste, political affiliations, and likes and dislikes have a free play. This necessarily encourages canvassing which, I am sorry to say, has become the order of the day. The Chief Minister holding a political office dependent on the goodwill of his party followers may well be induced to listen and give way to canvassing. The Chief Justice on the other hand does not hold his office on sufferance of any party and he knows the advocates and their merits and demerits and a recommendation by the Chief Justice is therefore more likely to be on merit alone that the one made by the Chief Minister who may know nothing about the comparative legal acumen of the advocates."[237]

65. To conclude this aspect, the Report observes that extraneous factors have influenced the appointments and that there seems to be canvassing for

[236] Chapter 6 paragraph 11
[237] Chapter 6 paragraph 14

appointment as a judge of the High Court:

> "This indeed is a dismal picture and would seem to show that the atmosphere of communalism, regionalism and political patronage, have in a considerable measure influenced appointments to the High Court Judiciary.
> Apart from this very disquieting feature, the prevalence of canvassing for judgeships is also a distressing development. Formerly, a member of the Bar was invited to accept a judgeship and he considered it a great privilege and honour. Within a few years of Independence, however, the judgeship of a High Court seems to have become a post to be worked and canvassed for."[238]

66. Based on its findings, the LCI reached the following conclusions, amongst others:

> "(8) Many unsatisfactory appointments have been made to the High Courts on political regional and communal or other grounds with the result that the fittest men have not been appointed. This has resulted in a diminution in the out-turn of work of the Judges.
> (9) These unsatisfactory appointments have been made notwithstanding the fact that in the vast majority of cases, appointments have been concurred in by the Chief Justice of the High Court and the Chief Justice of India.
> (10) Consultation with the State executive is necessary before appointments are made to the High Court.
> (11) While it should be open to the State executive to express its own opinion on a name proposed by the Chief Justice, it should not be open to it to propose a nominee of its own and forward it to the Centre.
> (12) The role of the State executive should be confined to making its remarks about the nominee proposed by the Chief Justice and if necessary asking the Chief Justice to make a fresh recommendation.
> (14) Article 217 of the Constitution should be amended to provide that a Judge of a High Court should be appointed only on the recommendation of the Chief Justice of that State and with the *concurrence* of the Chief Justice of India."[239]

67. Unlike in the appointment of judges to the Supreme Court, the LCI suggested, for the High Courts, that Article 217 of the Constitution ought to be amended to incorporate the concurrence of the Chief Justice of India to the appointment. This recommendation was made so that, in future, no appointment could be made without the concurrence of the Chief Justice of

[238] Chapter 6 paragraph 14 and 15
[239] Chapter 6 paragraph 82

India.

68. The Report was considered in Parliament on 23rd, 24th and 25th November, 1959 and the Government of the day gave its point of view, as did several Hon'ble Members. But what is more important is that in the debate on 24th November, 1959 it was stated by Shri Govind Ballabh Pant, Hon'ble Minister of Home Affairs that since 1950, as many as 211 judges were appointed to the High Courts and out of these except one 'were made on the advice, with the consent and concurrence of the Chief Justice of India. And out of the 211, 196 proposals which were accepted by the Government had the support of all persons who were connected with this matter.'[240]

69. A little later it was stated:

> "But as I said, these 196 appointments were made in accordance with the unanimous advice of the Chief Justice of the High Court, the Chief Minister of the State, the Governor and the Chief Justice of India. There were fifteen cases in which there was a difference of opinion between the Chief Justice and the Chief Minister or the Governor. So, these cases also were referred to the Chief Justice of India. In some of these he accepted the proposal made by the Chief Minister and in others he accepted the advice or the suggestion received from the Chief Justice of the High Court. But we on our part had his advice along with that of the Chief Justice of the High Court concerned and of the Chief Minister concerned. So, these cases do not even come to five per cent. But even there, so far as we are concerned, out of these 211 cases, as I said, except in one case where there was a difference of opinion between the Chief Minister and the Chief Justice, we had accepted in 210 cases the advice of the Chief Justice of India."[241]

70. On the next day, that is, 25th November, 1959 Shri A.K. Sen, Minister of Law reiterated the statement made by the Home Minister. He clarified that in one case where there was a difference of opinion, the Government

[240] Page 287
[241] Page 288-289

accepted the advice of the Chief Justice of the High Court (not the Chief Minister) rather than the advice of the Chief Justice of India.

71. The discussion ended with an Hon'ble Member suggesting that the recommendations of the LCI be taken note of and implemented as quickly as possible.

72. What is of importance in this Report (apart from several other conclusions) is that there had been instances where a recommendation for appointment as a judge of the High Court was made by the Chief Minister without the knowledge of the Chief Justice and that canvassing had begun to take place for appointment as a judge of the High Court. But in all cases, except one, the concurrence of the Chief Justice of India was taken.

(b) 80th Report – 10.8.1979
Appointment of judges of the Supreme Court

73. The 80th Report of the LCI was submitted on 10th August, 1979 and it was mainly prepared by Justice H.R. Khanna when he was its Chair.[242]

74. It was observed that an independent judiciary is absolutely indispensible for ensuring the Rule of Law. Generally in regard to appointment of judges, it was observed that wrong appointments have affected the image of the Courts and have undermined the confidence of the people in them. Further, it was observed that an appointment not made on merit but because of favouritism or other ulterior considerations can hardly command real and spontaneous respect of the Bar and that the effect of an

[242] Although Justice H.R. Khanna did not sign the Report, it had his full concurrence

improper appointment is felt not only for the time being but its repercussions are felt long thereafter.[243]

75. In this background, and in relation to the appointment of judges of the Supreme Court, it was concluded that (1) Only persons who enjoy the highest reputation for independence, dispassionate approach and detachment should be elevated to the Supreme Court. (2) No one should be appointed a judge of the Supreme Court unless he has severed affiliations with political parties for at least 7 (seven) years. (3) A person should be appointed as a judge if he has distinguished himself for his independence, dispassionate approach and freedom from political prejudice, bias or leaning.[244]

76. Significantly, the LCI recommended adopting a consultative process in that the Chief Justice of India should consult his three senior-most colleagues while making a recommendation for an appointment. He should reproduce their views while making the recommendation. This would minimize the chances of any possible arbitrariness or favouritism.[245]

77. These recommendations were incorporated by the LCI in its summary of recommendations. I am concerned with the following recommendation:

> "(32) The Chief Justice of India, while recommending the name of a person for appointment as a Judge of the Supreme Court should consult his three senior most colleagues and should in the communication incorporating his recommendation specify the result of such consultation and reproduce the views of each of his colleagues so consulted regarding his recommendation. The role of these colleagues would be confined to commenting on the recommendation of the Chief Justice. Such consultation would minimize possible arbitrariness or favoritism"[246]

[243] Paragraphs 2.2 to 2.5 are relevant in this context
[244] Chapter 7
[245] This later on became what is commonly called the 'collegium system' of appointment of judges
[246] Chapter 9

Appointment of judges of the High Court

78. In relation to the appointment of judges of the High Court, it was generally observed by the LCI in Chapter 6 of the Report that the prevailing impression was that their appointment 'has not been always made on merit and that this has affected the image of the High Courts.' [247]

79. The LCI suggested a consultation process for the appointment of a judge of the High Court. It was suggested that the Chief Justice should, when making a recommendation, consult his two senior-most colleagues and indicate their views in writing. This would have a 'healthy effect' and considerably minimize the chances of possible favoritism. It was opined that any recommendation of the Chief Justice which is concurred with by the two senior-most judges should normally be accepted. The LCI was, in principle, against the selection of persons as judges of the High Court on grounds or considerations of religion, caste or region.

80. With regard to the recommendations originating from the political executive it was said:

> "Another question which has engaged attention is as to whether the role of the Chief Minister should be that of commenting on the name recommended by the Chief Justice, or whether, in case he disagrees with the recommendation of the Chief Justice, he (the Chief Minister) can also suggest another name. This question was agitated in the past, and after due consideration it was decided that the Chief Minister would be entitled, in case he disagrees with the recommendation of the Chief Justice to suggest another name. The Chief Minister in such an event has to invite the comments of the Chief Justice and send the matter thereafter along with the comments of the Chief Justice, to the Union Minister of Law and Justice. In view of the fact that a decision referred to above has already

[247] Paragraph 5.9

> been taken after due consideration, we need not say anything further in the matter."[248]

81. Keeping all these factors in mind, some of the recommendations made by the LCI were as follows:

> "(3) When making a recommendation for appointment of a judge of a High Court, the Chief Justice should consult his two seniormost colleagues. The Chief Justice, in his letter recommending the appointment, should state the fact of such consultation and indicate the views of his two colleagues so consulted.
> (4) Any recommendation of the Chief Justice which carries the concurrence of his two seniormost colleagues should normally be accepted.
> (7) The Commission is, in principle, against selection to the High Court Bench on ground of religion, caste or region. Merit should be the only consideration. Even when matters of State policy make it necessary to give representation to persons belonging to some religion, caste or region, every effort should be made to select the best person. The number of such appointments should be as few as possible.
> (12) On the question whether the role of the Chief Minister should be that only of commenting on the name recommended by the Chief Justice, or whether the Chief Minister can also suggest another name, a decision has already been taken and nothing further need be said in the matter."[249]

82. Generally speaking, the LCI was of the view that the constitutional scheme of appointment of judges was basically sound, had worked satisfactorily and did not call for any radical change, though some aspects needed improvement. The recommendations mentioned above were made in that light.

(c) 121st Report – 31.7.1987
A new forum for judicial appointments

83. It is important to note that this Report was prepared after the decision of this Court in ***S.P. Gupta***. In its 121st Report, the LCI noted that over the last four decades, mounting dissatisfaction has been voiced over the method

[248] Paragraph 6.14
[249] Chapter 9

and strategy of selection and the selectees to man the superior judiciary.[250] Further, in paragraph 7.1 of its Report, the LCI noted that 'Everyone is agreed that the present scheme or model or mechanism for recruitment to superior judiciary has failed to deliver the goods.' This was with reference to the executive primacy theory in the appointment of judges propounded in ***S.P. Gupta***. In view of this the LCI recommended a new broad-based model called a National Judicial Service Commission.[251]

84. The LCI observed that two models were available for the appointment of judges. The first was the existing model which conferred overriding powers on the executive in selecting and appointing judges. But, Article 50 of the Constitution mandates a separation between the Executive and the Judiciary. The second model involved diluting (not excluding) the authority of the executive by associating more people in the decision making process and setting up a body in which the judiciary has a pre-eminent position. This participatory model was called by the LCI as the National Judicial Service Commission.

85. The Commission was envisaged as a multi-member body headed by the Chief Justice of India whose 'pre-eminent position should not be diluted at all', his predecessor in office, three senior-most judges of the Supreme Court, three Chief Justices of the High Courts in order of their seniority, the Law Minister, the Attorney-General for India and an outstanding law

[250] Chapter 1 paragraph 1.4
[251] Paragraph 7.8

academic. Thus, an 11 (eleven) member body was proposed by the LCI for the selection and appointment of judges of the Supreme Court and the High Courts. To give effect to the recommendation, it was proposed to suitably amend the Constitution.[252]

86. The recommendation of the LCI was partially accepted by the government of the day and the Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced in Parliament. This will be adverted to a little later.

Arrears Committee – 1989-90

87. Between 11th and 13th December, 1987 a Conference of Chief Justices was held with the Chief Justice of India in the Chair. The Conference discussed, inter alia, issues relating to arrears of cases in the High Courts and the District Courts in the country. Grave concern was expressed over the problem of arrears and it was pointed out by most Chief Justices that delay in the appointment of judges is responsible for the arrears. Even after recommendations are sent, the Chief Justice has to wait for a long time for the Government to make the appointment with the result that for a number of years Courts have been working with about 50% of their strength.

88. After a detailed discussion of the matter, it was decided to appoint a committee of Chief Justices to thoroughly examine the issues raised and a Resolution was passed appointing such a committee. The composition of the committee called the Arrears Committee changed over a period of time but finally it consisted of Chief Justice V.S. Malimath (Kerala High Court),

[252] Paragraph 7.10 and 7.15

Chief Justice P.D. Desai (Calcutta High Court) and Chief Justice Dr. A.S. Anand (Madras High Court). The Arrears Committee gave its Report in two volumes to the Conference of Chief Justices held between 31st August and 2nd September, 1990 which accepted the Reports, subject to a few modifications.

89. Chapter 5 of Volume 2 of the Report deals with the unsatisfactory appointment of judges to the High Courts. It was observed by the Arrears Committee that unsatisfactory appointments have contributed in a large measure to the accumulation of arrears in the High Courts. It was observed that merit and merit alone, coupled with a reputation for integrity, suitability and capability has to be the criterion for selection of judges and judges not selected on that basis or who are appointed on considerations other than merit, may not be able to act impartially and fairly. It was noted that for this reason the selection of judges should be made with utmost care and concern.[253]

90. The Arrears Committee also considered the Report given in the recent past by the Satish Chandra Committee which was of the confirmed view that some judges have not been directly recommended by the Chief Justice of the High Court but have been foisted on the High Court and that if this trend continued, it would be very difficult for the Chief Justice to effectively transact the judicial business of the Court.[254]

[253] Paragraph 5.1
[254] Paragraph 5.4

91. Thereafter, the selection of a judge of the High Court for reasons other than merit was discussed and it was observed as follows:

> "The selection of a person, on considerations other than merit, has far reaching consequences and does more damage than what apparently meets the eye. Such an appointee does not even receive from the members of the Bar the measure of respect and co-operation which is imperative for proper administration of justice. He may not have confidence even in himself and a command over the proceedings of the Court. All this would be at the cost of proper administration of justice. The effect would be felt not only on the quality but also on the quantity of the work turned out.
> According to Satish Chandra Committee, the sea change which has gradually come into the political process is directly responsible for the grave deterioration and the fall in the high standards of appointments to the High Court Bench previously maintained. Barring exceptions, the Chief Ministers to-day have come to think that even filling up vacancies on the High Court Bench is a matter of patronage, political or otherwise. It noticed that formerly members of the Bar were invited to accept judge-ship. Now, the judge-ship of the High Court seems to have become a post to be canvassed for. It was found that as long as the State executive has an effective hand in such appointments, this disquieting feature would continue and that it could be remedied only by providing the safeguard of the executive having no final say in the matter of appointment and that the last word in the matter should be of the Chief Justice of the High Court concerned and the Chief Justice of India. The Committee, therefore, suggested amendment of the Constitution, as a guarantee for ensuring the quality, that an appointment to the High Court must have the concurrence of the Chief Justice of India and should not be made merely in consultation with him. An amendment was suggested to Article 217(1) of the Constitution on those lines."[255]

92. It was concluded that for the judicial system to function effectively and for the people to have faith and confidence in it, the appointment of judges should be made only on considerations of merit, suitability, integrity and capability and not on political expediency or regional or communal sentiments. It was observed in this regard as follows:

> "This Committee is of the firm view that to ensure that the judicial system functions effectively and to maintain both the quality and quantity of judicial work, as well as the faith and confidence of the public, the appointments be made only on considerations of merit, suitability, integrity and capability and not of political expediency or regional or communal sentiments. The apprehension that the recommendation made by him may

[255] Paragraphs 5.5 and 5.6

> not meet with the approval of the executive, may sometimes induce a Chief Justice to propose the name of a person who does not measure upto the requisite standard, which is rather unfortunate. It is fundamental for the preservation of the independence of the judiciary that it be free from threats and pressures from any quarter. It is the duty of the State to ensure that the judiciary occupies, and is seen to occupy, such position in the polity that it can effectively perform the functions entrusted to it by the Constitution and that can be done only if the process of appointment is left unpolluted." [256]

93. Commenting on the existing system of appointment of judges, the Arrears Committee reviewed the system in Chapter 6 of the Report. Amongst other things it was observed that the system of appointment of judges had been prevailing for four decades and it was functioning satisfactorily so long as well-established conventions were honoured and followed and that it is not the system that has failed but those operating it had failed it by allowing it to be perverted. It was observed as follows:

> "The present system of appointment of Judges to the High Courts has been in vogue for about four decades. It functioned satisfactorily as long as the well-established conventions were honoured and followed. The gradual, but systematic violation and virtual annihilation of the conventions over the past two decades or so is essentially responsible for the present unfortunate situation. Has the system, therefore, failed or have the concerned failed the system is an all important question. It is apparent that the system has not failed, but all those concerned with operating the system have failed it by allowing it to be perverted."[257]

94. While dealing with the Memorandum of Procedure in existence at that time for the appointment of judges, the Arrears Committee was rather scathing in its observations to the effect that there had been cases where there was agreement between the Chief Justice of India, the Chief Justice of the concerned High Court and the Governor of the State but the Union Law

[256] Paragraph 5.8
[257] Paragraph 6.11

Minister either choose not to make the appointment or inordinately delayed the appointment. It was observed that sometimes the Union Law Minister adopted a pick and choose policy to appoint judges or disturb the order in which the recommendations were made. There had been political interference in this regard and undesirable influence of extra-constitutional authorities in the appointment of judges. The appointment process therefore was undermined leaving the executive to appoint judges not on excellence but on influence. It was observed as follows:

> "There are cases that even where the Chief Justice of India on being consulted, agrees with the recommendation made by the Chief Justice of the concerned High Court which is also concurred to by the Governor of the State and forwards his recommendation to the Union Law Minister, appointments are either not made or made after inordinate delay. Sometimes, the Union Law Minister even adopts the "pick and choose" policy to appoint Judges out of the list of selectees recommended by the Chief Justice of the High Court duly concurred in by the Chief Justice of India or makes appointments by disturbing the order in which the recommendations have been made. The malady has become more acute in view of the political interference and undesirable influence of "extra constitutional authorities" in the appointment of judges. Thus, the authority of the Chief Justice of India and the role of the Chief Justice of the High Courts in the matter of appointment of superior judiciary have, to a great extent, been undermined, leaving to the executive to appoint Judges not on "excellence" but on "influence". Thus, merit, ability and suitability which undoubtedly the Chief Justice of the High Court is the most proper person to judge, are sacrificed at the altar of political or other expediency. This attitude is essentially responsible for the deterioration and the fall in the high standards of appointments to the High Court Benches. It is unfortunate, but absolutely true, that the Chief Ministers have come to think and the Union Law Minister has come to believe that the vacancy in the High Court Bench is a matter of political patronage which they are entitled to distribute or dole out to their favourites. This veto power with the executive has played havoc in the matter of appointment of Judges."[258]

95. In its recommendations, the Arrears Committee recommended dilution of the role of the executive and measures to avoid the existing system of appointment from being perverted. It was recommended as follows:

[258] Paragraph 6.9

> "The role of the executive in the matter of appointment of judges should be diluted and that the cause for most of the ills in the functioning of the present system could be traced back to the veto power of the executive. This, indeed, is capable of being remedied by making certain amendments to Article 217 providing for concurrence of the Chief Justice of India, instead of consultation with him, in the matter of appointment of Judges of the High Courts."[259]
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> "The Committee is of the view that the present constitutional scheme which was framed by the founding fathers after great deliberation and much reflection is intrinsically sound and that it worked in the true spirit it does not require any radical change. In order to guard against and obviate the perversion revealed in the operation of the scheme, the Committee has made suitable recommendations. The Committee believes that if these recommendations are given effect to, there would not be any need to substitute it by a different mechanism."[260]

96. In view of the scathing indictment of the system of appointment of judges where the executive had the 'ultimate power'[261] which was being abused and perverted to take away the independence of the judiciary, contrary to the intention of the Constituent Assembly, there was no option but to have a fresh look into the entire issue of appointment of judges and that eventually led to the issue being referred in the early 1990's to a Bench of 9 (nine) judges of this Court. Quite clearly, the executive had made a mess of the appointment of judges, taken steps to subvert the independence of the judiciary, gone against the grain of the views of the Constituent Assembly and acted in a manner that a responsible executive ought not to.

97. Post Independence till the early 1990s, the judiciary saw the slow but sure interference of the executive in the appointment of judges. This was in the form of the executive recommending persons to the Chief Justice of the High Court for appointment as a judge of the High Court. There were

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[259] Paragraph 124
[260] Paragraph 130
[261] This expression was used by Justice Bhagwati and by Justice D.A. Desai in paragraph 719 of S.P. Gupta v. Union of India.

occasions when the executive completely by-passed the Chief Justice of the High Court and directly recommended persons to the Union Government for appointment as judges. The third stratagem adopted by the executive was to withhold recommendations made by the Chief Justice and instead forward its own recommendation to the Union Government. The fourth method was to reopen approved recommendations on some pretext or the other. The fifth method was to delay processing a recommendation made by the Chief Justice.

98. Tragically, almost all the appointments made during this period had the concurrence (as a constitutional convention) of the Chief Justice of India and yet, there was criticism of some of the appointments made. While the independence of the judiciary was maintained at law, it was being slowly eroded both from within and without through the appointment of 'unsuitable' judges with merit occasionally taking a side seat. The 14th Report of the LCI was generally critical of the appointments made to the High Courts and in this regard reliance was placed by the LCI on information collected from various sources including judges of the Supreme Court. It is true that the 80th Report of the LCI found nothing seriously wrong with the system of appointment of judges, but it still needed a change. The Arrears Committee, however, was derisive of the existing system of appointment of judges and made some positive recommendations within the existing system, while the 121st Report of the LCI suggested wholesale changes.

99. This discussion in the historical perspective indicates that the appointment of judges plays a crucial and critical role in the independence of the judiciary in the real sense of the term. If judges can be influenced by political considerations and other extraneous factors, the judiciary cannot remain independent only by securing the salary, allowances, conditions of service and pension of such judges. The meat lies in the caliber of the judges and not their perks.

100. In his concluding address to the Constituent Assembly on 26th November, 1949 Dr. Rajendra Prasad referred to the independence of the judiciary and had this to say:

> "We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence. One of our articles makes it easy for the State Governments to introduce separation of executive from judicial functions and placing the magistracy which deals with criminal cases on similar footing as civil courts. I can only express the hope that this long overdue reform will soon be introduced in the States."[262]

101. Providing for an independent judiciary is not enough – access to quality justice achieved through the appointment of independent judges is equally important. It has been said of the judges during apartheid in South Africa:

> "Now during apartheid judges had the formal guarantees of independence - life tenure, salary, administrative autonomy - that judges in the United States of America, Canada, the United Kingdom, New Zealand or Australia had. It is in seeing why it was the case that apartheid-era judges for the most part lacked independence even though they had its formal trappings that we see that judicial independence is also a kind of dependence; it

[262] http://parliamentofindia.nic.in/ls/debates/vol11p12.htm

> depends on something positive - the judicial pursuit of the justice of the law. One has to ask not only what judges have to be shielded *from* in order to be independent, but what we want them to be independent *for*."[263]

102. This review indicates that one of the important features of the Rule of Law and the independence of the judiciary is the appointment process. It is, therefore, necessary to objectively appreciate the evolution of the appointment process post Independence and how the Judiciary understood it.

Judicial pronouncements

103. The question of the appointment of judges (mainly of the High Courts) came up for consideration in this Court on three occasions. The decision rendered in each of these cases is not only of considerable importance but also indicates the complexity in the appointment of judges and the struggle by the Bar to maintain the independence of the judiciary from executive interference and encroachment. These three cases are referred to as the ***First Judges case***,[264] the ***Second Judges case***[265] and the ***Third Judges case***.[266] There have been other significant pronouncements on the subject and they will be considered at the appropriate stage.

First judges case – 30.12.1981

104. The ***First Judges case*** is important for several reasons, but I am concerned with a few of them. These are: (1) The independence of the

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[263] Judicial Independence, Transitional Justice and the Rule of Law by David Dyzenhaus, (2001-2004) 10 Otago L Rev 345 at 345-346
[264] S.P. Gupta v. Union of India, 1981 Supp SCC 87 (Seven Judges Bench)
[265] Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441 (Nine Judges Bench)
[266] Special Reference No. 1 of 1998, (1998) 7 SCC 739 (Nine Judges Bench)

judiciary was held to be a part of the basic feature of the Constitution.[267] This was the first judgment to so hold.

(2) The appointment of a judge is serious business and is recognized as a very vital component of the independence of the judiciary. 'What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half-hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives. This has to be the broad blueprint of the appointment project for the higher echelons of judicial service. It is only if appointments of Judges are made with these considerations weighing predominantly with the appointing authority that we can have a truly independent judiciary committed only to the Constitution and to the people of India.'[268] Justice Venkataramiah, however, was of the view that the independence of the judiciary is relatable only to

[267] Paragraphs 27, 320 and 634. This view has been upheld in several decisions thereafter.
[268] Paragraph 27

post-appointment and that 'It is difficult to hold that merely because the power of appointment is with the executive, the independence of the judiciary would become impaired. The true principle is that after such appointment the executive should have no scope to interfere with the work of a Judge.'[269]

(3) In the appointment of a judge of the Supreme Court or the High Court, the word 'consultation' occurring in Article 124(2) and in Article 217(1) of the Constitution does not mean 'concurrence'.[270] However, for the purposes of consultation, each constitutional functionary must have full and identical facts relating to the appointment of a judge and the consultation should be based on this identical material.[271]

(4) In the event of a disagreement between the constitutional functionaries required to be consulted in the appointment of a judge, the Union Government would decide whose opinion should be accepted and whether an appointment should be made or not. In such an event, the opinion of the Chief Justice of India has no primacy.[272] The 'ultimate power' of appointment of judges to the superior Courts rests with the Union Government.[273] (This is completely contrary to the view of the Constituent Assembly and Dr. Ambedkar).

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[269] Paragraph 1033
[270] Paragraph 30 and paragraph 890
[271] Paragraphs 30, 632 and 848
[272] Paragraph 30
[273] Paragraph 30

(5) The extant system of appointment of judges is not an ideal system of appointment. The idea of a consultative panel (called a collegium or Judicial Commission) was floated as a replacement. This body was to consist of persons expected to have knowledge of persons who might be fit for appointment on the Bench and possessed of qualities required for such an appointment. Countries like Australia and New Zealand 'have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary.'[274] Incidentally, we were informed during the course of hearing that even about 35 years after the decision in the ***First Judges case*** neither Australia nor New Zealand have established a Judicial Commission as yet.

105. On the meaning of 'consultation' for the purposes of Article 124(2) and Article 217(1) of the Constitution, Justice Bhagwati who spoke for the majority relied upon ***Union of India v. Sankalchand Himmatlal Sheth***[275] and ***R. Pushpam v. State of Madras***[276] to hold that:

> "Each of the constitutional functionaries required to be consulted under these two articles must have for his consideration full and identical facts bearing upon appointment or non-appointment of the person concerned as a Judge and the opinion of each of them taken on identical material must be considered by the Central Government before it takes a decision whether or not to appoint the person concerned as a Judge."[277]

106. The majority view in the ***First Judges case*** was overruled in the ***Second Judges case*** and it was held that 'consultation' in Article 217 and Article 124 of the Constitution meant that 'primacy' in the appointment of

[274] Paragraph 30 and 31
[275] (1977) 4 SCC 1993 (Five Judges Bench)
[276] AIR 1953 Mad 392
[277] Paragraph 30

judges must rest with the Chief Justice of India.[278] The evolution of the collegium system and a Judicial Commission will be discussed a little later, although it must be noted that the seeds thereof were sown (apart from the Reports of the LCI) in the ***First Judges case***.

107. I do not think it necessary to further discuss the ***First Judges case*** since it has been elaborately considered by Justice Khehar.

Subhash Sharma's case

108. In a writ petition filed in this Court praying for filling up the vacancies of judges in the Supreme Court and several High Courts of the country, a three judge Bench was of the view that the ***First Judges case*** required reconsideration.[279] It was observed that the decision of the majority not only rejects the primacy of the Chief Justice of India but also whittles down the significance of 'consultation'.

109. It was noted that the Constitution (Sixty-seventh Amendment) Bill, 1990 was pending consideration in Parliament and that the Statement of Objects and Reasons for the Amendment Act acknowledged that there was criticism of the existing system of appointment of judges (where the executive had the primacy) and that this needed change, hence the need for an Amendment Act.[280]

110. On the issue of executive interference in the appointment of judges, the Bench found that interference went to the extent of impermissibly

[278] I entirely agree with Justice Chelameswar when he says that the ***Second Judges case*** did not hold that consultation means concurrence.
[279] Subhash Sharma v. Union of India, 1991 Supp (1) SCC 574
[280] Paragraph 27

re-opening the appointment process even though a recommendation for the appointment of a judge had been accepted by the Chief Justice of India. It was observed:

> "From the affidavits filed by the Union of India and the statements made by learned Attorney General on the different occasions when the matter was heard we found that the Union Government had adopted the policy of reopening recommendations even though the same had been cleared by the Chief Justice of India on the basis that there had in the meantime been a change in the personnel of the Chief Justice of the High Court or the Chief Minister of the State. The selection of a person as a Judge has nothing personal either to the Chief Justice of the High Court or the Chief Minister of the State. The High Court is an institution of national importance wherein the person appointed as a Judge functions in an impersonal manner. The process of selection is intended to be totally honest and upright with a view to finding out the most suitable person for the vacancy. If in a given case the Chief Justice of the High Court has recommended and the name has been considered by the Chief Minister and duly processed through the Governor so as to reach the hands of the Chief Justice of India through the Ministry of Justice and the Chief Justice of India as the highest judicial authority in the country, on due application of his mind, has given finality to the process at his level, there cannot ordinarily be any justification for reopening the matter merely because there has been a change in the personnel of the Chief Justice or the Chief Minister of the State concerned."[281]

111. Apart from the above, the Bench was of the view that the interpretation given by the majority in the ***First Judges case*** to 'consultation' was not correctly appreciated in the constitutional scheme. It was also felt that the role of the institution of the Chief Justice of India in the constitutional scheme had been denuded in the ***First Judges case***. Keeping all these factors in mind, particularly the functioning of the appointment process and the acknowledgement of the Union Government that a change was needed, it was observed:

> "The view taken by Bhagwati, J., Fazal Ali, J., Desai, J., and Venkataramiah, J., to which we will presently advert, in our opinion, not

[281] Paragraph 28

> only seriously detracts from and denudes the primacy of the position, implicit in the constitutional scheme, of the Chief Justice of India in the consultative process but also whittles down the very significance of "consultation" as required to be understood in the constitutional scheme and context. This bears both on the substance and the process of the constitutional scheme….. Consistent with the constitutional purpose and process it becomes imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court and the High Courts of the States. We are of the view that this aspect dealt with in *Gupta case* requires reconsideration by a larger bench."[282]

112. The issues for consideration of a larger Bench were then formulated in the following words:

> "The points which require to be reconsidered relate to and arise from the views of the majority opinion touching the very status of "consultation" generally and in particular with reference to "consultation" with Chief Justice of India and, secondly, as to the primacy of the role of the Chief Justice of India. The content and quality of consultation may perhaps vary in different situations in the interaction between the executive and the judicial organs of the State and some aspects may require clarification."[283]

113. It was also observed that a view was expressed in the ***First Judges case*** that the government of the State could initiate a proposal for the appointment of a judge but that the proposal could not be sent directly to the Union Government, but should first be sent to the Chief Justice of the High Court.[284] Notwithstanding this clear exposition, the procedure was being distorted by the executive and a proposal for the appointment of judge of the High Court was being sent directly to the Union Government. It was said in this regard:

> "But it has been mentioned that a practice is sought to be developed where the executive government of the State sends up the proposals directly to the Centre without reference to the Chief Justice of the State. This is a distortion of the constitutional scheme and is wholly impermissible. So far as the executive is concerned, the 'right' to initiate an appointment should

[282] Paragraph 31
[283] Paragraph 32
[284] Paragraph 728 of the First Judges case

> be limited to suggesting appropriate names to the Chief Justice of the High Courts or the Chief Justice of India. If the recommendation is to emanate directly from a source other than that of the Chief Justices of the High Courts in the case of the High Courts and the Chief Justice of India in the case of both the High Courts and the Supreme Court it would be difficult for an appropriate selection to be made. It has been increasingly felt over the decades that there has been an anxiety on the part of the government of the day to assert its choice in the ultimate selection of Judges. If the power to recommend would vest in the State Government or even the Central Government, the picture is likely to be blurred and the process of selection ultimately may turn out to be difficult."[285]

114. By-passing the Chief Justice of the High Court in the matter of recommending a person for appointment as a judge of the High Court was an unhealthy practice that the political executive of the State was trying to establish since around the time of Independence. This 'subterfuge' was deprecated on more than one occasion, as noticed above.

115. Another practice that the political executive was trying to establish was to recommend persons for appointment as a judge of the High Court to the Chief Justice of that High Court. In this context, it was also stated in ***Subhash Sharma*** (as quoted above) that: 'It has been increasingly felt over the decades that there has been an anxiety on the part of the government of the day to assert its choice in the ultimate selection of Judges.'[286] This unequivocally indicates that the malaise of executive interference in appointing judges to the superior judiciary, first highlighted in the Memorandum emanating from the Chief Justices Conference and then by the LCI in its 14th Report, continued in some form or the other through the entire period from Independence till the early 1990s. In addition, the

[285] Paragraph 34
[286] Paragraph 34

recommendation given in the 14th Report of the LCI in Chapter 6 regarding the executive not being entitled to 'propose a nominee of its own and forward it to the Centre' was not given the due weight and consideration that it deserved from the executive.

116. Quite clearly, some complex issues arose in the matter of appointment of judges primarily due to the interference of the political executive and these needed consideration by a larger Bench. Well established and accepted constitutional conventions were sought to be disregarded by the political executive. If the independence of the judiciary was to be maintained and parliamentary democracy was to be retained, the ***First Judges case*** and the appointment process needed a fresh look.

Second Judges case – 6.10.1993

117. As mentioned above, the ***Second Judges case*** was the result of an acknowledgement that: (1) The existing system of appointment of judges in which the executive had the 'ultimate power' needed reconsideration since that 'ultimate power' was being abused; (2) The existing system of appointment of judges resulted in some appointments in which merit was overlooked due to executive interference or for extraneous considerations. The Chief Justice of the High Court was occasionally by-passed by the political executive and a recommendation for the appointment of a person as a judge of the High Court was made directly to the Union Government. This unfortunate situation had continued for more than 40 years and an attempt to

bring about a change was made and so a Constitution Amendment Bill was introduced in Parliament, but it lapsed.

118. In the ***Second Judges case*** it was held by **Justice Pandian**: (1) The selection and appointment of a proper and fit candidate to the superior judiciary is one of the inseparable and vital conditions for securing the independence of the judiciary.[287] 'The erroneous appointment of an unsuitable person is bound to produce irreparable damage to the faith of the community in the administration of justice and to inflict serious injury to the public interest...'[288] (2) Yet another facet of the independence of the judiciary is the separation between the executive and the judiciary (including the superior judiciary)[289] postulated by Article 50 of the Constitution.[290] (3) The Memorandum of Procedure for the selection and appointment of judges filed by the Union of India along with the written submissions relating to the pre ***First Judges case*** period and the extant procedure as mentioned in the 121st Report of the LCI relating to the post ***First Judges case*** period are more or less the same. They indicate that the recommendation for filling up a vacancy in the Supreme Court is initiated by the Chief Justice of India and the recommendation for filling up a vacancy in the High Court is initiated by the Chief Justice of the High Court. The Chief Minister of a State may recommend a person for filling up a vacancy in the High Court, but that is to

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[287] Paragraph 49
[288] Paragraph 63
[289] Paragraph 81
[290] 50. Separation of judiciary from executive - The State shall take steps to separate the judiciary from the executive in the public services of the State.

be routed only through the Chief Justice of the High Court.[291] (4) Reiterating the view expressed in ***Sankalchand Sheth*** and the ***First Judges case*** it was held that for the purposes of consultation, the materials before the President and the Chief Justice of India must be identical.[292] (5) For the appointment of a judge of the Supreme Court (under Article 124(2) of the Constitution) or a judge of a High Court (under Article 217(1) of the Constitution) consultation with the Chief Justice of India is mandatory.[293] (6) In the process of constitutional consultation in selecting judges to the Supreme Court or the High Court and transfer of judges of the High Court, the opinion of the Chief Justice of India is entitled to primacy.[294] (7) Agreeing with the majority opinion written by Justice J.S. Verma, it was held that if there are weighty and cogent reasons for not accepting the recommendation of the Chief Justice of India for the appointment of a judge, then the appointment may not be made. However, if the 'weighty and cogent' reasons are not acceptable to the Chief Justice of India, and the recommendation is reiterated, then the appointment shall be made.[295] (8) The majority opinion in the ***First Judges case*** regarding the primacy of the executive in the matter of appointment of judges was overruled.[296]

119. **Justice Ahmadi** dissented with the opinion of the majority and concluded: (1) Judicial independence is ingrained in our constitutional

[291] Paragraphs 95 to 99. Though such a practice exists and is accepted, there have been some aberrations in this regard as mentioned in the 14th Report of the LCI and in the Conference of Chief Justices.
[292] Paragraph 164
[293] Paragraph 172
[294] Paragraph 197 and 209
[295] Paragraph 212
[296] Paragraph 254

scheme and Article 50 of the Constitution 'illuminates it'.[297] (2) The ***First Judges case*** was not required to be overruled but on the question of primacy in the matter of appointment of judges, the opinion of the Chief Justice of India is entitled to 'graded weight'.[298]

120. **Justice Kuldip Singh** agreed with the majority and laid great stress on constitutional conventions that had evolved over several decades. The learned judge held: (1) Security of tenure is not the only source of independence of the judiciary but 'there has to be an independent judiciary as an institution.'[299] (2) Independence of the judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. There cannot be an independent judiciary when the power of appointment of judges vests in the executive.[300] (3) The President is bound by the advice given by the Council of Ministers.[301] (4) A constitutional convention is established since the Government of India Act, 1935 (I would add the words 'at least') that the appointment of judges was invariably made with the concurrence of the Chief Justice of India. The opinion and recommendation of the Chief Justice of India in the matter of appointment of judges binds the executive.[302] (5) In the matter of appointment of judges,

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[297] Paragraph 313

[298] Paragraph 303 and 313. It was observed in paragraph 303: "If the President has to act on the aid and advice of the Council of Ministers it is difficult to hold that he is bound by the opinion of the Chief Justice of India unless we hold that the Council of Ministers including the Prime Minister would be bound by the opinion of the Chief Justice of India, a construction which to our mind is too artificial and strained to commend acceptance."

[299] Paragraph 334

[300] Paragraph 335

[301] Paragraph 277, 356, 383 and 411

[302] Paragraph 359, 371,373 and 376. The figures relating to the appointment of judges have been mentioned in paragraphs 367 and 369.

consultation with the Chief Justice of India is mandatory.[303] (6) In the consultation process under Article 124(2) and 217(1) of the Constitution, the advice and recommendation of the Chief Justice of India is binding on the executive and must be the final word. The majority view in the ***First Judges case*** does not lay down the correct law.[304]

(7) For the purposes of Article 124(2) and 217(1) of the Constitution, the Chief Justice of India and the Chief Justice of the High Court mean the functionaries representing their respective Court.[305]

121. One of the more interesting facts pointed out by Justice Kuldip Singh is that from 1st January, 1983 (after the decision in the ***First Judges case***) till 10th April, 1993 (that is during a period of ten years) the opinion of the Chief Justice of India was not accepted by the President in as many as seven cases. This is worth contrasting with a part of the period before the 'ultimate power' theory was propounded when the opinion of the Chief Justice of India was not accepted by the President only in one case and in that case, the opinion of the Chief Justice of the High Court (not the political executive) was accepted. This is what the learned judge had to say:

> "Mr S.K. Bose, Joint Secretary, Department of Justice, Ministry of Law and Justice has filed an affidavit dated April 22, 1993 before us. In para 6 of the said affidavit it is stated as under:
>
> > "As regards the appointments of Judges made, not in consonance with the views expressed by the Chief Justice of India, it is respectfully submitted that since January 1, 1983 to April 10, 1993, there have been only seven such cases, five of these were in 1983 (2 in January 1983, 2 in July 1983, 1 in August 1983); one in

[303] Paragraph 377 and 411
[304] Paragraph 385, 387 and 411
[305] Paragraph 392 and 411

> September 1985 and one in March 1991, out of a total of 547 appointments made during this period."
>
> It is thus obvious from the facts and figures given by the executive itself that in actual practice the recommendations of the Chief Justice of India have invariably been accepted."[306]

122. **Justice Verma** speaking for the majority held: (1) Independence of the judiciary has to be safeguarded not only by providing security of tenure and other conditions of service, but also by preventing political considerations in making appointments of judges to the superior judiciary.[307]

(2) In the matter of appointment of judges, primacy was given to the executive in the Government of India Act, 1919 and the Government of India Act, 1935 but in the constitutional scheme, primacy of the executive is excluded.[308]

(3) The Chief Justice of India and the Chief Justice of the High Court are 'best equipped to know and assess the worth of a candidate, and his suitability for appointment as a superior judge.' In the event of a difference of opinion between the executive and the judiciary, the opinion of the Chief Justice of India should have the greatest weight. [This echoed Dr. Ambedkar's view that consultation would be between persons who are well qualified to give advice in matters of this sort.] Therefore, since primacy is not with the executive, then in such a situation, it must lie with the Chief Justice of India.[309] This certainly does not exclude the executive from the appointment process. The executive might be aware (unlike a Chief Justice)

[306] Paragraphs 369 and 370
[307] Paragraph 447
[308] Paragraph 444, 446, 448 and 450
[309] Paragraph 450, 451, 455, 478 and 486

of some antecedents or some information relatable to the personal character or trait of a lawyer or a judge which might have a bearing on the potential of a person becoming a good judge.[310] This might form the basis for rejecting a recommendation for the appointment of a person as a judge by the Chief Justice of India.[311]

(4) Primacy of the opinion of the Chief Justice of India is not to his/her individual opinion but to the collective opinion of the Chief Justice of India and his/her senior colleagues or those who are associated with the function of appointment of judges.[312] Therefore, the President may not accept the recommendation of a person for appointment as a judge, if the recommendation of the Chief Justice of India is not supported by the unanimous opinion of the other senior judges.[313] The President may return for reconsideration a unanimous recommendation for good reasons. However, in the latter event, if the Chief Justice of India and the other judges consulted by him/her, unanimously reiterate the recommendation 'with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made.'[314] (The key word here is unanimous – both at the stage of the initial recommendation and at the stage of reiteration).

(5) For appointing a judge of the Supreme Court or the High Court,

[310] Paragraph 462
[311] Paragraph 478(7)
[312] Paragraph 456 and 466
[313] Paragraph 478(8)
[314] Paragraph 478(7)

consultation with the Chief Justice of India or the Chief Justice of the High Court is mandatory.[315]

(6) The President in Articles 124(2) and 217(1) of the Constitution means the President acting in accordance with the advice of the Council of Ministers with the Prime Minister at the head.[316]

(7) The advice given by the Council of Ministers to the President should be in accord with the Constitution. Such an advice is binding on the President. Since the opinion of the Chief Justice of India (representing the Judiciary) has finality, the advice of the Council of Ministers to the President must be in accordance with the opinion of the Chief Justice of India.[317]

(8) The convention is that the appointment process is initiated by the Chief Justice of India for the appointment of a judge to the Supreme Court and by the Chief Justice of the High Court for the appointment of a judge to the High Court. There is no reason to depart from this convention.[318]

(9) The law laid down in the ***First Judges case*** is not the correct view.[319]

123. In his otherwise dissenting opinion, **Justice Punchhi** supported the view taken by Justice Verma to the extent that the executive could not disapprove the views of the Chief Justice of India or the views of the Chief Justice of the High Court (as the case may be) when a recommendation is

[315] Paragraph 448
[316] Paragraph 457
[317] Paragraph 457 and 476
[318] Paragraph 478(10) and 486(2)
[319] Paragraph 486

made for the appointment of a judge to a superior court.[320]

124. The most significant feature of the ***Second Judges case*** is that it introduced what has come to be called a 'collegium system' of consultation for the appointment of judges of the Supreme Court and the High Courts. As far as the Chief Justice of India is concerned, the collegium system broad-based his/her role in the appointment of judges of the High Courts and the Supreme Court and (in one sense) diluted his/her role in the appointment process by taking it out of the individualized or personalized role of the Chief Justice of India as thought of by Dr. Ambedkar. The consultative role of the Chief Justice of India in Article 124 of the Constitution was radically transformed through a pragmatic interpretation of that provision. How did this happen?

125. In the ***Second Judges case*** certain norms were laid down by Justice Verma in the matter of appointment of judges. These norms were: For the appointment of judges in the Supreme Court, the Chief Justice of India must ascertain the views of the two senior-most judges of the Supreme Court and of the senior-most judge in the Supreme Court from the High Court of the candidate concerned. Through this process, the individual opinion of the Chief Justice of India was substituted by the collective opinion of several judges. In this sense the opinion of the Chief Justice of India in the consultative process was made broad-based and ceased to be individualized. At this stage it is worth recalling the words of Dr. Ambedkar that 'the Chief

[320] Paragraph 500

Justice, despite his eminence, had all the failings, sentiments and prejudices of common people.' The apprehension or fear that Dr. Ambedkar had in this regard in case the Chief Justice of India were to act in an individual or personal capacity was now buried.[321] A somewhat similar norm was laid down for consultation for the appointment of a judge of the High Court. This is what was said:

> "This opinion has to be formed in a pragmatic manner and past practice based on convention is a safe guide. In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two seniormost Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the senior-most Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite. The object underlying Article 124(2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124(2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.
>
> In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the two seniormost Judges of the High Court."[322]

126. The importance of the role of the Chief Justice of India was acknowledged in that it was observed that the constitutional convention was

[321] According to the learned Attorney-General, this would have made Dr. Ambedkar turn in his grave. Not so and quite to the contrary.

[322] Paragraph 478(1)

that no appointment should be made by the President under Article 124(2) and Article 217(1) of the Constitution unless it was in conformity with the final opinion of the Chief Justice of India. It was said:

> "The opinion of the Chief Justice of India, for the purpose of Articles 124(2) and 217(1), so given, has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Courts, unless it is in conformity with the final opinion of the Chief Justice of India, formed in the manner indicated."[323]

127. The 'manner indicated' was that if a recommendation is returned by the executive (for cogent reasons) to the Chief Justice of India and the Chief Justice of India reiterates the recommendation with the unanimous agreement of the judges earlier consulted, then the appointment should be made 'as a matter of healthy convention'. This is what was said in this context:

> "Non-appointment of anyone recommended, on the ground of unsuitability, must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person, for reasons to be recorded, may be permissible in the public interest. If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment. However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made."[324]

[323] Paragraph 478(5)
[324] Paragraph 478(7)

128. The norms took the form of conclusions that became binding on the Judiciary and the Executive. It is not necessary to reproduce the conclusions arrived at.

129. An important aspect of the appointment process, which was adverted to by Justice Verma, is the constitutional convention that the recommendation must be initiated by and must originate from the Chief Justice of the High Court (for appointment to the High Court) and from the Chief Justice of India (for appointment to the Supreme Court). In the event the Chief Minister of a State recommends a person for appointment as a judge of the High Court, it must be routed only through the Chief Justice of the High Court. It is then for the said Chief Justice to consult his colleagues (and others, if necessary) and decide whether or not the person should be formally recommended. If the Chief Justice of the High Court recommends that person, the procedure as mentioned in the ***Second Judges case*** would thereafter follow. If the Chief Justice of the High Court decides not to recommend that person for appointment, the matter stands closed and, therefore, the question of making an appointment without the consent of the Chief Justice of India simply does not and cannot arise. It is this constitutionally and conventionally accepted procedure, which is apparently not acceptable to the political executive, that has led to the political executive by-passing the Chief Justice of a High Court and directly recommending to the Union Government a person for appointment as a

judge of the High Court. Be that as it may, the majority view expressed in the ***Second Judges case*** restored the constitutional position envisaged by Dr. Ambedkar by diluting the individual authority of the Chief Justice of India and conferring it on a collegium of judges, which is perhaps in consonance with the views of Dr. Ambedkar.

130. According to the learned Attorney-General, these conclusions turned Article 124(2) and Article 217(1) of the Constitution 'on their head' and even Justice Verma, the author of the judgment felt that the decision required a rethink. The reference was to an interview given by Justice Verma post his retirement. In that, it was said by Justice Verma:

> "My 1993 judgment which holds the field, was very much misunderstood and misused. It was in that context that I said the working of the judgment now for some time is raising serious questions, which cannot be called unreasonable. Therefore some kind of rethink is required."[325]

131. It appears that the misunderstanding of the decision in the ***Second Judges case*** continues even today, especially by the political executive. The misunderstanding is not due to any lack of clarity in the decision rendered by this Court but due to the discomfort in the 'working of the judgment'. I say this because it was submitted by the learned Attorney-General and learned counsel for some States that the ***Second Judges case*** left the executive with no role (or no effective role) to play in the appointment of a judge of the Supreme Court or the High Court particularly since the opinion of the executive is now rendered meaningless. Nothing can be further from the truth. The executive continues to have a vital role to play and in some cases,

[325] The Frontline, Volume 25 Issue 20 September 27, 2008 to October 10,2008

the final say in the appointment of a judge – the misunderstanding of the judgment is due to the completely and regrettably defeatist attitude of the Union of India and the States or their view that in the matter of appointment of judges, it is their way or the highway. The Constitution of India is a sacred document and not a Rubik's cube that can be manipulated and maneuvered by the political executive any which way only to suit its immediate needs.

132. In an article found on the website of the Tamil Nadu State Judicial Academy, Justice Verma adverted to the appointment process in the ***Second Judges case*** and the role of the executive and said:

> "The clear language of the decision leaves no room for any doubt that the executive has a participatory role in these appointments; the opinion of the executive is weightier in the area of antecedents and personal character and conduct of the candidate; the power of non-appointment on this ground is expressly with the executive, notwithstanding the recommendation of the CJI; and that doubtful antecedents etc. are alone sufficient for non-appointment by the executive. The decision also holds that the opinion of the judicial collegium, if not unanimous does not bind the executive to make the appointment.
> Some reported instances in the recent past of the executive failing to perform its duty by exercise of this power even when the recommendation of the judicial collegium was not unanimous and the then President of India had returned it for reconsideration, are not only inexplicable but also a misapplication of the decision, which the CJI, Balakrishnan rightly says is binding during its validity. Such instances only prove the prophecy of Dr. Rajendra Prasad that the Constitution will be as good as the people who work it. Have any system you like, its worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability."[326]

A little later in the article Justice Verma says (and this is also adverted to in the interview referred to by the learned Attorney-General):

> "The recent aberrations are in the application of the Second Judge's case in making the appointments, and not because of it. This is what I had pointed out in my letter of 5 December 2005 to CJI, Y.K.Sabharwal with copy to

[326] http://www.tnsja.tn.nic.in/article/Judicial%20Independence%20JSVJ.pdf

> the two senior most judges, who included the present CJI, K.G.Balakrishnan."

133. The misunderstanding is, therefore, of the political executive and no one else. However, as pointed out by the learned Attorney-General, the merits or demerits of the ***Second Judges case*** is not in issue after the 99th Constitution Amendment Act and therefore no further comment is made, although it must be said, quite categorically, that the political executive has completely misunderstood the scope and impact of the ***Second Judges case*** and the working of the collegium system.

Third Judges case – 28.10.1998

134. ***Special Reference No. 1 of 1998*** is commonly referred to as the ***Third Judges case***. The President sought the advisory opinion of this Court under Article 143 of the Constitution on the following, amongst other, questions:

> "(1) whether the expression 'consultation with the Chief Justice of India' in Articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India or does the sole individual opinion of the Chief Justice of India constitute consultation within the meaning of the said articles.
> (3) whether Article 124(2) as interpreted in the said judgment [***Second Judges case***] requires the Chief Justice of India to consult only the two seniormost Judges or whether there should be wider consultation according to past practice.
> (4) whether the Chief Justice of India is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of all materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment;"

135. At the outset, it must be noted that the learned Attorney-General stated at the hearing of the Presidential Reference that the Central Government was neither seeking a review nor a reconsideration of the ***Second Judges case***.

Therefore, the answers to the Presidential Reference do not depart from the conclusions arrived at by this Court in the ***Second Judges case***. In that sense, this opinion did not take the substantive discussion much further though it substantially resolved some procedural issues and filled in the gaps relating to the process of appointment of judges to the superior judiciary. In any event, the answers to the three questions mentioned above are:

> "1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles.
> 3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four seniormost puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two seniormost puisne Judges of the Supreme Court.
> 4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment."[327]

136. The decision in the ***Second Judges case*** read with the opinion given by this Court to the various questions raised in the Presidential Reference or the ***Third Judges case*** fully settled the controversies surrounding the procedure to be adopted in the appointment of judges to the superior judiciary. Issues of primacy of views and consultation with the Chief Justice of India were all answered by the decision and the opinion.

137. It is important to note that the ***Third Judges case*** modified one important norm or conclusion of the ***Second Judges case***. The modification

[327] Paragraph 44

was that the 'collegium' for appointment of judges in the Supreme Court was expanded to consist of the Chief Justice of India and four senior-most judges rather than the two senior-most judges as concluded in the ***Second Judges case***. In this manner, the consultation with the Chief Justice of India was further broad-based. It was clarified in conclusion 9 as follows:

> "9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India."

This conclusion is important, but seems to have been ignored or overlooked by the President.

Samsher Singh's case

138. For a complete picture of the judicial pronouncements on the subject, it is also necessary to refer to the decision rendered by this Court in ***Samsher Singh v. State of Punjab***.[328]

139. This case related to the termination of the services of two officers of the subordinate judicial service by the Governor of the State. The issue was whether the Governor could exercise his discretion in the matter personally or should act on the advice of the Council of Ministers. The judicial officers contended that the Governor was obliged to exercise his personal discretion and reliance was placed on ***Sardari Lal v. Union of India***[329] in which it was held that for invoking the 'pleasure doctrine' under Article 311(2) of the Constitution, the personal satisfaction of the President is necessary for dispensing with an inquiry under clause (c) of the proviso to Article 311(2) of

[328] (1974) 2 SCC 831 (Seven Judges Bench)
[329] (1971) 1 SCC 411 (Five Judges Bench)

the Constitution. On the other hand, the State contended that the Governor was obliged to act only on the advice of the Council of Ministers.

140. This Court speaking through Chief Justice A.N. Ray (for himself and four other learned judges) overruled ***Sardari Lal*** and held that the decision did not correctly state the law. It was held that under the Rules of Business, the decision of the concerned Minister or officer is the decision of the President or the Governor as the case may be. It was then concluded:

> "For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the Executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally. The present appeals concern the appointment of persons other than District Judges to the Judicial Services of the State which is to be made by the Governor as contemplated in Article 234 of the Constitution after consultation with the State Public Service Commission and the High Court. Appointment or dismissal or removal of persons belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution."[330]

141. In a separate but concurring judgment authored by Justice Krishna Iyer (for himself and Justice Bhagwati) the view expressed by Chief Justice Ray was accepted in the following words:

> "We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (*a*) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (*b*) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (*c*) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime

[330] Paragraph 88

> Minister (Chief Minister) who will eventually take the responsibility for the step."[331]

142. An additional reason was given by the two learned judges for coming to this conclusion and that is also important for our present purposes. The additional reason relates to the independence of the judiciary. For this, reference was made to ***Jyoti Prokash Mitter v. Chief Justice, Calcutta***.[332] The question in that case related to the determination of the age of a sitting judge of the High Court under Article 217(3) of the Constitution.[333] This Court held that the age determination should be by the President uninfluenced by the views of the executive. This was on the ground that were the executive to make the determination of the age of a sitting judge, it would 'seriously affect the independence of the Judiciary.' This view was subsequently reiterated in ***Union of India v. Jyoti Prokash Mitter***.[334]

143. The learned judges then held, on the basis of the scheme of the Constitution that had already been adverted to, that the President means the Council of Ministers and the independence of the judiciary has been safeguarded by Article 217(3) of the Constitution by making mandatory the consultation with the Chief Justice of India in regard to age determination. This would prevent the possibility of extraneous considerations entering into the decision of the Minister if he/she departs from the views of the Chief

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[331] Paragraph 154

[332] [1965] 2 SCR 53 (Five Judges Bench)

[333] **217. Appointment and conditions of the office of a Judge of a High Court**. –
(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

[334] (1971) 1 SCC 396 (Five Judges Bench)

Justice of India. It was held that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the executive and if there is a departure from the views of the Chief Justice of India, the Court can examine the issue in the light of the available facts. In such a 'sensitive subject' the last word should be with the Chief Justice of India. On this interpretation, it becomes irrelevant who formally decides the issue. This is what was held:

> "In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."[335]

144. This decision is important for three key reasons: (1) It recognized, judicially, the independence of the judiciary. (This was before the ***First Judges case*** which recognized that the independence of the judiciary was a basic feature of the Constitution). (2) It cleared the air by concluding that the President was obliged to act on the advice of the Council of Ministers, even on the issue of appointment of judges. This was 'formalized' by the

[335] Paragraph 149

Constitution (Forty-second Amendment) Act, 1976. (3) In a sense, this decision was a precursor to the primacy conclusion in the ***Second Judges case*** with the last word on the subject being with the Chief Justice of India.

145. There are two observations that need to be made at this stage. Firstly, Justice Krishna Iyer penned the decision in ***Samsher Singh*** on behalf of Justice Bhagwati as well. Surprisingly, Justice Bhagwati did not refer to this decision in the ***First Judges case***. The significance of this failure is that while in ***Samsher Singh*** it was held by Justice Bhagwati that the 'last word' must belong to the Chief Justice of India, in the ***First Judges case*** it was held by Justice Bhagwati that the 'ultimate power' is with the executive. This completely divergent view, though in different circumstances, is inexplicable since the underlying principle is the same, namely, the status of the Chief Justice of India with reference to the affairs concerning the judiciary. The second observation is that the 'last word' theory was not and has not been questioned by the executive in any case, even in the ***Second Judges case***. Therefore, the 'last word' principle having been accepted, there is now no reason to go back on it or to repudiate it. It may be mentioned in the 'last word' context that ever since the Constitution came to be enacted, writes Granville Austin, quoting from Chief Justice Mehr Chand Mahajan's 'A Pillar of Justice':

> "Nehru 'has always acted in accordance with the advice of the CJI', he recalled, except in rare circumstances, despite efforts by state politicians with 'considerable pull' to influence him."[336]

[336] Granville Austin: Working a Democratic Constitution page131

Sankalchand Sheth's case

146. Another decision of considerable significance is ***Union of India v. Sankalchand Himatlal Sheth***.[337] That case pertained to the transfer of judges from one High Court to another and the interpretation of Article 222(1) of the Constitution.[338] Referring to the independence of the judiciary as also Article 50 of the Constitution it was said by Justice Y.V. Chandrachud:

> "Having envisaged that the judiciary, which ought to act as a bastion of the rights and freedom of the people, must be immune from the influence and interference of the executive, the Constituent Assembly gave to that concept a concrete form by making various provisions to secure and safeguard the independence of the judiciary. Article 50 of the Constitution, which contains a Directive Principle of State Policy, provides that the State shall take steps to separate the judiciary from the executive in the public services of the State."

147. On the meaning of consultation by the President with the Chief Justice of India in the context of Article 222 of the Constitution, it was held that it has to be full and effective consultation and not formal or unproductive. It was said:

> "Article 222(1) which requires the President to consult the Chief Justice of India is founded on the principle that in a matter which concerns the judiciary vitally, no decision ought to be taken by the executive without obtaining the views of the Chief Justice of India who, by training and experience, is in the best position to consider the situation fairly, competently and objectively. But there can be no purposeful consideration of a matter, in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken. It must, therefore, follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered

[337] (1977) 4 SCC 193 (Five Judges Bench)

[338] **222. Transfer of a Judge from one High Court to another.**—(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(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 the 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.

> opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, 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 on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President, of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Article 222(1), therefore, means full and effective, not formal or unproductive, consultation."[339]

148. It was observed that though 'consultation' did not mean 'concurrence' yet, as held in ***Samsher Singh*** consultation with the Chief Justice of India should be accepted and in such a sensitive subject the last word must belong to the Chief Justice of India. It was noted that if there is a departure from the counsel of the Chief Justice of India, the Court would have the opportunity to examine if any extraneous considerations entered into the decision.[340]

149. This view was reiterated by Justice Krishna Iyer (for himself and Justice Fazl Ali).[341] Significantly, it was added that: 'It seems to us that the word, 'consultation' has been used in Article 222 as a matter of constitutional courtesy in view of the fact that two very high dignitaries are concerned in the matter, namely, the President and the Chief Justice of India.'[342]

150. The greater significance of ***Sankalchand Sheth*** lies in the conclusion, relying upon ***R. Pushpam***, that for a meaningful consultation, both parties must have for consideration full and identical facts. It was said:

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[339] Paragraph 37
[340] Paragraph 41
[341] Paragraph 115
[342] Paragraph 115

> "The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution". In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision."[343]

151. This view was accepted in the ***First Judges case*** by Justice Bhagwati,[344] Justice Fazal Ali,[345] Justice V.D. Tulzapurkar[346] and Justice D.A. Desai.[347] It was also accepted in the ***Second Judges case*** by Justice Pandian.[348]

Memorandum of Procedure – 30.6.1999

152. Following up on the decision and opinion rendered in the ***Second Judges case*** and the ***Third Judges case***, the Minister for Law in the Government of India framed and prepared one Memorandum of Procedure for the appointment of a judge of the Supreme Court and another for the appointment of a judge of the High Court. These were shared with the Chief Justice of India. None of the each successive Chief Justices of India have complained or criticized any of the Memoranda or adversely commented on them, or at least we have not been told of any such complaint or objection. No one, including any successive Law Minister of the Government of India, complained that the Memoranda were unworkable or caused any hindrance or delay in the appointment of judges or did not correctly reflect the views of

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[343] Paragraph 39
[344] Paragraph 30
[345] Paragraph 563, 564 and 569
[346] Paragraph 632 and 663
[347] Paragraph 848 and 849
[348] Paragraphs 129 to 133 and 164

this Court in the two decisions mentioned above or that they did not conform to any provision of the Constitution, either in letter or in spirit or even otherwise, or at least we have not been told of any such constraint. These Memoranda remained operational and the appointment of judges to the superior judiciary made subsequent thereto has been in conformity with them. No one complained about the inability to effectively work any Memorandum of Procedure.

153. We were invited by Mr. Fali S. Nariman to mention the procedure for the appointment of judges both in public interest and for reasons of transparency. The Memorandum of Procedure for the appointment of judges of the Supreme Court and the High Court are available on the website of the Department of Justice of the Government of India[349] and therefore it is not necessary to make a detailed mention of the procedure. Similar Memoranda have been referred to in the ***Second Judges case*** by Justice Pandian.[350]

154. A reading of the Memoranda makes it explicit that a proposal recommending the appointment of a judge of a High Court shall be initiated by the Chief Justice of the High Court. However, if the Chief Minister desires to recommend the name of any person he should forward the same to the Chief Justice for his consideration. Although it is not clearly spelt out, it is implicit that the Chief Justice is not obliged to accept the suggestion of the Chief Minister.

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[349] http://doj.gov.in/sites/default/files/memohc.pdf (for High Court Judges)
http://doj.gov.in/sites/default/files/memosc.pdf (for Supreme Court judges)

[350] Paragraph 96 and 97

155. It is also significant and important to note that in the Memoranda, consultation by the judges in the collegium with 'non-judges' for making an appointment to the Supreme Court is postulated and it is not prohibited for making an appointment to the High Court. That is to say, a 'collegium judge' is not prohibited from taking the opinion of any person, either connected with the legal profession or otherwise for taking an informed decision regarding the suitability or otherwise of a person for appointment as a judge of the High Court or the Supreme Court. That this is not unknown is clear from a categorical statement of Justice Verma in an interview that:

> "For every Supreme Court appointment, I consulted senior lawyers like Fali S. Nariman and Shanthi Bhushan. I used to consult five or six top lawyers. I used to consult even lawyers belonging to the middle level. Similar consultation took place in the case of High Courts. I recorded details of every consultation. I wish all my correspondence is made public."

156. Therefore, during the evolution of the system of appointment of judges four cobwebs were cleared. They were: (1) The role of the President – he/she was expected to act on the advice of the Council of Ministers even in the appointment of judges; (2) The initial recommendation for the appointment of a judge of a High Court was to originate from the Chief Justice of the High Court and for the appointment of a judge of the Supreme Court from the Chief Justice of India; (3) Consultation between the President and the Chief Justice of India is an integrated participative process with the result that the President has the final say in the appointment of a judge under certain circumstances and the Chief Justice of India (in consultation with and

on the unanimous view of the other judges consulted by him/her) has the final say under certain circumstances; and (4) The Union of India accepted these propositions without hesitation in the ***Third Judges case***.

Amendments to the Constitution

157. Apart from judicial discourses on the appointment of judges, Parliament too has had its share of discussions. On as many as four occasions, it was proposed to amend the Constitution in relation to the procedure for the appointment of judges of the Supreme Court and the High Courts. These proposed amendments are considered below.

(a) The Constitution (Sixty-seventh Amendment) Bill, 1990

158. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced in the Lok Sabha on 18th May, 1990 and it proposed to set up a National Judicial Commission (for short the NJC), though not in line with the recommendations of the LCI. The composition of the NJC was to vary with the subject matter of concern, namely, the appointment of a judge of the Supreme Court or the appointment of a judge of the High Court.

159. For the appointment of a judge of the Supreme Court, in terms of the proposed Article 307A of the Constitution, the NJC was to consist of the Chief Justice of India and two other judges of the Supreme Court next in seniority to the Chief Justice of India. For the appointment of a judge of the High Court, the NJC was to consist of the Chief Justice of India, the Chief Minister or Governor (as the case may be) of the concerned State, one other

judge of the Supreme Court next in seniority to the Chief Justice of India, the Chief Justice of the High Court and the judge of the High Court next in seniority to the Chief Justice of the High Court. There was no provision for the appointment of the Chief Justice of India or the Chief Justice of the High Court.

160. The procedure for the transaction of business of the NJC was to be determined by the President in consultation with the Chief Justice of India and was subject to any law made by Parliament.

161. The Amendment Act also provided that in the event the recommendation of the NJC is not accepted, the reasons therefor shall be recorded in writing.

162. The Bill was criticized (in part) by the Arrears Committee which stated that:

> "The Committee is unable to find any logic or justification for different commissions….Keeping in view the objects and reasons for the constitution of the commission, namely, to obviate the criticism of executive arbitrariness in the matter of appointment and transfer of High Court judges and to prevent delay in making appointments, there is no justification for the executive through the Chief Minister to be on the commission. Instead of removing the vice of executive interference which has vitiated the working of the present system the presence of the Chief Minister on the recommendatory body actual alleviates him from the status of a mere consultee to the position of an equal participant in the selection process of the recommendatory body. By making the Chief Minister an equal party when he is not equipped to offer any view in regard to the merit, ability, competency, integrity and suitability of the candidates for appointments, the scope of executive interference is enhanced."[351]

163. The Bill was not taken up for consideration due to the dissolution of the Lok Sabha in May, 1991.

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[351] Paragraph 7.8

(b) The Constitution (Ninety-eighth Amendment) Bill, 2003

164. On 22nd February, 2000 – barely 8 months after the issuance of the (Revised) Memorandum of Procedure mentioned above – the Government of India issued a notification setting up a **National Commission to Review the Working of the Constitution** (for short the NCRWC), including the procedure for the appointment of judges of the superior judiciary. The terms of reference of the NCRWC were as follows:

> "The Commission shall examine, in the light of the experience of the past 50 years, as to how best the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of parliamentary democracy and to recommend changes, if any, that are required in the provisions of the Constitution without interfering with its basic structure or features."

165. On 26th September, 2001 an Advisory Panel of the NCRWC issued a Consultation Paper on Superior Judiciary.[352] This Paper dealt with the procedure for appointment of judges of the Supreme Court and the High Courts, the age of retirement of judges, the transfer of judges of the High Courts and the procedure for dealing with 'deviant' behavior of a judge and for his/her removal.

166. In the context of appointment of judges of the superior judiciary, paragraph 8.20 of the Paper is significant since it tacitly acknowledges that the procedure evolved over the years particularly as a result of the ***Second Judges case*** and the ***Third Judges case*** was quite satisfactory. Paragraph 8.20 reads as follows:

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[352] The Consultation Paper can be found on the website of the Law Ministry. This was accessed on 2nd May, 2015: http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm

> "8.20 **Purpose of 67th Amendment Bill served by the judgement in SCAORA**: We have set out hereinabove the several methods of appointment (to Supreme Court and High Courts) suggested by the various bodies, committees and organizations. We have also set out the method and procedure of appointment devised by the 1993 decision of the Supreme Court in SCAORA[353] and in the 1998 opinion rendered under Article 143. It would be evident therefrom that the 1993 decision gives effect to the substance of the Constitution (Sixty-seventh Amendment) Bill, without of course calling it a 'National Judicial Commission', and without the necessity of amending the Constitution as suggested by the said Amendment Bill. Indeed, it carries forward the object underlying the Amendment Bill by making the recommendations of the Chief Justice of India and his colleagues binding on the President. The 1998 opinion indeed enlarges the 'collegium'. In this sense, the purpose of the said Amendment Bill evidenced by the proviso to Article 124(2) and the Explanation appended thereto, is served, speaking broadly. The method of appointment evolved by these decisions has indeed been hailed by several jurists and is held out as a precedent worthy of emulation by U.K. and others. (See the opinion of Lord Templeman, a member of the House of Lords, cited hereinabove.) The said decisions lay down the proposition that the "consultation" contemplated by Articles 124 and 217 should be a real and effective consultation and that having regard to the concept of Judicial independence, which is a basic feature of the Constitution, the opinion rendered by the Chief Justice of India (after consulting his colleagues) shall be binding upon the Executive. In this view of the matter, much of the expectations from a National Judicial Commission (N.J.C) have been met. The said Constitution Amendment Bill was, it would appear, prepared after a wide and elaborate consultation with all the political parties and other stakeholders. However, the aspect of disciplinary jurisdiction remains unanswered. We may however discuss the concept of an N.J.C. which may cover both appointments and matters of discipline."

167. The Paper acknowledged that the ***Second Judges case*** and the ***Third Judges case*** 'speaking broadly' served the purpose of the Constitution (Sixty-seventh Amendment) Bill and that 'much of the expectations from a National Judicial Commission (N.J.C) have been met.' The shortfalls in expectations were not specified in the Paper except that of the disciplinary jurisdiction which did not arise and was not dealt with in the ***Second Judges case*** or the ***Third Judges case***. However, it is important to note that a dispassionate jurist Lord Templeman, a member of the House of Lords held

[353] Second Judges case

the view that the system of appointment of judges in India ought to be followed in England as well. Apart from him, the system of appointment of judges laid down by these decisions 'has been hailed by several jurists and is held out as a precedent worthy of emulation'.

168. Be that as it may, the NCRWC submitted its Report to the Prime Minister on 31st March, 2002. In Chapter 7 of the Report relating to the judiciary, the NCRWC recommended in paragraph 7.3.7 thereof the establishment of a National Judicial Commission (for short the NJC). It was observed that such a commission was necessary for 'the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges' in line with the integrated participatory consultative process suggested by this Court in the ***Second Judges case*** and the ***Third Judges case***. This is what the NCRWC had to say:

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

judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.

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

The Chief Justice of India: Chairman

Two senior most judges of the Supreme Court: Member

The Union Minister for Law and Justice: Member

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

The recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary."[354]

169. Pursuant to the recommendations of the NCRWC, the **Constitution (Ninety-eighth Amendment) Bill, 2003** was introduced in Parliament on or about 8th May, 2003. The Statement of Objects and Reasons of the Bill states, inter alia, that the Government of India has been committed to the setting up of an NJC for appointment of judges of the Supreme Court, Chief Justices and Judges of the High Courts as well as their transfer so as to provide for the effective participation of both the executive and the judicial wings of the Government. It is mentioned that the NCRWC also considered this matter and recommended the establishment of an NJC.

170. The Statement of Objects and Reasons refers to the composition of the NJC and while the NCRWC had recommended the nomination in the NJC of one eminent person by the President of India after consulting the Chief Justice of India, the Constitution (Ninety-Eighth Amendment) Bill modified this recommendation and proposed that one eminent citizen be nominated by the President of India in consultation with the Prime Minister of India for a

[354] Paragraph 7.3.7

period of three years.

171. The Constitution (Ninety-eighth Amendment) Bill proposed the insertion of Chapter IVA in the Constitution consisting of one Article namely Article 147A. This Article related to the establishment of the NJC in terms of the Statement of Objects and Reasons.

172. The Bill was not passed in any House of Parliament due to the dissolution of the Lok Sabha in March 2004 and the general elections being called.

(c) The Constitution (One Hundred and Twentieth Amendment) Bill, 2013

173. A third attempt was made to amend the Constitution for the purposes of appointment of judges of the superior judiciary. This was by the introduction of the Constitution (One Hundred and Twentieth Amendment) Bill, 2013 introduced in the Rajya Sabha on 24th August 2013.

174. The Statement of Objects and Reasons to the Bill referred to the ***Second Judges case*** and the ***Third Judges case*** as well as the Memorandum of Procedure. It was mentioned that the Memorandum confers upon the judiciary itself the power of appointment of judges of the superior judiciary.[355] It was further stated that after a review of the pronouncements of this Court and relevant constitutional provisions, a broad based judicial appointment commission could be established for making recommendations for the selection of judges. This commission would provide a meaningful

[355] This is factually incorrect. The Memorandum was drawn up by the Law Minister and did not confer any power upon the judiciary.

role to the executive and the judiciary to present their viewpoint and make the participants accountable while introducing transparency in the selection process. The Statement of Objects and Reasons also mentioned that the proposed Bill would enable equal participation of the judiciary and the executive in the appointment of judges to the superior judiciary and also make the system more accountable and thereby increase the confidence of the public in the judiciary.

175. The Constitution (One Hundred and Twentieth Amendment) Bill proposed the insertion of Article 124A in the Constitution establishing a commission known as the National Judicial Appointments Commission (for short the NJAC). The composition of the NJAC, the appointment of its Chairperson and Members, their qualifications, conditions of services, tenure, functions and the procedure as well as the manner of selection of persons for appointment as Chief Justice of India, judges of the Supreme Court, Chief Justices and other judges of the High Courts was to be provided by law made by Parliament.

176. The Constitution (One Hundred and Twentieth Amendment) Bill was passed by the Rajya Sabha on 5th September 2013 but the Lok Sabha was dissolved in May 2014 before the Bill could be sent to it and the general elections called.

177. Strangely, the Statement of Objects and Reasons completely overlooked the fact that there already was ‘equal participation of the

judiciary and the executive in the appointment of judges to the superior judiciary.' In the ***Second Judges case*** it was clearly, explicitly and unequivocally stated that:

> "The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise."[356]

However, in the event of a difference of opinion, one of the constitutional authorities must have the final say and given the constitutional convention over the decades the final say ought to be with the Chief Justice of India, the head of the judiciary in India under certain circumstances and with the President under certain circumstances. Otherwise, a stalemate or deadlock situation could arise which the Constituent Assembly obviously did not anticipate from two constitutional functionaries. The ***Second Judges case*** and the ***Third Judges case*** gave this shared responsibility to the President and the Chief Justice of India.[357] For the appointment of a judge of the Supreme Court, the collegium of 5 (five) judges must make a unanimous recommendation. The President is entitled to turn down a 4-1 or 3-2 recommendation. If the unanimous recommendation does not find favour with the President for strong and cogent reasons and is returned to the collegium for reconsideration, and it is unanimously reiterated, then the President is obliged to accept the recommendation. However, if the

[356] Paragraph 486(1)

[357] I am somewhat uncomfortable with the word 'primacy' while dealing with the President and the Chief Justice of India. In the context of the appointment of judges, the word 'responsibility' used by the LCI in its 14th Report seems more appropriate.

reiteration is not unanimous, then the President is entitled to turn down the recommendation. The theory which the Constitution (One Hundred and Twentieth Amendment) Bill, 2013 [and subsequently the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014] sought to demolish that 'judges appoint judges' is non-existent.

(d) The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014

178. The fourth and final attempt (presently successful and under challenge in these petitions) to amend the Constitution was by the introduction on 11th August, 2014 of the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014. This Bill was passed by the Lok Sabha on 13th August, 2014 and by the Rajya Sabha on 14th August, 2014. It received the ratification of more than one half of the States as required by Article 368(2) of the Constitution and received the assent of the President on 31st December, 2014 when it became the Constitution (Ninety-ninth Amendment) Act 2014.

179. It may be mentioned *en passant* that the learned Solicitor General was requested to place on record the procedure adopted by the State Legislatures for ratification of the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 but that information was not forthcoming, for reasons that are not known. The intention was not to question the factum of ratification but only to understand the process and to add transparency to the process, since there have been instances in the United States where the courts

have examined the issue of the ratification of an amendment to the Constitution.[358] Transparency is not a one-way street.

180. Section 1(2) of the Constitution (Ninety-ninth Amendment) Act 2014 provides that it shall come into force on such date as the Central Government may by notification in the official gazette, appoint. The appointed date is 13th April, 2015.

181. Simultaneous with the passage of the Constitution (One Hundred and Twenty-First Amendment) Bill, Parliament also considered the National Judicial Appointment Commission Bill, 2014. The Bill was introduced in Parliament on 11th August, 2014. It was passed by the Lok Sabha on 13th August, 2014 and by the Rajya Sabha on 14th August, 2014. The National Judicial Appointments Commission Act also received the assent of the President on 31st December, 2014 and it was brought into force by a gazette notification issued on 13th April, 2015.

182. Both the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 are challenged in this and a batch of connected writ petitions.

Conclusions on the factual background

183. The conclusions that can be drawn from the background historical facts are as follows:

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[358] See for example: Hammond v. Clark, 136 Ga. 313 (1911), Fahey v. Hackmann, 291 Mo. 351 (1922), Associated Industries of Oklahoma v. Oklahoma Tax Commission, 176 Okla. 120 (1936), State of Wisconsin v. Adam S. Gonzales, 253 Wis.2d 134 (2002), The State v. Swift, 69 Ind. 505 (1880) etc.

(1) The independence of the judiciary has been always recognized and acknowledged by all concerned.

(2) Prior to Independence, the appointment of a judge to a superior court was entirely the discretion of the Crown. The Constituent Assembly felt that such a 'supreme and absolute' power should not vest in the President or the government of the day or the Chief Justice of India (as an individual) and therefore a fetter was placed on that power by requiring the President to mandatorily consult the Chief Justice of India (with the discretion to consult other judges) for the appointment of a judge to the Supreme Court. For the appointment of a judge of the High Court also, consultation with the Chief Justice of India was mandatory. In addition, consultation with the Chief Justice of the High Court and the Governor of the State was mandatory. Significantly, there is no mention of consultation with anybody from civil society.

(3) Any doubt about the individual role of the President in the process of appointment of judges came to rest and it was clear that the President was expected to act only on the advice of the Council of Ministers.

(4) Similarly, the Chief Justice of India is not expected to act in an individual or personal capacity but must consult his/her senior judges before making a recommendation for the appointment of a judge.

(5) Dr. Ambedkar and the Constituent Assembly did not accept the 'unfettered discretion' theory in the CAD but this view was subsequently

rejected in the ***First Judges case*** which brought in the 'ultimate power' theory propounded by Justice Bhagwati and Justice Desai.

(6) Executive interference in the appointment process (with perhaps an informal method of 'take over') had started around the time of Independence and got aggravated post Independence, peaking towards the end of the 1980s.

(7) Not a single instance was given to us where the President recommended a person for appointment as a judge of the Supreme Court or the High Court. The Chief Minister of a State might have made a recommendation (although no instance was given to us) but that was required to be routed through the Chief Justice of the High Court, as per the Memorandum of Procedure.

(8) Only one instance was given to us, pre the ***First Judges case*** where an appointment as a judge of the High Court was made without the concurrence of the Chief Justice of India. Post the ***First Judges case*** as many as seven such appointments were made. This is a clear indication that the 'ultimate power' theory propounded in the ***First Judges case*** translated into 'absolute executive primacy'. The dream of Dr. Ambedkar became a nightmare, thanks to the political executive.

(9) The 'ultimate power' theory or the 'absolute executive primacy' theory is now diluted and the last word in the appointment of a judge of the Supreme Court is shared between the President and the Chief Justice of India

in terms of the ***Second Judges case*** and the ***Third Judges case***. Historically, giving the last word to the executive has been criticized by no less than the Attorney-General Shri M.C. Setalvad who chaired the Law Commission of India when the 14th Report was given. That system has not worked well at all as noted from time to time.

(10) The National Commission to Review the Working of the Constitution as well as a responsible judge from the House of Lords were of the opinion that the procedure for appointment of judges as laid down in the ***Second Judges case*** and the ***Third Judges case*** broadly serves the purpose of maintaining the independence of the judiciary and providing a suitable method for appointment of judges of the superior Courts.

184. This is not to say that the 'collegium system' is perfect. Hardly so. During the course of hearing, some critical comments were made with regard to the appointment of some judges to this Court which, it was submitted by the learned Attorney-General would not have been possible were it not for the failure of the collegium system. Even the petitioners were critical of the collegium system. However, I must express my anguish at the manner in which an 'attack' was launched by some learned counsel appearing for the respondents. It was vitriolic at times, lacking discretion and wholly unnecessary. Denigrating judges is the easiest thing to do – they cannot fight back – and the surest way to ensure that the judiciary loses its independence and the people lose confidence in the judiciary, which is hardly advisable.

The Bar has an equal (if not greater) stake in the independence of the judiciary and the silence of the Bar at relevant moments is inexplicable. The solution, in the larger canvas, is a democratic audit, an audit limited to the judiciary and the Rule of Law. If some positive developments can be incorporated in the justice delivery system (in the larger context) they should be so incorporated.

185. In this context, it is interesting to recall the words of Dr. Ambedkar on the working of the Constitution:

> '… however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution."[359]

186. Both the 'absolute executive primacy' system or the 'ultimate power' theory and the 'collegium system' of appointment of judges of the Supreme Court and the High Courts were acceptable systems in their time. The 'executive primacy' system was, unfortunately, abused by the executive and the judiciary could do precious little about it, bound as the judges are by the Rule of Law. It is because of this abuse that the constitutional provisions were revisited at the instance of the Bar of this Court and the revisit gave the correct interpretational insight into our constitutional history and the constitutional provisions. It is this insight that resulted in the ***Second Judges case*** and a meaningful and pragmatic interpretation of the Constitution.

187. That the ***Second Judges case*** was correctly decided by the majority

[359] http://parliamentofindia.nic.in/ls/debates/vol11p11.htm

was accepted in the ***Third Judges case*** by the Attorney-General and, what is more important, by the President (aided and advised by the Council of Ministers) who did not seek a reversal of the dicta laid down in the ***Second Judges case***.

188. To say, as was conveyed to us during the hearing of the case, that the collegium system has failed and that it needs replacement would not be a correct or a fair post mortem. It is true that there has been criticism (sometimes scathing) of the decisions of the collegium, but it must not be forgotten that the executive had an equally important participative role in the integrated process of the appointment of judges. That the executive adopted a defeatist or an I-don't-care attitude is most unfortunate. The collegium cannot be blamed for all the ills in the appointment of judges - the political executive has to share the blame equally if not more, since it mortgaged its constitutional responsibility of maintaining a check on what may be described as the erroneous decisions of the collegium.

189. To say that the executive had no role to play (as was suggested to us) is incorrect to say the least, as is clear from a close reading of the ***Second Judges case*** and the ***Third Judges case***. Even the President did not think so. In fact, the President was clearly of the opinion that the executive or at least the Head of State had a role to play in the appointment of judges. This evident from an article titled "Merit" in the Appointment of Judges'[360] which quotes from an issue of *India Today* magazine of 25th January, 1999 the

[360] By Professor M.P. Singh, (1999) 8 SCC (Jour) 1

following noting made by the President concerning the appointment of judges of the Supreme Court:

> "I would like to record my views that while recommending the appointment of Supreme Court judges, it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like SCs and STs, who comprise 25 per cent of the population, and women are given due consideration. Eligible persons from these categories are available and their under-representation or non-representation would not be justifiable. Keeping vacancies unfilled is also not desirable given the need for representation of different sections of society and the volume of work the Supreme Court is required to handle."

The Chief Justice of India is reported to have responded as follows:

> "I would like to assert that merit alone has been the criterion for selection of Judges and no discrimination has been done while making appointments. All eligible candidates, including those belonging to the Scheduled Castes and Tribes, are considered by us while recommending names for appointment as Supreme Court Judges. Our Constitution envisages that merit alone is the criterion for all appointments to the Supreme Court and High Courts. And we are scrupulously adhering to these provisions. An unfilled vacancy may not cause as much harm as a wrongly filled vacancy."

190. All that was needed to keep the collegium system on the rails was the unstinted cooperation of the executive and an effective implementation strategy, with serious and meaningful introspection and perhaps some fine tuning and tweaking to make it more effective. Unfortunately, the executive did not respond positively, perhaps due to its misunderstanding of the decisions of this Court.

191. On the other hand, an independent and impartial jurist, Lord Templeman praised the integrated consultative collegium system and recommended it as a method that the British could follow with advantage. The learned judge wrote:

> "However, having regard to the earlier experience in India of attempts by the executive to influence the personalities and attitudes of members of the judiciary, and having regard to the successful attempts made in Pakistan to control the judiciary, and having regard to the unfortunate results of the appointment of Supreme Court judges of the United States by the President subject to approval by Congress, the majority decision of the Supreme Court of India in the *Advocates on Record* case marks a welcome assertion of the independence of the judiciary and is the best method of obtaining appointments of integrity and quality, a precedent method which the British could follow with advantage."[361]

While others shower praise on our system of appointment of judges, we can only heap scorn!

Preliminary issue – reconsideration of the *Second Judges case* and the *Third Judges case*

192. With this rather detailed history, the preliminary objections raised by the learned Attorney-General need consideration. The learned Attorney-General raised three preliminary issues: (1) The writ petitions are premature and not maintainable since the 99th Constitution Amendment Act and the NJAC Act have not come into force; (2) The writ petitions are premature and not maintainable since the National Judicial Appointments Commission has not been constituted and so there is no adverse impact of the 99th Constitution Amendment Act and the NJAC and no facts have been pleaded by the petitioners in this regard; (3) This batch of cases ought to be heard by a Bench of 9 (nine) or more judges since the decision of this Court in the ***Second Judges case***[362] and the ***Third Judges case***[363] do not lay down the correct law but require reconsideration. It was submitted that the

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[361] Supreme But Not Infallible, Essays in Honour of the Supreme Court of India page 48, 53

[362] Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441 (Nine Judges Bench)

[363] Special Reference No. 1 of 1998, (1998) 7 SCC 739 (Nine Judges Bench)

decisions have the effect of usurping the powers of the President under Article 124(2) and Article 217(1) of the Constitution and that the judiciary has effectively converted the appointment of judges to the Supreme Court and the High Courts from 'consultation' between the President and the Chief Justice of India (as occurring in Article 124(2) of the Constitution) into 'concurrence' of the Chief Justice of India and giving birth to a 'right to insist' on the acceptance of a recommendation of the Chief Justice of India. Moreover, the doctrine of separation of powers between the Legislature, the Executive and the Judiciary has been thrown overboard as also the system of checks and balances inherent in the Constitution. To decide this particular preliminary issue, the learned Attorney-General referred to the separation of powers in our Constitution, the law and the principles on which this Court should proceed to decide whether an earlier or prior decision rendered requires to be reconsidered.

193. As far as the first preliminary objection is concerned, it was raised before the 99th Constitution Amendment Act and the NJAC Act came into force. Now the preliminary objection does not survive since the 99th Constitution Amendment Act and the NJAC Act have in fact been brought into force. The second preliminary objection has no substance since the question in these petitions relates to the basic structure of the Constitution and the independence of the judiciary. It would be facetious to say that the writ petitions should have been filed after an adverse impact is felt by the

alteration of the basic structure of the Constitution and after the independence of the judiciary is bartered away. If the petitioners were expected to wait that long it would perhaps be too late. That apart, since we have heard these petitions at length, it is advisable to pronounce on the substantive issues raised. Really speaking, it is only the third preliminary objection that needs consideration.

The third preliminary objection and the separation of powers

194. The issue of the separation of powers has been the subject matter of discussion in several cases. Broadly, the consistent view of this Court has been that while the Constitution recognizes the separation of powers, it is not a rigid separation and there is some overlap.

195. In ***Ram Jawaya Kapur v. State of Punjab***[364] it was held by Chief Justice Mukherjea speaking for this Court:

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law."[365]

196. The separation of powers in our Constitution is not as rigid as in the United States. One of the elements of the separation of powers is the system

[364] [1955] 2 SCR 225 (Five Judges Bench)
[365] Paragraph 12

of checks and balances. This too is recognized by our Constitution and Article 226 and Article 32 (judicial review) is one of the features of checks and balances. It was so held in ***Kesavananda Bharati v. State of Kerala***[366] where it was said by Justice Shelat and Justice Grover as follows:

> "There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in *Ranasinghe case*.[367] The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances."[368]

197. In ***Indira Nehru Gandhi v. Raj Narain***[369] the constitutional validity of the Constitution (Thirty-ninth Amendment) Act, 1975 was challenged. By this Amendment Act, Article 39-A was inserted in the Constitution and the challenge was, inter alia, to clause (4) thereof.[370] While striking down the offending clause, it was held by Justice H.R. Khanna:

> "A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the legislature to encroach upon the judicial sphere. It has accordingly been held that a legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the legislature to declare the

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[366] (1973) 4 SCC 225 (Thirteen Judges Bench)
[367] 1965 AC 172
[368] Paragraph 577
[369] 1975 Supp SCC 1 (Five Judges Bench)
[370] (4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, insofar as it relates to election petitions and matters connected therewith shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void, or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

> judgment of the court to be void or not binding (see *Shri Prithvi Cotton Mills Ltd*. v. *Broach Borough Municipality, Janapada Sabha*, *Chhindwara* v. *Central Provinces Syndicate Ltd*., *Municipal Corporation of the City of Ahmedabad* v. *New Shorock Spg. & Wvg. Co. Ltd*. and *State of Tamil Nadu* v. *M. Rayappa Gounder*)."[371] (Internal citations omitted).

198. Justice Mathew held that ours is a cooperative federalism that does not contain any rigid separation of powers and there exists a system of checks and balances. Harold Laski was quoted as saying that 'Separation of powers does not mean the equal balance of powers.'[372] In that context it was held that the exercise of judicial power by the Legislature is impermissible. The learned judge expressed the view that:

> "Montesquieu was the first to conceive of the three functions of Government as exercised by three organs, each juxtaposed against others. He realised that the efficient operation of Government involved a certain degree of overlapping and that the theory of checks and balances required each organ to impede too great an aggrandizement of authority by the other two powers. As Holdsworth says, Montesquieu convinced the world that he had discovered a new constitutional principle which was universally valid. The doctrine of separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of Government into three branches does not imply, as its critics would have us think, three watertight compartments. Thus, legislative impeachment of executive officers or judges, executive veto over legislation, judicial review of administrative or legislative actions are treated as partial exceptions which need explanation."[373]

199. Justice Y.V. Chandrachud made a distinction between the separation of powers as understood in the United States and Australia and as understood in India and expressed the following view in this regard:

> "The American Constitution provides for a rigid separation of governmental powers into three basic divisions, the executive, legislative and judicial. It is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian Constitution follows the same pattern of distribution of powers. Unlike these Constitutions, the Indian Constitution

[371] Paragraph 190
[372] A Grammar of Politics (Works of Harold J. Laski), 297
[373] Paragraph 318

> does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. As observed by Cardozo, J. in his dissenting opinion in *Panama Refining Company* v. *Ryan*[374] the principle of separation of powers "is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of Government which cannot foresee today the developments of tomorrow in their nearly infinite variety". Thus, even in America, despite the theory that the legislature cannot delegate its power to the executive, a host of rules and regulations are passed by non-legislative bodies, which have been judicially recognized as valid."[375]

200. In ***Minerva Mills Ltd. v. Union of India***[376] Justice Bhagwati opined that the Constitution has devised a structure for the separation of powers and checks and balances and held:

> "It is clear from the majority decision in *Kesavananda Bharati case* that our Constitution is a controlled Constitution which confers powers on the various authorities created and recognised by it and defines the limits of those powers. The Constitution is suprema lex, the paramount law of the land and there is no authority, no department or branch of the State which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of such authority."[377]

201. A little later, it was observed by the learned judge:

> "It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of government are divided; the executive, the legislature and the judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping

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[374] 293 U.S. 388 (1935)
[375] Paragraph 87
[376] (1980) 3 SCC 625 (Five Judges Bench)
[377] Paragraph 86

> is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J., (as he then was) in *Indira Gandhi case* 'by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged'."[378]

202. In ***I.R. Coelho v. State of Tamil Nadu***[379] it was held by Chief Justice Sabharwal speaking for the Court that the doctrine of separation of powers is a part of the basic structure of the Constitution. It was held:

> "The separation of powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in *Kesavananda Bharati case* by the majority. Later, it was reiterated in *Indira Gandhi case*. A large number of judgments have reiterated that the separation of powers is one of the basic features of the Constitution."[380]

203. In ***Bhim Singh v. Union of India***[381] it was held that separation of powers is an essential feature of the Constitution and in modern governance strict separation is neither possible nor desirable. There is no violation of the principle of separation of powers if there is an overlap of the function of one branch of governance with another, but if one branch takes over an essential function of another branch, then there is a violation of the principle. It was observed by Justice Sathasivam speaking for the Court, while considering the constitutional validity of the Members of Parliament Local Area Development Scheme:

> "The concept of separation of powers, even though not found in any particular constitutional provision, is inherent in the polity the Constitution has adopted. The aim of separation of powers is to achieve the maximum extent of accountability of each branch of the Government.
> While understanding this concept [of separation of powers], two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict

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[378] Paragraph 87
[379] (2007) 2 SCC 1 (Nine Judges Bench)
[380] Paragraph 63. This has been reiterated in paragraphs 67, 125 and 129.
[381] (2010) 5 SCC 538 (Five Judges Bench)

> separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability.
>
> Thus, the test for the violation of separation of powers must be precisely this. A law would be violative of separation of powers not if it results in some overlap of functions of different branches of the State, but if it takes over an essential function of the other branch leading to lapse in constitutional accountability."[382]

204. Finally, in ***State of Tamil Nadu v. State of Kerala***[383] there is an elaborate discussion on the separation of powers with reference to several cases decided by this Court.[384] It was held therein that in view of the doctrine of the separation of powers (and for other reasons as well) the Kerala Irrigation and Water Conservation (Amendment) Act, 2006 passed by the Kerala Legislature is unconstitutional since it seeks to nullify the decision of this Court in ***Mullaperiyar Environmental Protection Forum*** **v.** ***Union of India***.[385]

205. The submission of the learned Attorney-General was that the appointment of a judge of the Supreme Court or a High Court is an executive function and this has been so held even in the ***Second Judges case***. Justice Ahmadi held that the appointment of judges is an executive function[386] as did Justice Verma.[387] By an unsustainable interpretation of the Constitution (an interpretation which, according to the learned Attorney-General must have

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[382] Paragraphs 77 and 78
[383] (2014) 12 SCC 696 (Five Judges Bench)
[384] Paragraphs 98 to 126.7. The conclusions are stated in paragraphs 126.1 to 126.7.
[385] (2006) 3 SCC 643 (Five Judges Bench)
[386] Paragraph 298 and 304
[387] Paragraph 443

made Dr. Ambedkar turn in his grave), this executive function has been taken over or usurped by the judiciary and that is the reason why the ***Second Judges case*** requires to be reconsidered and the correct constitutional position deserves to be restored. In other words, by a process of judicial encroachment, the separation of power theory has been broken down by this Court, in violation of the basic structure of the Constitution.

Constituent Assembly Debates and the third preliminary issue

206. In further support of his contention that the ***Second Judges case*** and the ***Third Judges case*** do not lay down the correct law and need reconsideration, the learned Attorney-General placed great reliance on the CAD. It is necessary, therefore, to consider the law on the subject and then the debates.

207. In ***Administrator-General of Bengal v. Prem Lal Mullick***[388] the Privy Council did not approve of a reference to debates in the Legislature as a legitimate aid to the construction of a statute. It was held:

> "Their Lordships observe that the two learned Judges who constituted the majority in the Appellate Court, although they do not base their judgment upon them, refer to the proceedings of the Legislature which resulted in the passing of the Act of 1874 [Administrator-General's Act] as legitimate aids to the construction of Section 31. Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations when the clauses of an Act of the British Legislature are under construction are equally cogent in the case of an Indian statute."

208. This view was partially accepted, with reference to the CAD in ***A.K. Gopalan v. State of Madras***[389] by Chief Justice Harilal Kania who held that

[388] (1894-95) 22 I.A. 107, 118
[389] 1950 SCR 88 (6 Judges Bench)

reference may be made to the CAD with great caution and only when 'latent ambiguities are to be resolved.'[390] The learned Chief Justice observed:

> "Our attention was drawn to the debates and report of the drafting committee of the Constituent Assembly in respect of the wording of this clause. The report may be read not to control the meaning of the article, but may be seen in case of ambiguity. In *Municipal Council of Sydney v. The Commonwealth*[391] it was thought that individual opinion of members of the Convention expressed in the debate cannot be referred to for the purpose of construing the Constitution. The same opinion was expressed in *United States v. Wong Kim Ark.*[392] The result appears to be that while it is not proper to take into consideration the individual opinions of Members of Parliament or Convention to construe the meaning of the particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted. In the present case the debates were referred to show that the expression "due process of law" was known to exist in the American Constitution and after a discussion was not adopted by the Constituent Assembly in our Constitution. In *Administrator General of Bengal* v. *Premlal Mullick* a reference to the proceedings of the legislature which resulted in the passing of the Act was not considered legitimate aid in the construction of a particular section. The same reasons were held as cogent for excluding a reference to such debates in construing an Indian statute. Resort may be had to these sources with great caution and only when latent ambiguities are to be resolved."[393]

209. This view was endorsed by Fazl Ali, J who referred to the expression 'due process of law' which was originally interpreted by the United States Supreme Court as referring to matters of procedure but was subsequently widened to cover substantive law as well. The learned judge held:

> "In the course of the arguments, the learned Attorney-General referred us to the proceedings in the Constituent Assembly for the purpose of showing that the article as originally drafted contained the words "without due process of law" but these words were subsequently replaced by the words "except according to procedure established by law". In my opinion, though the proceedings or discussions in the Assembly are not relevant for the purpose of construing the meaning of the expressions used in Article 21, especially when they are plain and unambiguous, they are relevant to show that the Assembly intended to avoid the use of the expression "without due process of law"……. In the earliest times, the American Supreme Court construed "due process of law" to cover matters of procedure only, but

[390] Quoted from Willoughby on the Constitution of the United States, page 64
[391] (1904) 1 Com LR 208
[392] 169 US 649, 699
[393] Page 110 and 111

> gradually the meaning of the expression was widened so as to cover substantive law also, by laying emphasis on the word "due".[394]

210. Justice Patanjali Sastri was of the same opinion and so the learned judge held as follows:

> "Learned counsel drew attention to the speeches made by several members of the Assembly on the floor of the House for explaining, as he put it, the "historical background". A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord. The Court could only search for the objective intent of the legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles etc. I attach no importance, therefore, to the speeches made by some of the members of the Constituent Assembly in the course of the debate on Article 15 (now Article 21)".[395]

211. Justice Mukherjea noted the concession of the learned Attorney-General that the CAD are not admissible to explain the meaning of the words used – a position quite the opposite from what is now taken by the learned Attorney-General. The learned judge then observed that such extrinsic evidence is best left out of account and held as follows:

> "The learned Attorney-General has placed before us the debates in the Constituent Assembly centering round the adoption of this recommendation of the Drafting Committee and he has referred us to the speeches of several members of the Assembly who played an important part in the shaping of the Constitution. As an aid to discover the meaning of the words in a Constitution, these debates are of doubtful value. "Resort can be had to them"' says Willoughby, "with great caution and only when latent ambiguities are to be solved. The proceedings may be of some value when they clearly point out the purpose of the provision. But when the question is of abstract meaning, it will be difficult to derive from this source much material assistance in interpretation."
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> The learned Attorney-General concedes that these debates are not admissible to explain the meaning of the words used and he wanted to use them only for the purpose of showing that the Constituent Assembly when they finally adopted the recommendation of the Drafting Committee, were fully aware of the implications of the differences between the old form of expression and the new. In my opinion, in interpreting the Constitution, it

[394] Page 158 and 159
[395] Page 201 and 202

> will be better if such extrinsic evidence is left out of account. In matters like this, different members act upon different impulses and from different motives and it is quite possible that some members accepted certain words in a particular sense, while others took them in a different light."[396]

212. Justice S.R. Das specifically stated that he expresses no opinion on the question of admissibility or otherwise of the CAD to interpret the Constitution.

213. In ***State of Travancore-Cochin v. The Bombay Co. Ltd.***[397] it was unanimously held that reference to the CAD is unwarranted and such an extrinsic aid to the interpretation of statutes is not admissible. Speaking for the Court, Chief Justice Patanjali Sastri held:

> "It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes — see *Administrator-General of Bengal* v. *Prem Lal Mallick*. The reason behind the rule was explained by one of us in *Gopalan case* thus:
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> > "A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord,"
>
> or, as it is more tersely put in an American case—
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> > "Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other — *United States* v. *Trans-Missouri Freight Association*.[398]"[399]

214. In ***Golak Nath v. State of Punjab***[400] Chief Justice Subba Rao noted the submissions of the petitioners, one of which was:

> "The debates in the Constituent Assembly, particularly the speech of Mr Jawahar Lal Nehru, the first Prime Minister of India, and the reply of Dr Ambedkar, who piloted the Bill disclose clearly that it was never the

[396] Page 273 and 274
[397] 1952 SCR 1112 (5 Judges Bench)
[398] 169 US 290, 318
[399] Page 1121
[400] (1967) 2 SCR 762 (11 Judges Bench)

> intention of the makers of the Constitution by putting in Article 368 to enable the Parliament to repeal the fundamental rights; the circumstances under which the amendment moved by Mr H.V. Kamath, one of the members of Constituent Assembly, was withdrawn and Article 368 was finally adopted, support the contention that amendment of Part III is outside the scope of Article 368."[401]

215. The submissions of the learned Attorney-General were also noted and one of which was, again, diametrically opposed to the submission made before us by the learned Attorney-General:

> "Debates in the Constituent Assembly cannot be relied upon for construing Article 368 of the Constitution and even if they can be, there is nothing in the debates to prove positively that fundamental rights were excluded from amendment."[402]

216. The learned Chief Justice (speaking for the majority) referred to the CAD and observed:

> "We have referred to the speeches of Pandit Jawaharlal Nehru and Dr. Ambedkar not with a view to interpret the provisions of Art. 368, which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution."[403]

217. Justice Wanchoo dealt with the issue a bit more elaborately and on a consideration of the law (drawing support from ***Prem Lal Mullick*** and ***A.K. Gopalan***) held that the CAD could not be looked into for interpreting Article 368 of the Constitution and that the said Article 'must be interpreted on the words thereof as they finally found place in the Constitution.' It was said:

> "Copious references were made during the course of arguments to debates in Parliament and it is urged that it is open to this Court to look into the debates in order to interpret Article 368 to find out the intention of the Constitution-makers. We are of opinion that we cannot and should not look into the debates that took place in the Constituent Assembly to determine the interpretation of Article 368 and the scope and extent of the provision contained therein. It may be conceded that historical background and

[401] Page 782
[402] Page 783
[403] Page 792

> perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed, may be taken into account in finding out the scope and extent of Article 368. But we have no doubt that what was spoken in the debates in the Constituent Assembly cannot and should not be looked into in order to interpret Article 368……..
> We are therefore of opinion that it is not possible to read the speeches made in the Constituent Assembly in order to interpret Article 368 or to define its extent and scope and to determine what it takes in and what it does not. As to the historical facts, namely, what was accepted or what was avoided in the Constituent Assembly in connection with Article 368, it is enough to say that we have not been able to find any help from the material relating to this. There were proposals for restricting the power of amendment under Article 368 and making fundamental rights immune therefrom and there were counter proposals before the Constituent Assembly for making the power of amendment all-embracing. They were all either dropped or negatived and in the circumstances are of no help in determining the interpretation of Article 368 which must be interpreted on the words thereof as they finally found place in the Constitution, and on those words we have no doubt that there are no implied limitations of any kind on the power to amend given therein."[404]

218. Justice Bachawat concluded his judgment by referring to the issue of the CAD being an aid to interpreting the Constitution. In rather terse words, the learned judge rejected the submission made in this regard and relied upon ***State of Travancore-Cochin***. This is what was said:

> "Before concluding this judgment I must refer to some of the speeches made by the members of the Constituent Assembly in the course of debates on the draft constitution. These speeches cannot be used as aids for interpreting the Constitution. See *State of Travancore-Cochin and others* v. *Bombay Co. Ltd.* Accordingly, I do not rely on them as aids to construction."[405]

219. Justice Bachawat also makes a rather interesting reference to a special article written by Sir B.N. Rau (Constitutional Adviser) on 15th August, 1948. Sir Benegal remarked:

> "It seems rather illogical that a constitution should be settled by simple majority by an assembly elected indirectly on a very limited franchise and that it should not be capable of being amended in the same way by a

[404] Page 836, 837 and 838
[405] Page 922

> Parliament elected - and perhaps for the most part elected directly by adult suffrage."[406]

This is mentioned, without any comment, only to throw open the thought whether the interpretation of the Constitution can be tied down forever to the views expressed by a few Hon'ble Members of the Constituent Assembly, who were undoubtedly extremely learned and visionary but who nevertheless constituted 'an assembly elected indirectly on a very limited franchise'.

220. In ***Kesavananda Bharati*** it was held by Chief Justice Sikri that 'speeches made by members of the legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any provisions of the statute.' The learned Chief Justice held that the same rule is applicable to provisions of the Constitution as well and for this reliance was placed, inter alia, on ***Prem Lal Mullick***, ***A.K Gopalan***, ***State of Travancore-Cochin*** and ***Golak Nath***. Explaining ***Union of India v. H.S. Dhillon***[407] the learned Chief Justice said:

> "In *Union of India* v. *H.S. Dhillon* I, on behalf of the majority, before referring to the speeches observed at p. 58 that "we are however, glad to find from the following extracts from the debates that our interpretation accords with what was intended". There is no harm in finding confirmation of one's interpretation in debates but it is quite a different thing to interpret the provisions of the Constitution in the light of the debates."[408]

221. Apart from relying on case law, the learned Chief Justice gave an additional reason for concluding that reliance on the CAD was not advisable for interpreting the provisions of the Constitution. This is best understood in the words of the learned Chief Justice:

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[406] Page 917
[407] (1972) 2 SCR 331
[408] Paragraph 183

> "There is an additional reason for not referring to debates for the purpose of interpretation. The Constitution, as far as most of the Indian States were concerned, came into operation only because of the acceptance by the Ruler or Rajpramukh. This is borne out by the following extract from the statement of Sardar Vallabhbhai Patel in the Constituent Assembly on October 12, 1949, (CAD, Vol. X, pp. 161-63):
>
> > "Unfortunately we have no properly constituted legislatures in the rest of the States (apart from Mysore, Saurashtra and Travancore and Cochin Union) nor will it be possible to have legislatures constituted in them before the Constitution of India emerges in its final form. We have, therefore, no option but to make the Constitution operative in these States on the basis of its acceptance by the Rulers or the Rajpramukh, as the case may be, who will no doubt consult his Council of Ministers."
>
> In accordance with this statement, declarations were issued by the Rulers or Rajpramukhs accepting the Constitution.
>
> It seems to me that when a Ruler or Rajpramukh or the people of the State accepted the Constitution of India in its final form, he did not accept it subject to the speeches made during the Constituent Assembly debates. The speeches can, in my view, be relied on only in order to see if the course of the progress of a particular provision or provisions throws any light on the historical background or shows that a common understanding or agreement was arrived at between certain sections of the people."[409]

222. Justice Hegde and Justice A.K Mukherjea also held that reliance could not be placed on the CAD to interpret any provision of the Constitution. Reference was made to ***State of Travancore-Cochin*** and it was held:

> "For finding out the true scope of Article 31(2) as it stands now, the learned Advocate-General of Maharashtra as well as the Solicitor-General has taken us through the history of this article. According to them the article as it stands now truly represents the intention of the Constitution-makers. In support of that contention, we were asked to go through the Constituent Assembly debates relating to that article. In particular we were invited to go through the speeches made by Pandit Nehru, Sir Alladi Krishnaswami Ayyar, Dr Munshi and Dr Ambedkar. In our opinion, it is impermissible for us to do so. It is a well-settled rule of construction that speeches made by members of a Legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any of the provisions of the statute. The same rule is applicable when we are called upon to interpret the provisions of a Constitution."[410]

The learned judges observed that no decision was brought to their notice

[409] Paragraph 184 to 186
[410] Paragraph 683

dissenting with the view mentioned above.

223. Justice H.R Khanna was also of the opinion that the CAD could be referred only for the limited purpose of determining the history of the constitutional provision. The CAD 'cannot form the basis for construing the provisions of the Constitution.' The learned judge further said that the intention of the draftsman of a statute would have to be gathered from the words used. The learned judge said:

> "The speeches in the Constituent Assembly, in my opinion, can be referred to for finding the history of the Constitutional provision and the background against which the said provision was drafted. The speeches can also shed light to show as to what was the mischief which was sought to be remedied and what was the object which was sought to be attained in drafting the provision. The speeches cannot, however, form the basis for construing the provisions of the Constitution. The task of interpreting the provision of the Constitution has to be done independently and the reference to the speeches made in the Constituent Assembly does not absolve the court from performing that task. The draftsmen are supposed to have expressed their intentions in the words used by them in the provisions. Those words are final repositories of the intention and it would be ultimately from the words of the provision that the intention of the draftsmen would have to be gathered."[411]

224. Justice Y.V. Chandrachud relied upon ***State of Travancore-Cochin***, ***A.K. Gopalan*** and ***Golak Nath*** to conclude:

> "Debates of the Constituent Assembly and of the First Provisional Parliament were extensively read out to us during the course of arguments. I read the speeches with interest, but in my opinion, the debates are not admissible as aids to construction of constitutional provisions."[412]

A little later it was said:

> "It is hazardous to rely upon parliamentary debates as aids to statutory construction. Different speakers have different motives and the system of "Party Whip" leaves no warrant for assuming that those who voted but did not speak were of identical persuasion. That assumption may be difficult to make even in regard to those who speak. The safest course is to gather the intention of the legislature from the language it uses. Therefore,

[411] Paragraph 1368
[412] Paragraph 2137

> parliamentary proceedings can be used only for a limited purpose as explained in *Gopalan case*."[413]

225. A contrary view was rhetorically expressed by Justice Jaganmohan Reddy but it was eventually held that the CAD could aid in interpretation, being 'valuable material' unlike legislative debates which could be motivated by partisan views and party politics. Constituent Assembly Debates were not motivated by such partisan considerations. It was said:

> "Speaking for myself, why should we not look into them [CAD] boldly for ascertaining what was the intention of our framers and how they translated that intention? What is the rationale for treating them as forbidden or forbidding material. The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned…….. In proceedings of a legislature on an ordinary draft bill, as I said earlier, there may be a partisan and heated debate, which often times may not throw any light on the issues which come before the Court but the proceedings in a .Constituent Assembly have no such partisan nuances and their only concern is to give the national a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an interplay of forces which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and expounding it, should not, if it has to catch the objectives of the framers, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly."[414]

226. Justice K.K. Mathew supported the view of Justice Jaganmohan Reddy and observed that: 'Logically, there is no reason why we should exclude altogether the speeches made in the Constituent Assembly by individual members if they throw any light which will resolve latent ambiguity in a provision of Constitution.' The learned judge went on to hold in a subsequent paragraph of the decision:

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[413] Paragraph 2140
[414] Paragraph 1088

> "If the debates in the Constituent Assembly can be looked into to understand the legislative history of a provision of the Constitution including its derivation, that is, the various steps leading up to and attending its enactment, to ascertain the intention of the makers of the Constitution, it is difficult to see why the debates are inadmissible to throw light on the purpose and general intent of the provision. After all, legislative history only tends to reveal the legislative purpose in enacting the provision and thereby sheds light upon legislative intent. It would be drawing an invisible distinction if resort to debates is permitted simply to show the legislative history and the same is not allowed to show the legislative intent in case of latent ambiguity in the provision."[415]

227. In ***Samsher Singh*** in their concurring opinion, Justice Krishna Iyer (for himself and Justice P.N. Bhagwati) extensively referred to the CAD for arriving at their conclusion, while Chief Justice Ray (for himself and four other learned judges) made no reference to the CAD.

228. Be that as it may, reference to the CAD again came up for consideration in ***Indra Sawhney v. Union of India***.[416] Speaking for the learned Chief Justice, Justice M.N. Venkatachaliah, Justice Ahmadi and himself, Justice B.P. Jeevan Reddy clarified that though the CAD or the speeches of Dr. Ambedkar cannot be ignored, they are not conclusive or binding on the Court but can be relied upon as an aid to interpreting a constitutional provision. The CAD were referred to for 'furnishing the context and the objective' to be achieved by clause (4) of Article 16 of the Constitution. Reference was made, inter alia, to ***Golaknath***, ***Dhillon*** and ***Kesavananda Bharati*** and it was held:

> "We are aware that what is said during these debates is not conclusive or binding upon the Court because several members may have expressed several views, all of which may not be reflected in the provision finally

[415] Paragraph 1598
[416] 1992 Supp (3) SCC 217 (9 Judges Bench)

> enacted. The speech of Dr Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as *an aid* to interpretation of a constitutional provision is borne out by a series of decisions of this Court…… Since the expression "backward" or "backward class of citizens" is not defined in the Constitution, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable."[417]

229. In ***S.R. Chaudhuri v. State of Punjab***[418] it was held that it is settled that the CAD may be relied upon 'as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution.' This view was followed by me in ***Manoj Narula v. Union of India***.[419]

230. In ***T.M.A. Pai Foundation v. State of Karnataka***[420] Justice Khare referred to ***Kesavananda Bharati*** and observed therein that though the CAD are not conclusive, yet they can throw light into the intention of the framers in enacting provisions of the Constitution. On this basis the learned judge held:

> "Thus, the accepted view appears to be that the report of the Constituent Assembly debates can legitimately be taken into consideration for construction of the provisions of the Act or the Constitution."[421]

231. Justice Variava (for himself and Justice Bhan) also referred to

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[417] Paragraph 772
[418] (2001) 7 SCC 126
[419] (2014) 9 SCC 1 (5 Judges Bench)
[420] (2002) 8 SCC 481 (11 Judges Bench)
[421] This conclusion appears to be doubtful

Kesavananda Bharati and held that though the CAD are not conclusive, but 'in a constitutional matter where the intent of the framers of the Constitution is to be ascertained, the Court should look into the proceedings and the relevant data, including the speeches, which throw light on ascertaining the intent.'

232. Justice Syed Shah Quadri stated an interesting principle in the following words:

> "The correct way to interpret an article is to go by its plain language and lay bare the meaning it conveys. It would no doubt be useful to refer to the historical and political background which supports the interpretation given by the court and in that context the debates of the Constituent Assembly would be the best record of understanding all those aspects. *A host of considerations might have prompted the people of India through Members of Constituent Assembly to adopt, enact and to give to themselves the Constitution. We are really concerned with what they have adopted, enacted and given to themselves in these documents*. We cannot and we should not cause scar on it which would take years for the coming generations to remove from its face."[422]

233. The learned judge then went on to hold, relying on ***Prem Lal Mullick***, ***A.K. Gopalan***, ***State of Travancore-Cochin***, ***Kesavananda Bharati*** and ***Indra Sawhney*** that 'admissibility of speeches made in the Constituent Assembly for interpreting provisions of the Constitution is not permissible' and that 'The preponderance of opinion appears to me not to rely on the debates in the Constituent Assembly or the Parliament to interpret a constitutional provision although they may be relevant for other purposes.' The learned judge quoted a sentence from ***Black Clawson International Ltd.***

[422] Paragraph 286

v. Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft[423] to the following effect:

> "We are seeking not what Parliament meant but the true meaning of what Parliament said."[424]

234. In re: ***Special Reference No. 1 of 2002*** (Gujarat Assembly Election Matter)[425] the issue of relying on the CAD again came up for consideration. Justice Khare (for the Chief Justice, Justice Bhan and himself) referred to ***Kesavananda Bharati*** and held:

> "Constituent Assembly Debates although not conclusive, yet show the intention of the framers of the Constitution in enacting provisions of the Constitution and the Constituent Assembly Debates can throw light in ascertaining the intention behind such provisions."[426]

235. In a decision rendered by the Constitutional Court of the Republic of South Africa in ***The State v. T. Makwanyane***[427] a brief survey of the law in the United States Supreme Court, German Constitutional Court, Canadian Supreme Court, this Court, European Court of Human Rights and the United Nations Committee on Human Rights was carried out and it was held (per Justice Chaskalson):

> In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process. The United States Supreme Court pays attention to such matters, and its judgments frequently contain reviews of the legislative history of the provision in question, including references to debates, and statements made, at the time the provision was adopted. The German Constitutional Court also has regard to such evidence. The Canadian Supreme Court has held such evidence to be admissible, and has referred to the historical background including the pre-confederation

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[423] [1975] AC 591
[424] Paragraph 297
[425] (2002) 8 SCC 237
[426] Paragraph 16
[427] 1995 (3) SA 391 (CC) (Eleven Judges Bench) paragraph 16

> debates for the purpose of interpreting provisions of the Canadian Constitution, although it attaches less weight to such information than the United States Supreme Court does. It also has regard to ministerial statements in Parliament in regard to the purpose of particular legislation. In India, whilst speeches of individual members of Parliament or the Convention are apparently not ordinarily admissible, the reports of drafting committees can, according to Seervai, "be a helpful extrinsic aid to construction." Seervai cites Kania CJ in A. K. Gopalan v The State for the proposition that whilst not taking "...into consideration the individual opinions of Members of Parliament or Convention to construe the meaning of a particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to debates may be permitted." The European Court of Human Rights and the United Nations Committee on Human Rights all allow their deliberations to be informed by *travaux preparatoires*."[428] (Internal citations omitted)

236. Earlier, on a consideration of the law in England it was held (per Justice Chaskalon):

> "Debates in Parliament, including statements made by Ministers responsible for legislation, and explanatory memoranda providing reasons for new bills have not been admitted as background material. It is, however, permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining "the mischief aimed at the statutory enactment in question." These principles were derived in part from English law. In England, the courts have recently relaxed this exclusionary rule and have held, in Pepper (Inspector of Taxes) v Hart that, subject to the privileges of the House of Commons:
>
> > ...reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words."[429] (Internal citations omitted)

237. It is quite clear that the overwhelming view of the various learned judges in different decisions rendered by this Court and in other jurisdictions as well is that: (1) A reference may be made to the CAD or to Parliamentary debates (as indeed to any other 'relevant material') to understand the context in which the constitutional or statutory provisions were framed and to gather

[428] Paragraph 16
[429] Paragraph 14

the intent of the law makers but only if there is some ambiguity or uncertainty or incongruity or obscurity in the language of the provision. A reference to the CAD or the Parliamentary debates ought not to be made only because they are there;[430] (2) The CAD or Parliamentary debates ought not to be relied upon to interpret the provisions of the Constitution or the statute if there is no ambiguity in the language used. These provisions ought to be interpreted independently – or at least, if reference is made to the CAD or Parliamentary debates, the Court should not be unduly influenced by the speeches made. Confirmation of the interpretation may be sought from the CAD or the Parliamentary debates but not vice versa.

238. This discussion has been necessitated by the submission of the learned Attorney-General that the Constituent Assembly did not intend that for the appointment of a judge of the Supreme Court or of the High Court the concurrence of the Chief Justice of India is necessary. The word 'consultation' in Article 124 of the Constitution and in Article 217 of the Constitution did not and could not mean 'concurrence'. This, according to the learned Attorney-General is specifically and clearly borne out from the CAD. In fact, the learned Attorney-General drew our attention to the discussion that took place in the Constituent Assembly on 23rd and 24th May, 1949.

239. It was submitted that under the circumstances there was no ambiguity

[430] With due apologies to George Mallory who is famously quoted as having replied to the question "Why do you want to climb Mount Everest?" with the retort "Because it's there."

in the meaning of the word 'consultation' and a reference to the CAD was necessary, applying the dictum of Chief Justice Sikri, only to confirm the interpretation of 'consultation' as not meaning 'concurrence'. It is for this reason, apart from others that the ***Second Judges case*** and the ***Third Judges case*** required reconsideration.

240. The learned Attorney-General also drew our attention to the following expression of opinion by Mr. T.T. Krishnamachari in the Constituent Assembly on 27th May, 1949 in relation to clause (3) of the draft Article 122 concerning the officers and servants and expenses of the Supreme Court.[431] The contention was that it was not the intention of the Constituent Assembly to make the Chief Justice of India or the Supreme Court above the executive or the Legislature thereby discarding the theory of separation of powers, and if 'consultation' is interpreted to mean 'concurrence', then that would be the inevitable result. Reliance was placed on the following speech:

> "While I undoubtedly support the amendment moved by Dr. Ambedkar, I think it should be understood by the Members of this House, and I do hope by those people who will be administering justice and also administering the country in the future that this is a safeguard rather than an operative provision. The only thing about it is that a matter like the employment of staff by the Judges should be placed ordinarily outside the purview of the Executive which would otherwise have to take the initiative to include these items in the budget for the reason that the independence of the Judiciary should be maintained and that the Judiciary should not feel that they are subject to favours that the Executive might grant to them from time to time and which would naturally influence their decision in any matter they have to take where the interests of the Executive of the time being happens to be concerned. At the same time, Sir, I think it should be made clear that it is not the intention of this House or of the framers of this Constitution that they want to create specially favoured bodies which in themselves becomes an *Imperium in Imperio*, completely independent of

[431] (3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the revenues of India, and any fees or other moneys taken by the court shall form part of those revenues.

> the Executive and the Legislature and operating as a sort of superior body to the general body politic. If that were so, I think we should be rather chary of introducing a provision of this nature, not merely in regard to the Supreme Court but also in regard to the Auditor-General, in regard to the Union Public Service Commission, in regard to the Speaker and the President of the two House of Parliament and so on, as we will thereby be creating a number of bodies which are placed in such a position that they are bound to come into conflict with the Executive in every attempt they make to display their superiority. In actual practice, it is better for all these bodies to more or less fall in line with the regulations that obtain in matters of recruitment to the public services, conditions of promotion and salaries paid to their staff."[432]

Replying to this debate, Dr. Ambedkar clarified the position that there was no question of creating an *Imperium in Imperio*. Dr. Ambedkar said:

> "Mr. President, Sir, I would just like to make a few observations in order to clear the position. Sir, there is no doubt that the House in general, has agreed that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law. At the same time, there is the fear that in the name of the independence of the Judiciary, we might be creating, what my Friend Mr. T. T. Krishnamachari very aptly called an "Imperium in Imperio". We do not want to create an *Imperium in Imperio*, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive. My friend, if they will carefully examine the provisions of the new amendment which I have proposed in place of the original article 122, will find that the new article proposes to steer a middle course. It refuses to create an Imperium in Imperio, and I think it gives the Judiciary as much independence as is necessary for the purpose of administering justice without fear or favour. I need not therefore, dilate on all the provisions contained in this new article 122….."[433]

241. It is quite clear from the above that the endeavour of Dr. Ambedkar was to ensure the independence of the judiciary from the executive without creating any power imbalance and this, therefore, needed steering a middle course whether in the appointment of judges or the officers of the Supreme Court. There can be no doubt about this at all. But what is the 'independence of the judiciary' and how can it be maintained and does the 99th Constitution

[432] http://parliamentofindia.nic.in/ls/debates/vol8p10b.htm
[433] http://parliamentofindia.nic.in/ls/debates/vol8p10b.htm

Amendment Act impact on that independence? These are some troubling questions that need an answer with reference to the issue before us, namely, the constitutional validity of the 99th Constitution Amendment Act.

Judicial pronouncements and the third preliminary issue

242. The learned Attorney-General submitted that in any event the ***Second Judges case*** requires reconsideration. There is large volume of case law which gives guidance on the circumstances when an earlier decision of this Court should be reconsidered. It is necessary to consider these cases before deciding whether a platform for reconsideration of the ***Second Judges case*** has been made.

243. ***Bengal Immunity Co. Ltd. v. State of Bihar & Ors.***[434] concerned the interpretation of Article 286 of the Constitution which, it was contended, had been incorrectly interpreted in ***State of Bombay v. The United Motors (India) Ltd.***[435] This Court addressed the issue of reconsideration of a previous decision rendered by it. Chief Justice Das (speaking for himself, Justice Vivian Bose and Justice Syed Jafer Imam) discussed the judgments delivered in England, Australia, the United States and by the Privy Council and was of the view (for several reasons) that a previous decision rendered by this Court could be departed from. It was observed that it was not easy to amend the Constitution and if an erroneous interpretation was put upon a provision thereof it could 'conceivably be perpetuated or may at any rate

[434] AIR 1955 SC 661 (7 Judges Bench)
[435] (1953) 4 SCR 1069 (5 Judges Bench)

remain unrectified for a considerable time to the great detriment to public well being.' It was held, inter alia, that if this Court was convinced of its error and 'baneful effect' on the general interests of the public of an erroneous interpretation of a provision of the Constitution, then there is nothing in the Constitution that prevents this Court in departing from its earlier decision. It could also depart from a previous decision if it was vague or inconsistent or plainly erroneous. It was held that the doctrine of *stare decisis* 'is not an inflexible rule of law and cannot be permitted to perpetuate our errors to the detriment to the general welfare of the public or a considerable section thereof.'

244. In a significant passage (one that will have a bearing on this subject), it was observed:

> "The majority decision does not merely determine the rights of the two contending parties to the Bombay appeal. Its effect is far reaching as it affects the rights of all consuming public. It authorises the imposition and levying of a tax by the State on an interpretation of a constitutional provision which appears to us to be unsupportable. To follow that interpretation will result in perpetuating what, with humility we say, is an error and in perpetuating a tax burden imposed on the people which, according to our considered opinion, is manifestly and wholly unauthorised.
> It is not an ordinary pronouncement declaring the rights of two private individuals inter se. It involves an adjudication on the taxing power of the States as against the consuming public generally. If the decision is erroneous, as indeed we conceive it to be, we owe it to that public to protect them against the illegal tax burdens which the States are seeking to impose on the strength of that erroneous recent decision."[436]

245. Justice N.H. Bhagwati also reviewed several decisions from various jurisdictions and agreed with Chief Justice Das but drew a distinction between reconsideration of a previous decision concerning the interpretation

[436] Paragraph 17

of a provision of a legislative enactment and the interpretation of a provision of the Constitution. While an erroneous interpretation of the former by the Court could be corrected by the Legislature, it was not easy to amend the Constitution to correct its erroneous interpretation by the Court. It is for this reason that Justice N.H. Bhagwati held that if the previous decision interpreting the provisions of the Constitution was 'manifestly wrong or erroneous' and that 'public interest' demanded its reconsideration then the Court should have no hesitation in doing so.

246. Justice Jagannadhadas also held that this Court is competent to reconsider its earlier decisions. It was added that: 'But, it does not follow that such power can be exercised without restriction or limitation or that a prior decision can be reversed on the ground that, on later consideration, the Court disagrees with the prior decision and thinks it erroneous.' It was held that though the power to reconsider a prior decision does exist, the actual exercise of that power should be confined 'within very narrow limits.' The learned Judge preferred to adopt the view expressed by Justice Dixon of the High Court of Australia in ***Attorney-General for N.S.W.*** **v.** ***The Perpetual Trustee Co. Ltd.***[437] to the effect that a prior decision should not be reconsidered simply because an opposite conclusion is to be preferred.

247. Justice Venkatarama Aiyar also held the view that this Court could reconsider an earlier decision rendered by it. However, the learned Judge was of the opinion that the power to reconsider should be 'exercised very

[437] 85 CLR 237

sparingly and only in exceptional circumstances, such as when a material provision of law had been overlooked, or where a fundamental assumption on which the decision is based, turns out to be mistaken.' Agreeing with the view canvassed by Justice Jagannadhadas (and Justice Dixon) the learned Judge posed the following question and also answered it: 'Can we differ from a previous decision of this Court, because a view contrary to the one taken therein appears to be preferable? I would unhesitatingly answer it in the negative, not because the view previously taken must necessarily be infallible but because it is important in public interest that the law declared should be certain and final rather than that it should be declared in one sense or the other.'

248. Justice B.P. Sinha agreed with Justice Jagannadhadas and Justice Venkatarama Aiyar and held that a previous judgment of this Court ought not to be reviewed simply because another view may be taken of the points in controversy. This Court should review its previous decisions only in exceptional circumstances. It was observed that 'Definiteness and certainty of the legal position are essential conditions for the growth of the rule of law.'

249. ***Lt. Col. Khajoor Singh v. Union of India***[438] concerned the interpretation of Article 226 of the Constitution and Article 32(2-A) of the Constitution (as applicable to Jammu & Kashmir). Though Justice Subba Rao (dissenting) and Justice Das Gupta (concurring) delivered separate

[438] AIR 1961 SC 532 (7 Judges Bench)

judgments, they did not advert to the question of reconsideration of a decision of this Court. Chief Justice B.P. Sinha speaking for the remaining learned judges took the view that a previous decision rendered by this Court may be reconsidered if there are 'clear and compelling reasons' to do so or if there is a fair amount of unanimity that the previous decision is 'manifestly wrong' or if it is demonstrated that the earlier decision was erroneous 'beyond all reasonable doubt' particularly on a constitutional issue. If any inconvenience is felt on the interpretations of the provisions of the Constitution under consideration, then the remedy 'seems to be a constitutional amendment.'

250. In ***Keshav Mills v. CIT***[439] the question for consideration was the scope of the High Court's powers under Section 66(4) of the Income Tax Act, 1922. It was submitted by the learned Attorney-General that two earlier decisions on the subject, that is, ***New Jehangir Vakil Mills Ltd. v. CIT***[440] and ***Petlad Turkey Red Dye Works Co. Ltd., Petlad v. CIT***[441] needed reconsideration. In considering this submission, it was held that when this Court interprets a statutory provision, merely because an alternative view different from an opinion earlier expressed by this Court is more reasonable is not necessarily an adequate reason for reconsidering the earlier opinion. This Court should ask itself the question whether in the interests of the

[439] AIR 1965 SC 1636 (7 Judges Bench)
[440] (1960) 1 SCR 249
[441] (1963) Supp 1 SCR 871

public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. This Court held:

> "When this Court decides questions of law, its decisions are, under Article 141 binding on all courts within the territory of India and so it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country…..That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified."[442]

251. ***Maganlal Chhaganlal v. Municipal Corporation of Greater Bombay***[443] concerned the validity of proceedings under Chapter V-A of the Bombay Municipal Corporation Act, 1888 and the Bombay Government Premises (Eviction) Act, 1955 in the context of the decision of this Court in ***Northern India Caterers v. State of Punjab***.[444] Justice H.R. Khanna alone considered the question of overruling an earlier decision of this Court, namely, in ***Northern India Caterers***. It was observed that certainty in law would be eroded if a decision that 'held the field' for several years is readily overruled – 'certainty and continuity are essential ingredients of rule of law.' It was held that if two views are possible then, simply because the earlier decision does not take a view that is more acceptable would not be a ground for overruling the earlier decision. An earlier decision ought to be overruled only for compelling reasons otherwise it would create 'uncertainty, instability and confusion if the law propounded by this Court on the basis of

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[442] Paragraph 23
[443] (1974) 2 SCC 402 (7 Judges Bench)
[444] AIR 1967 SC 1581

which numerous cases have been decided and many transactions have taken place is held to be not the correct law.' Justice Khanna observed that new ideas and developments in the field of law and that the fullness of experience and indeed subsequent experience cannot be wished away. The learned judge held:

> "As in life so in law things are not static. Fresh vistas and horizons may reveal themselves as a result of the impact of new ideas and developments in different fields of life. Law, if it has to satisfy human needs and to meet the problems of life, must adapt itself to cope with new situations. Nobody is so gifted with foresight that he can divine all possible human events in advance and prescribe proper rules for each of them. There are, however, certain verities which are of the essence of the rule of law and no law can afford to do away with them. At the same time it has to be recognized that there is a continuing process of the growth of law and one can retard it only at the risk of alienating law from life itself. There should not be much hesitation to abandon an untenable position when the rule to be discarded was in its origin the product of institutions or conditions which have gained a new significance or development with the progress of years. It sometimes happens that the rule of law which grew up in remote generations may in the fullness of experience be found to serve another generation badly. The Court cannot allow itself to be tied down by and become captive of a view which in the light of the subsequent experience has been found to be patently erroneous, manifestly unreasonable or to cause hardship or to result in plain iniquity or public inconvenience."[445]

252. ***Ganga Sugar Corporation v. State of Uttar Pradesh***[446] related to the constitutional validity of a levy under the U.P. Sugarcane (Purchase Tax) Act, 1961. The decision does not contain any detailed discussion on the subject of reconsideration of an earlier decision of this Court. But it was nevertheless held that decisions of a Constitution Bench must be accepted as final unless the subject is of fundamental importance to national life or the reasoning of the previous decision is so plainly erroneous that 'it is wiser to be ultimately

[445] Paragraph 22
[446] (1980) 1 SCC 223 (5 Judges Bench)

right rather than to be consistently wrong. *Stare decisis* is not a ritual of convenience but a rule with limited exceptions. Pronouncements by Constitution Benches should not be treated so cavalierly as to be revised frequently.'

253. A rather exhaustive reference to the cases and the law laid down in different jurisdictions was adverted to in ***Union of India v. Raghubir Singh***.[447] This decision concerned itself with the grant of solatium under the Land Acquisition Act, 1894 as amended by the Land Acquisition (Amendment) Act, 1984. Reference was made to the 'guidelines' culled out from the decisions of the House of Lords[448] which suggest that the freedom to reconsider an earlier decision ought to be exercised sparingly; a decision ought not to be overruled if it upsets the legitimate expectation of persons who have made arrangements based on the earlier decision or causes great uncertainty in the law; decisions involving the interpretation of statutes or documents ought not to be overruled except in rare or exceptional circumstances; if the consequences of departing from an earlier decision are not foreseeable; merely because an earlier decision was wrongly taken is not a good enough justification for overruling it. On the other hand, a prior decision ought to be overruled 'if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy.'

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[447] (1989) 2 SCC 754 (5 Judges Bench)

[448] Reference was made to Dr. Alan Paterson's *Law Lords*. This reference is not at all clear and is simply stated as '1982 at pp. 156-157'

254. Reference was also made to several decisions earlier rendered by this Court (including those mentioned above) and though no new or different principles or guidelines were laid down, the law as stated by this Court was iterated, and it was observed: 'It is not necessary to refer to all the cases on the point. The broad guidelines are easily deducible from what has gone before. The possibility of further defining these guiding principles can be envisaged with further juridical experience, and when common jurisprudential values linking different national systems of law may make a consensual pattern possible. But that lies in the future.'

255. Echoing the views expressed in ***Maganlal Chhaganlal*** and ***Raghubir Singh*** with regard to acknowledging changes with the passage of time and modern conceptions of public policy, it was said:

> "Not infrequently, in the nature of things there is a gravity-heavy inclination to follow the groove set by precedential law. Yet a sensitive judicial conscience often persuades the mind to search for a ,different set of norms more responsive to the changed social context. The dilemma before the Judge poses the task of finding a new equilibrium prompted not seldom by the desire to reconcile opposing mobilities. The competing goals, according to Dean Roscoe Pound, invest the Judge with the responsibility "of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires". The reconciliation suggested by Lord Reid in *The Judge as Law Maker* lies in keeping both objectives in view, "that the law shall be certain, and that it shall be just and shall move with the times"."[449] (Internal citations have been omitted).

256. In ***Gannon Dunkerley & Co. v. State of Rajasthan***[450] the question related to 'the imposition of tax on the transfer of property in goods involved in the execution of works contracts. The power to impose this tax became

[449] Paragraph 13
[450] (1993) 1 SCC 364

available to the State Legislatures as a result of the amendments introduced in the Constitution by the Constitution (Forty-sixth Amendment) Act, 1982.' The constitutional validity of this Amendment Act had been upheld in ***Builders' Association of India v. Union of India***.[451] One of the issues raised was whether ***Builders' Association*** had been correctly decided or not. This Court did not add to the discourse on the subject but concluded, relying upon ***Khajoor Singh***, ***Keshav Mills*** and ***Ganga Sugar Corporation*** that there was no occasion to reconsider the decision in ***Builders' Association***.

257. Another decision (which is rather interesting) on the subject of reconsideration of an earlier decision is ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology***.[452] The question before this Court was whether the Council for Scientific and Industrial Research was 'the State' as 'defined' in Article 12 of the Constitution. The answer to this question required consideration of an earlier unanimous decision of this Court in ***Sabhajit Tewary v. Union of India***[453] which had stood undisturbed for about 25 years. While answering this question, this Court did not detail the law on the subject of reconsideration of an earlier decision of this Court, but on a consideration of the facts (and the law) concluded that ***Sabhajit Tewary*** had been wrongly decided and was overruled. This Court referred to ***Maganlal Chhaganlal*** and ***Raghubir Singh*** and held:

> "From whichever perspective the facts are considered, there can be no doubt that the conclusion reached in *Sabhajit Tewary* was erroneous. …….

[451] (1989) 2 SCC 645
[452] (2002) 5 SCC 111 (7 Judges Bench)
[453] (1975) 1 SCC 485 (5 Judges Bench)

> In the assessment of the facts, the Court had assumed certain principles, and sought precedential support from decisions which were irrelevant and had "followed a groove chased amidst a context which has long since crumbled."[454] Had the facts been closely scrutinised in the proper perspective, it could have led and can only lead to the conclusion that CSIR is a State within the meaning of Article 12.
>
> Should *Sabhajit Tewary* still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the facts leading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them and
>
> > "[T]here is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public".
>
> Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake."[455] (Internal citations have been omitted).

258. One of the more interesting aspects of ***Pradeep Kumar Biswas*** is that out of the 7 (seven) learned judges constituting the Bench, 5 learned judges overruled the unanimous decision of another set of 5 learned judges in ***Sabhajit Tewary***. Two of the learned judges in ***Pradeep Kumar Biswas*** found that ***Sabhajit Tewary*** had been correctly decided. In other words, while a total of 7 learned judges took a particular view on an issue of fact and law, that view was found to be incorrect by 5 learned judges, whose decision actually holds the field today. Is the weight of numbers irrelevant? Is it that only the numbers in a subsequent Bench are what really matters? What would have been the position if only 4 learned judges in ***Pradeep Kumar Biswas*** had decided to overrule ***Sabhajit Tewary*** while the remaining 3 learned judges found no error in that decision? Would a decision rendered unanimously by a Bench of 5 learned judges stand overruled by the decision

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[454] Sabhajit Tewary was a unanimous decision of 5 learned judges of this Court. To conclude that it "sought precedential support from decisions which were irrelevant" is, with respect, rather uncharitable.

[455] Paragraph 59 to 61

of 4 learned judges in a subsequent Bench of 7 learned judges? ***Pradeep Kumar Biswas*** presents a rather anomalous situation which needs to be addressed by appropriate rules of procedure. If this anomaly is perpetuated then the unanimous decision of 9 learned judges in the ***Third Judges case*** can be overruled (as sought by the learned Attorney-General) by 6 learned judges in a Bench of 11 learned judges, with 5 of them taking a different view, bringing the total tally of judges having one view to 14 and having another view to 6, with the view of the 6 learned judges being taken as the law!

259. Be that as it may, two other decisions of importance on the subject of reconsidering a prior decision of this Court are ***Kesavananda Bharati*** and the ***Second Judges case***.

260. In ***Kesavananda Bharati*** it was pithily stated by Chief Justice S.M. Sikri that the question before the Court was whether ***Golak Nath*** was correctly decided. The learned Chief Justice observed:

> "However, as I see it, the question whether *Golak Nath* case was rightly decided or not does not matter because the real issue is different and of much greater importance, the issue being: what is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2), on Parliament ?"[456]

261. It follows from this that where a matter is of 'great importance', this Court may refer the issue to a larger Bench to reconsider an earlier decision of this Court.

262. In the ***Second Judges case*** it was observed by Justice Pandian that an

[456] Paragraph 10

earlier decision rendered by this Court may be reconsidered if, amongst others, 'exceptional and extraordinarily compelling' circumstances so warrant. It was observed that 'no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception grown along with the passage of time.'[457] Recalling the observations in ***Maganlal Chhaganlal***, ***Raghubir Singh*** and ***Pradeep Kumar Biswas*** it was held that:

> "Therefore, in exceptional and extraordinarily compelling circumstances or under new set of conditions, the court is on a fresh outlook and in the light of the development of innovative ideas, principles and perception grown along with the passage of time, obliged by legal and moral forces to reconsider its earlier ruling or decision and if necessitated even to overrule or reverse the mistaken decision by the application of the 'principle of retroactive invalidity'. Otherwise even the wrong judicial interpretation that the Constitution or law has received over decades will be holding the field for ages to come without that wrong being corrected. Indeed, no historic precedent and long-term practice can supply a rule of unalterable decision."[458]

263. There is absolutely no dispute or doubt that this Court can reconsider (and set aside) an earlier decision rendered by it. But what are the circumstances under which the reconsideration can be sought? This Court has debated and discussed the issue on several occasions as mentioned above and the broad principles that can be culled out from the various decisions suggest that:

(1) If the decision concerns an interpretation of the Constitution, perhaps the bar for reconsideration might be lowered a bit (as in

[457] Paragraph 17
[458] Paragraph 19

Kesavananda Bharati). Although the remedy of amending the Constitution is available to Parliament, not all amendments are easy to carry out. Some amendments require following the procedure of ratification by the States. Nevertheless, where a constitutional issue is involved, the necessity of reconsideration should be shown beyond all reasonable doubt, the remedy of amending the Constitution always being available to Parliament.

(2) If the decision concerns the imposition of a tax, then too the bar might be lowered a bit since the tax burden would affect a large section of the public. However, the general principles for requiring reconsideration do not necessarily fall by the wayside.

(3) If the decision concerns the fundamental rights of the people, then too the bar might be lowered for obvious reasons. However again, the general principles for requiring reconsideration must be adhered to.

(4) In other cases, the Court must be convinced that the earlier decision is plainly erroneous and has a baneful effect on the public; that it is vague or inconsistent or manifestly wrong.

(5) If the decision only concerns two contending private parties or individuals, then perhaps it might not be advisable to reconsider it. Each and every error of law cannot obviously be corrected by this Court.

(6) The power to reconsider is not unrestricted or unlimited, but is confined within narrow limits and must be exercised sparingly and under exceptional circumstances for clear and compelling reasons. Therefore,

merely because a view different from or contrary to what has been expressed earlier is preferable is no reason to reconsider an earlier decision. The endeavour of this Court must always be to ensure that the law is definite and certain and continuity in the interpretation of the law is maintained.

In this regard, ***Raghubir Singh*** presents an interesting picture. Section 23(2) of the Land Acquisition Act, 1894 (as amended in 1984) was interpreted by this Court on 14th February, 1985 in ***K. Kamalajammanniavaru v. Special Land Acquisition Officer***.[459] That decision was overruled six months later on 14th August, 1985 in ***Bhag Singh v. Union Territory of Chandigarh***.[460] That decision was in turn overruled on 16th May, 1989 in ***Raghubir Singh*** and the law laid in ***Kamalajammanniavaru*** was reiterated. It is this uncertainly and absence of continuity in the law that is required to be avoided.

(7) An earlier decision may be reconsidered if a material provision of law is overlooked[461] or a fundamental assumption is found to be erroneous or if there are valid and compulsive or compelling reasons or if the issue is of fundamental importance to national life. However, it might not be wise to overrule a decision if people have changed their position on the basis of the existing law. This is because it might upset the legitimate expectation of persons who have made arrangements based on the earlier decision and also because the consequences of such a decision might not be foreseeable.

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[459] (1985) 1 SCC 582
[460] (1985) 3 SCC 737
[461] How is this to be ascertained?

(8) Whether a decision has held the field for a long time or not is not of much consequence. In ***Bengal Immunity*** a recent decision delivered by the Constitution Bench was overruled; in ***Pradeep Kumar Biswas*** a decision holding the field for a quarter of a century was overruled.

(9) Significantly, this Court has taken note of and approved the view that the changing times might require the interpretation of the law to be readjusted keeping in mind the 'infinite and variable human desires' and changed conditions due to 'development with the progress of years.' The interpretation of the law, valid for one generation may not necessarily be valid for subsequent generations. This is a reality that ought to be acknowledged as has been done by this Court in ***Maganlal Chhaganlal*** and by Chief Justice Dickson of the Canadian Supreme Court in ***The Queen v. Beauregard***.[462] Similarly, the social context or 'contemporary social conditions or modern conceptions of public policy' cannot be overlooked. Oliver Wendell Holmes later a judge of the Supreme Court of the United States put it

[462] [1986] 2 SCR 56 wherein it is stated: With respect to the first of these arguments, I do not think s.100 [of the Constitution Act, 1867] imposes on Parliament the duty to continue to provide judges with precisely the same type of pension they received in 1867. The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people. Accordingly, if the Constitution can accommodate, as it has, many subjects unknown in 1867--airplanes, nuclear energy, hydroelectric power-- it is surely not straining s. 100 too much to say that the word `pensions', admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of `pensions'.

rather pithily when he said that: 'But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.'[463]

264. It is trite that the Constitution is a living document[464] and it is also wise to remember, in this context, what was said in ***R.C. Poudyal v. Union of India***[465] that:

> "In the interpretation of a constitutional document, 'words are but the framework of concepts and concepts may change more than words themselves'. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that 'the intention of a Constitution is rather to outline principles than to engrave details'."[466]

265. On the basis of the law as laid down by this Court and considering the historical developments over the last six decades, it was submitted by the learned Attorney-General that a fundamental and significant question as to the interpretation of the Constitution has arisen; that the ***Second Judges case*** and the ***Third Judges case*** did not correctly appreciate the Constituent Assembly Debates on the Judiciary and that the time has now come to make a course correction.

Conclusions on the preliminary issue

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[463] "The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."
"Learning and Science", speech at a dinner of the Harvard Law School Association in honor of Professor C. C. Langdell (June 25, 1895); reported in *Speeches by Oliver Wendell Holmes* (1896). p. 67-68

[464] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1 paragraph 42

[465] 1994 Supp (1) SCC 324

[466] 1994 Supp (1) SCC 324 paragraph 124

266. It is quite clear that there is a distribution of power through a system of checks and balances rather than a classical separation of power between the Legislature, the Executive and the Judiciary. These three organs of the State are not in a silo and therefore there is an occasional overlap – but every overlap does not necessarily lead to a violation of the separation of powers theory.[467]

267. There are several examples of this 'overlap' and the learned Attorney-General has taken us through the various provisions of the Constitution in this regard: Article 124(1) of the Constitution enables Parliament to pass a law prescribing the composition of the Supreme Court as consisting of more than seven judges. Pursuant to this the Supreme Court (Number of Judges) Act, 1956 was passed; Article 124(4) provides for the impeachment process for the removal of a judge; Article 124(5) enables Parliament to legislate for regulating the procedure for the presentation of an address in the impeachment process and in the investigation and proof of the misbehavior or incapacity of a judge; Article 125(1) enables Parliament by law to determine the salary of a judge while Article 125(2) enables Parliament to pass a law with regard to the privileges, allowances, etc. of a judge. Pursuant to this the Supreme Court Judges (Conditions of Service) Act, 1958 has been enacted; Article 134(2) enables Parliament to confer on the Supreme Court by legislation, further powers to entertain and hear

[467] In his concluding speech, Br. Rajendra Prasad used the expression 'distribution of powers' and not 'separation of powers'. See: http://parliamentofindia.nic.in/ls/debates/vol11p12.htm

appeals and criminal proceedings. Pursuant to this, Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970; Article 135 enables Parliament to make a law with regard to the jurisdiction and power of the Supreme Court with respect of any matter to which the provisions of Article 133 and Article 134 do not apply; Article 137 provides that subject to any law made by Parliament the Supreme Court shall have the power to review any judgment pronounced or order made by it; Article 138 enables Parliament by law to enlarge the jurisdiction of the Supreme Court with respect to any matter as the Government of India and the Government of any State may by special agreement confer and Article 139 enables Parliament to make a law to issue writs other than those mentioned in Article 32 of the Constitution; Article 140 enables Parliament to make a law conferring upon the Supreme Court supplementary powers; Article 142 enables Parliament to make a law for the enforcement of a decree or order of the Supreme Court and the exercise of power by the Supreme Court to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt, Article 145 enables Parliament to make any law for regulating the practice and procedure of Supreme Court while Article 146(2) enables Parliament to lay down the conditions of service of officers and servants of the Supreme Court. Article 130 of the Constitution permits the Supreme Court to sit at any place other than Delhi with the approval of

the President while Article 145 enables the Supreme Court to make rules for regulating the practice and procedure of the Court with the approval of the President.

268. There is quite clearly an entire host of parliamentary and legislative checks placed on the judiciary whereby its administrative functioning can be and is controlled, but these do not necessarily violate the theory of separation of powers or infringe the independence of the judiciary as far as decision making is concerned. As has been repeatedly held, the theory of separation of powers is not rigidly implemented in our Constitution, but if there is an overlap in the form of a check with reference to an essential or a basic function or element of one organ of State as against another, a constitutional issue does arise. It is in this context that the 99th Constitution Amendment Act has to be viewed – whether it impacts on a basic or an essential element of the independence of the judiciary, namely, its decisional independence.

269. The learned Attorney-General is not right in his submission that the ***Second Judges case*** overlooked the separation of powers and the CAD and incorrectly interpreted the provisions of the Constitution particularly Article 124(2) thereof. This is a rather narrow understanding of the ***Second Judges case*** which, amongst others, considered the interpretation of Article 50 of the Constitution, constitutional history and conventions, the entire spectrum of issues relating to the appointment of judges in the context of the independence of the judiciary, transparency and sharing of information

between the constitutional authorities, the primacy of the President or the Judiciary in the appointment process (depending on the circumstances), the importance of the President in the integrated consultative process derived from the debates in the Constituent Assembly and several other related aspects. All this involved a pragmatic and workable interpretation of the Constitution, which is the task only of the judiciary and there can be no doubt about this. This was pithily stated in ***Marbury v. Madison***[468]: 'It is emphatically the province and duty of the Judicial Department to say what the law is.' It was also explicitly held in ***Re: Powers, Privileges and Immunities of State Legislatures***[469] where it was said:

> "[W]hether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves."[470]

270. The learned Attorney-General is also not right in reducing the ***Second Judges case*** to only one aspect – the decision of this Court has to be appreciated as a part of the larger constitutional scheme relating to the independence of the judiciary. The learned Attorney-General may or may not

[468] 5 U.S. (1 Cranch) 137, 177 (1803)
[469] [1965] 1 SCR 413 (Seven Judges Bench)
[470] Page 446

agree with the interpretation given by this Court to the constitutional scheme but that is no indication that the theory of the separation of powers has broken down. If there is an interpretational error, it can be corrected only by the judiciary, or by a suitable amendment to the Constitution that does not violate its basic structure.

271. No one thought that this Court, in the ***Second Judges case***, had erroneously interpreted or misunderstood the constitutional scheme concerning the appointment of judges and the independence of the judiciary. There were some problem areas and these were referred to this Court in the form of questions raised by the President seeking the advisory opinion of this Court in the ***Third Judges case***. The correctness of the decision rendered in the ***Second Judges case*** was not in doubt and to remove any misunderstanding in this regard the learned Attorney-General categorically stated in the ***Third Judges case*** that 'the Union of India is not seeking a review or reconsideration of the judgment in the ***Second Judges case***.' Therefore, neither the President nor the Union of India nor anybody else for that matter sought a reconsideration of the ***Second Judges case***. There is no reason (apart from an absence of a reason at law) why such a request should be entertained at this stage, except on a fanciful misunderstanding of the law by the Union of India.

272. The contention of the learned Attorney-General is that the appointment of a judge of the Supreme Court or a High Court is an executive

function and that has been taken over by the judiciary by a process of judicial encroachment through a 'right to insist' thereby breaking down the separation of power theory. It is not possible to accept this line of thought. The appointment of a judge is an executive function of the President and it continues to be so. However, the constitutional convention established even before Independence has been that a judge is appointed only if the Chief Justice of India or the Chief Justice of the High Court gives his/her nod to the appointment. This position continued even after Independence. Justice Kuldip Singh summarized the appointments position in the ***Second Judges case*** in the following words:

> "(i) The executive had absolute power to appoint the Judges under the Government of India Act, 1935. Despite that all the appointments made thereunder were made with the concurrence of the Chief Justice of India.
> (ii) A convention had come to be established by the year 1948 that appointment of a Judge could only be made with the concurrence of the Chief Justice of India.
> (iii) All the appointments to the Supreme Court from 1950 to 1959 were made with the concurrence of the Chief Justice of India. 210 out of 211 appointments made to the High Courts during that period were also with the concurrence of the Chief Justice of India.
> (iv) Mr Gobind Ballabh Pant, Home Minister of India, declared on the floor of the Parliament on November 24, 1959 that appointment of Judges were virtually being made by the Chief Justice of India and the executive was only an order-issuing authority.
> (v) Mr Ashoke Sen, the Law Minister reiterated in the Parliament on November 25, 1959 that almost all the appointments made to the Supreme Court and the High Courts were made with the concurrence of the Chief Justice of India.
> (iv) Out of 547 appointments of Judges made during the period January 1, 1983 to April 10, 1993 only 7 were not in consonance with the views expressed by the Chief Justice of India."[471]

273. These facts and figures clearly indicate that at least since 1935, if not earlier, the appointment of judges was made in accordance with the view of

[471] Paragraph 371

the Chief Justice of India or the Chief Justice of the High Court as the case may be. There were aberrations but these appear to have mainly taken place only after Independence, as mentioned above. But even in those cases where there were aberrations pre-1959 (with the Chief Justice of the High Court having been by-passed) the concurrence of the Chief Justice of India was taken. The executive, therefore, never had real primacy in the matter of appointment of judges. But, post the ***First Judges case*** the executive exerted its newly given absolute primacy in the appointment of judges and the aberrations increased. Surely, the executive cannot take advantage of the aberrations caused at its instance and then employ them as an argument that no constitutional convention existed regarding the concurrence of the Chief Justice of India. On the contrary, the aberrations indicate the stealthy attempt of the political executive to subvert the independence of the judiciary through appointments that were not necessarily merit-based, and the submissions advanced before us suggest that henceforth the independence of the judiciary may not necessarily be sacrosanct. It is for this reason that the Bar has fought back to preserve and protect the existing conventions and practices and will, hopefully maintain its vigil.

274. In ***The Pocket Veto case***[472] the US Supreme Court referred to a long standing practice as an interpretation to a constitutional provision, which would be equally applicable to India. It was said:

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[472] 279 U.S. 655, 689 (1929)

> "The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character. *Compare Missouri Pac. Ry. Co. v. Kansas*[473]; *Myers v. United States*[474]; and *State v. South Norwalk*[475] in which the court said that a practice of at least twenty years' duration on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning."

275. By claiming absolute executive primacy, the learned Attorney-General is, in effect, propagating the view that the President can exercise a veto on the proposal to appoint a judge, even if that proposal has the approval of all other constitutional authorities. Such a view was not acceptable to Dr. Ambedkar and the Constituent Assembly and it is impermissible to introduce it through the back door. The Chief Justice of India has no 'right to insist' on an appointment nor does the President have the 'right to reject' or a veto. The Constitution postulates a consultative and participatory process between the constitutional functionaries for appointing the 'best' possible person as a judge of a High Court or the Supreme Court. In this consultative process the final word is given, by a constitutional convention and practice developed over the years, to the Chief Justice of India since that constitutional functionary is best equipped to appreciate the requirements of effective justice delivery, to maintain the independence of the judiciary, to keep at bay external influences, 'eliminate political influence even at the stage of initial

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[473] 248 U.S. 276
[474] 272 U.S. 52
[475] 77 Conn. 257

appointment of a Judge'[476] and as the head of the judiciary, his/her judgment ought to be trusted in this regard. That this could be characterized as a 'right to insist' is not at all justified, nor can any voice of disagreement by the executive be construed as a 'right to reject' or a veto. These expressions do not gel with the constitutional scheme or the responsibilities of constitutional functionaries.

276. What did the ***Second Judges case*** and the ***Third Judges case*** decide that should lead the political executive to misunderstand the views expressed and misunderstand the law interpreted or call for a reconsideration of the law laid down? In essence, all that was decided was that the Chief Justice of India (in an individual capacity) could not recommend a person for appointment as a judge, but must do so in consultation with the other judges (and if necessary with non-judges). Such a recommendation of the Chief Justice of India, if made unanimously, ought normally to be accepted by the President. However, the President can return the recommendation for reconsideration for strong and cogent reasons. If the Chief Justice of India (in consultation with the other judges and unanimously) reiterates the recommendation, it should be accepted. On the other hand, a recommendation made by the Chief Justice of India, which is initially not unanimous, may not be accepted by the President. As pointed out by Justice Verma, the President occasionally failed to exercise this particular constitutional power, for unknown reasons or due to a misunderstanding of

[476] Second Judges case, paragraph 450

the dicta laid down by this Court. The path taken by this Court was in consonance with the views of the Constituent Assembly, in that in the appointment of judges, no constitutional functionary could act in an individual capacity but the Chief Justice of India and other judges were well qualified to give the correct advice to the President in a matter of this sort, and that ought to be accepted as long as it was unanimous.

277. The debate on 24th May, 1949 discloses that a variety of options were available before the Constituent Assembly with regard to the procedure for the appointment of judges of the Supreme Court and the High Court.

278. One of the available methods was to have the appointment of a judge approved by the Council of State. This was opposed by Mr. R.K. Sidhwa (C.P. & Berar: General) who was of the opinion that if the appointment is left to the Council of State then there is a possibility of canvassing in which event the issue of ability etc. of a person recommended for appointment as a judge will cease to be relevant. Mr. Sidhwa was of the opinion that this method would be the same as an election, although Prof. K.T. Shah thought otherwise. The proposal was also opposed by Mr. Biswanath Das (Orissa: General) who referred to this method of appointment as laying down a very dangerous principle.

279. Another method of appointment discussed was to leave the process entirely to the President. Mr. Rohini Kumar Chaudhari (Assam: General) apparently supported that view and went on to suggest that the amendment

proposed by Dr. Ambedkar for deletion of consultation by the President with judges of the Supreme Court and the High Court should be accepted. He was of the opinion that the matter should be dealt with only by the President who could consult anybody, why only judges of the Supreme Court and the High Court. If the President knew a person to be of outstanding ability, it might not be necessary for him/her to consult anybody for making the appointment. This view was supported by Mr. M. Ananthasayanam Ayyangar (Madras: General) who also felt that it should be left to the President to decide whom to consult, if necessary.

280. Yet another method of appointment was the British system where appointments were made by the Crown without any kind of limitation whatsoever, that is, by the political executive. A fourth method discussed was that prevailing in the United States where appointments were made with the concurrence of the Senate.

281. Dr. Ambedkar was of the view that none of the methods proposed was suitable for a variety of reasons and therefore a middle path was taken which required the President to consult the Chief Justice of India and other judges. Dr. Ambedkar felt that consultation with the Chief Justice of India and other judges was necessary since they were *ex hypothesi* well qualified to give advice in a matter of this nature.

282. The Chief Justice of India and other judges are undoubtedly well qualified to give proper advice with regard to the knowledge, ability,

competence and suitability of a person to be appointed as a judge of a High Court of the Supreme Court. There is no reason, therefore, why the opinion of the Chief Justice of India taken along with the opinion of other judges should not be accepted by the executive, which is certainly not better qualified to make an assessment in this regard. However, it is possible that the executive may be in possession of some information about some aspect of a particular person which may not be known to the Chief Justice of India and as postulated in ***Sankalchand Himatlal Sheth*** and in the ***Second Judges case*** the entire material should be made available to the Chief Justice of India leaving it to him/her to decide whether the person recommended for appointment meets the requirement for being appointed a judge or not, despite any antecedents, peculiarities and angularities. If the Chief Justice of India and others with whom he/she has discussed the matter conclude – unanimously - that the person ought to be appointed as a judge of a High Court or the Supreme Court despite the antecedents, peculiarities and angularities, there can be no earthly reason why that collective view should not be accepted. The Chief Justice of India is in a sense the captain of the ship as far as the judiciary is concerned and his/her opinion (obtained collectively and unanimously) should be accepted rather than the opinion of someone who is a passenger (though an important one) in the ship. Dr. Ambedkar was of the confirmed view that the judiciary should be independent and impartial and if the Chief Justice of India does not have the

final say in the matter then the judiciary is, in a sense, under some other authority and therefore not independent to that extent. This would be a rejection of the views of Dr. Ambedkar and a negation of the views of the Constituent Assembly.

283. From the debates of the Constituent Assembly it is evident that Dr. Ambedkar's objection was to the suggestion that only the Chief Justice of India (as an individual) should have the final say in the matter. There is nothing to suggest that the Constituent Assembly had any objection to an integrated consultative participatory process as mentioned in the ***Second Judges case*** and the ***Third Judges case*** or, as Dr. Rajeev Dhavan described it as 'institutional participation' in the matter of appointment of judges. The objection only was to one person (the President or the Chief Justice of India) having a final say in the matter and that one person (the Chief Justice of India) could possibly suffer from the same frailties as any one of us and this is what Dr. Ambedkar sought to emphasize in his objection. It must be appreciated that when the debate took place (on 24th May, 1949) the appointment of judges was, due to the insertion of clause (5)a in Article 62 of the Draft Constitution[477] considered to be the responsibility of the President acting on his own and not through the Council of Ministers. That this theory was in the process of being given up (and was actually given up) is a

[477] Clause 5(a) of Article 62 reads:

"(5)a In the choice of his Ministers and the exercise of his other functions under this Constitution, the President shall be generally guided by the instructions set out in Schedule III-A, but the validity of anything done by the President shall not be called in question on the ground that it was done otherwise than in accordance with such instructions."

different matter altogether. Alternatively, if the thinking at that time was that the President was to act only the advice of the Council of Ministers (and not as an individual having unfettered discretion) there can today possibly be no objection to the Chief Justice of India acting institutionally on the views of his/her colleagues and not, as desired by Dr. Ambedkar, as an individual. In other words, constitutionalism in India has undergone a positive transformation and the objection that Dr. Ambedkar had to any individual having the final say is rendered non-existent. In view of ***Samsher Singh*** the President cannot act in an individual capacity (except to a limited extent) and in view of the ***Second Judges case*** and the ***Third Judges case*** the Chief Justice of India cannot act in an individual capacity (except to a limited extent). The Constitution being an organic and living document must be and has been interpreted positively and meaningfully.

284. It is this philosophy, of the Constitution being an organic and living document that ought to be positively and meaningfully interpreted, that is to be found in ***Samsher Singh***. It is this constructive interpretation read with the CAD that made the advice of the Council of Ministers binding on the President and not a 'take it or leave it' advice. Similarly, 'consultation' with the Chief Justice of India has to be understood in this light and not as a 'consulted and opinion rejected' situation.

285. It is not correct to suggest, as did the learned Attorney-General, that the theory of separation of powers in the Constitution has been torpedoed by

the interpretation given to Article 124(2) of the Constitution in the ***Second Judges case***. On the contrary, the constitutional convention, the constitutional scheme and the constitutional practice recognize the responsibility of the judiciary in the appointment of judges and this was merely formalized in the ***Second Judges case***. The theory of the separation of powers or the distribution of powers was maintained by the ***Second Judges case*** rather than thrown overboard. To rephrase Justice Jackson of the US Supreme Court in ***Youngstown Sheet & Tube Co. v. Sawyer***[478] the Constitution enjoins upon its branches 'separateness but interdependence, autonomy but reciprocity' and the ***Second Judges case*** has effectively maintained this equilibrium between the judiciary and the political executive, keeping the independence of the judiciary in mind, including the appointment of judges.

286. Taking all these factors and the CAD into account, all of which were discussed in the ***Second Judges case*** it is difficult to accept the contention of the learned Attorney General that the ***Second Judges case*** requires reconsideration on merits. While the various decisions referred to dealt with the issue of reconsideration of an earlier decision of this Court, it is difficult to conclude that a decision rendered by 8 out of 9 judges who decided the ***Second Judges case*** (Justice Punchhi also concurred on the primacy of the Chief Justice of India) ought to be rejected only because there could be a change of opinion or a change of circumstances. The ***Second Judges case***

[478] 343 U.S. 579, 635 (1952)

was accepted by the Attorney-General as mentioned in the ***Third Judges case*** and also by the President who did not raise any question about the interpretation given to Article 124(2) and Article 217(1) of the Constitution. These constitutional authorities having accepted the law laid down in the ***Second Judges case***, there is no reason to reconsider that decision on the parameters repeatedly laid down by the Court. There are no exceptional circumstances, clear and compelling reasons for reconsideration, nor can it be said that the ***Second Judges case*** was plainly erroneous or that it has a baneful effect on the public. On the contrary, the decision restored the independence of the judiciary in real terms and eliminated the baneful effect of executive controls.

287. It may also be mentioned that it was categorically laid down in ***Samsher Singh*** that the last word in matters pertaining to judiciary should be with the Chief Justice of India. ***Samsher Singh*** was decided by a Bench of seven learned judges and no one has said that that decision requires reconsideration or that it does not lay down the correct law. The ***Second Judges case*** merely reiterates the 'last word' view in a limited sense.

288. The consensus of opinion across the board is quite clear that the ***Second Judges case*** has been correctly decided and that the conventions and the principles laid down therein flow from our constitutional history and these do not need any reconsideration.

289. This is not to say that the ***Second Judges case*** and the ***Third Judges case*** do not leave any gaps. Perhaps better institutionalization and fine tuning of the scheme laid down in these decisions is required, but nothing more. But, in view of the submission made by the learned Attorney-General that the only question for consideration is the constitutional validity of the 99th Constitution Amendment Act and the NJAC Act the issue of reconsideration becomes academic and it is not at all necessary at present to express any further view on this. By the 99th Constitution Amendment Act the word 'consultation' has been deleted from Article 124(2) and Article 217(1) of the Constitution. Therefore the question whether that word has been correctly interpreted in the ***Second Judges case*** or not is today completely academic. A new constitutional regime has been put in place and that has to be tested as it is. It is only if the 99th Constitution Amendment Act is held as violating the basic structure of the Constitution and is declared unconstitutional that the fine tuning and filling in the gaps in the ***Second Judges case*** and the ***Third Judges case*** would arise.

290. Hence the only question now is whether the 99th Constitution Amendment Act violates the basic structure of the Constitution and to decide this question it is not necessary to reconsider the ***Second Judges case*** or the ***Third Judges case***. This is apart from the fact that reconsideration is not warranted at law, even on merits.

Rule of Law

291. On the merits of the controversy before us, it is necessary to proceed on the basis that there is no doubt that the CAD, the Constitution and judicial pronouncements guarantee the independence of the judiciary. Does the independence of the judiciary include the appointment of a judge? According to the learned Attorney-General, the appointment of judges is a part of the independence of the judiciary, but not a predominant part.

292. Before considering these issues, it is necessary to appreciate the role of the Rule of Law in our constitutional history. It has been said: 'Ultimately, it is the rule of law, not the judges, which provides the foundation for personal freedom and responsible government.'[479]

293. The Rule of Law is recognized as a basic feature of our Constitution. It is in this context that the aphorism, 'Be you ever so high, the law is above you' is acknowledged and implemented by the Judiciary. If the Rule of Law is a basic feature of our Constitution, so must be the independence of the judiciary since the 'enforcement' of the Rule of Law requires an independent judiciary as its integral and critical component.

294. Justice Mathew concluded in ***Indira Nehru Gandhi*** that according to some judges constituting the majority in ***Kesavananda Bharati*** the Rule of Law is a basic structure of the Constitution.[480]

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[479] Judicial Independence and the Rule of Law by Jonathan K. Van Patten, Volume 2 Benchmark page 117, 129 (1986)

[480] Paragraph 335

295. In ***Samsher Singh*** the independence of the judiciary was held to be a cardinal principle of the Constitution by Justice Krishna Iyer speaking for himself and Justice Bhagwati.[481] That it is a part of the basic structure of the Constitution was unequivocally stated for the first time in the ***First Judges case*** by Justice Bhagwati,[482] by Justice A.C. Gupta[483] and by Justice V.D. Tulzapurkar.[484]

296. In the ***Second Judges case*** Justice Pandian expressed the view that independence of the judiciary is 'inextricably linked and connected with the judicial process.'[485] This was also the view expressed by Justice Kuldip Singh who held that the independence of the judiciary is a basic feature of the Constitution.[486] Justice J.S. Verma speaking for the majority and relying upon a few decisions held that the Rule of Law is a basic feature of the Constitution.[487] Similarly, Justice Punchhi (dissent) held that the Rule of Law is a basic feature of the Constitution and the independence of the judiciary is its essential attribute:

> "It is said that Rule of Law is a basic feature the Constitution permeating the whole constitutional fabric. I agree. Independence of the judiciary is an essential attribute of Rule of Law, and is part of the basic structure of the Constitution. To this I also agree."[488]

297. In ***Sub-Committee on Judicial Accountability v. Union of India***[489] it was held by Justice B.C. Ray speaking for the majority that the Rule of Law

[481] Paragraph 149
[482] Paragraph 27 and paragraph 83
[483] Paragraph 320
[484] Paragraph 634
[485] Paragraph 56
[486] Paragraph 331
[487] Paragraph 421
[488] Paragraph 502
[489] (1991) 4 SCC 699 (Five Judges Bench)

is a basic feature of the Constitution and an independent judiciary is an essential attribute thereof. It was said:

> "Before we discuss the merits of the arguments it is necessary to take a conspectus of the constitutional provisions concerning the judiciary and its independence. In interpreting the constitutional provisions in this area the Court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution. Rule of law is a basic feature of the Constitution which permeates the whole of the constitutional fabric and is an integral part of the constitutional structure. Independence of the judiciary is an essential attribute of rule of law."[490]

298. Similarly, in ***Kartar Singh v. State of Punjab***[491] it was said by Justice K. Ramaswamy (dissent) that an independent judiciary is the most essential attribute of the Rule of Law:

> "Independent judiciary is the most essential attribute of rule of law and is indispensible to sustain democracy. Independence and integrity of the judiciary in a democratic system of Government is of the highest importance and interest not only to the judges but to the people at large who seek judicial redress against perceived legal injury or executive excesses."[492]

299. This view was reiterated by the learned judge in yet another dissent, that is, in ***Krishna Swami v. Union of India***.[493]

300. In ***Union of India v. Madras Bar Association***[494] speaking for the Court, Justice Raveendran held:

> "The rule of law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the executive."[495]

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[490] Paragraph 16
[491] (1994) 3 SCC 569 (Five Judges Bench)
[492] Paragraph 412
[493] (1992) 4 SCC 605 paragraph 66
[494] (2010) 11 SCC 1 (Five Judges Bench)
[495] Paragraph 101

301. Finally, in ***State of Tamil Nadu*** it was unanimously held by the Bench speaking through Chief Justice Lodha that the independence of the judiciary is fundamental to the Rule of Law:

> "Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India."[496]

302. The view that the Rule of Law and the independence of the judiciary go hand in hand and are a part of the basic structure of the Constitution has been acknowledged in several other decisions as well and is no longer in dispute, nor was it disputed by any of the learned counsel before us. It is, therefore, not necessary to cite a train of cases in this regard, except to conclude that the Rule of Law and the independence of the judiciary are intertwined and inseparable and a part of the basic structure of our Constitution.

Independence of the judiciary – its nature and content

303. What are the attributes of an independent judiciary? It is impossible to define them, except illustratively. At this stage, it is worth recalling the words of Sir Ninian Stephen, a former Judge of the High Court of Australia who memorably said: '[An] independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed.'[497] It is this fragile bastion that needs

[496] Paragraph 126.2
[497] Southey Memorial Lecture, 1981

protection to maintain its independence and if this fragile bastion is subject to a challenge, constitutional protection is necessary.

304. The independence of the judiciary takes within its fold two broad concepts: (1) Independence of an individual judge, that is, decisional independence; and (2) Independence of the judiciary as an institution or an organ of the State, that is, functional independence. In a lecture on Judicial Independence, Lord Phillips[498] said: 'In order to be impartial a judge must be independent; personally independent, that is free of personal pressures and institutionally independent, that is free of pressure from the State.'

305. As far as individual independence is concerned, the Constitution provides security of tenure of office till the age of 65 years for a judge of the Supreme Court.[499] However, the judge may resign earlier or may be removed by a process of impeachment on the ground of proved misbehavior or incapacity.[500] To give effect to this, Parliament has enacted the Judges (Inquiry) Act, 1968. The procedure for the impeachment of a judge is that a motion may be passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than 2/3rd members of that House present and voting in the same session. To maintain the integrity and independence of the judiciary, the impeachment process is not a cake walk.

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[498] Former President of the Supreme Court of the United Kingdom and Lord Chief Justice of England and Wales
[499] Article 124(2)
[500] Article 124(4)

306. A judge's salary, privileges, allowances, leave of absence and pension and such other privileges, allowances and rights mentioned in the Second Schedule of the Constitution are protected and will not be varied to his/her disadvantage after appointment.[501] To give effect to this, Parliament has enacted the Supreme Court Judges (Conditions of Service) Act, 1958.

307. The salary, allowances and pension payable to or in respect of a judge of the Supreme Court is charged to the Consolidated Fund of India.[502] The estimate of this expenditure may be discussed but shall not be submitted to the vote of Parliament.[503]

308. As far as this subject is concerned in respect of a judge of the High Court, there is an extensive reference in ***Sankalchand Sheth***. Broadly, the constitutional protections and provisions for a judge of the High Court are the same as for a judge of the Supreme Court.

309. A judge of the High Court has security of tenure till the age of 62 years[504] and the removal process is the same as for a judge of the Supreme Court.[505] The salary, privileges, allowances, right of leave of absence and pension etc. are protected by Article 221 of the Constitution. While the salary and allowances are charged to the Consolidated Fund of the State,[506] the pension payable is charged to the Consolidated Fund of India.[507] As in the case of the Supreme Court, the estimate of this expenditure may be discussed

[501] Article 125
[502] Article 112(2)(d)
[503] Article 113
[504] Article 217
[505] Article 218
[506] Article 202
[507] Article 112(3)(d)

but shall not be submitted to the vote of the Legislative Assembly.[508] The conditions of service of a High Court judge are governed by the High Court Judges (Salaries and Conditions of Service) Act, 1954 in terms of Article 221 of the Constitution.

310. The entire package of rights and protections ensures that a judge remains independent and is free to take a decision in accordance with law unmindful of the consequences to his/her continuance as a judge. This does not mean that a judge may take whatever decision he/she desires to take. The parameters of decision making and discretion are circumscribed by the Constitution, the statute and the Rule of Law. This is the essence of decisional independence, not that judges can do as they please.

311. In this context, Justice Anthony M. Kennedy of the US Supreme Court had this to say before the United States Senate Committee on the Judiciary (Judicial Security and Independence) on 14th February, 2007:

> "Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must. A judiciary with permanent tenure, with a sufficient degree of separation from other branches of government, and with the undoubted obligation to resist improper influence is essential to the Rule of Law as we have come to understand that term."[509]

312. As far as decisional independence is concerned, a good example of the protection is to be found in ***Anderson v. Gorrie***[510] where it was said by Lord Esher M.R.:

> "the question arises whether there can be an action against a judge of a court of record for doing something within his jurisdiction, but doing it

[508] Article 203
[509] http://www.judiciary.senate.gov/imo/media/doc/kennedy_testimony_02_14_07.pdf
[510] [1895] 1 Q.B. 668, 670

> maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie."

Explaining this, Lord Bridge of Harwich said in ***McC (A Minor), Re***[511]:

> "The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction."

313. As far as institutional independence is concerned, our Constitution provides for it as well. For the Supreme Court, institutional independence is provided for in Article 129 which enables the institution to punish for contempt of itself. A similar provision is made for the High Court in Article 215. The law declared by the Supreme Court shall be binding on all courts within the territory of India.[512] All authorities, civil and judicial are obliged to act in aid of the Supreme Court.[513] The Supreme Court is entitled to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it and such decree or order shall also be enforceable throughout the territory of India.[514] Subject to a law made by Parliament, the Supreme Court is entitled to frame rules to regulate its practice and procedure.[515] The Chief Justice of India is empowered to appoint officers and 'servants' of the Supreme Court but their conditions of service shall be regulated by rules made by the Supreme Court (subject to approval by the President) or by law made by Parliament. [516] The administrative

[511] [1985] A.C. 528, 540
[512] Article 141. There is no corresponding constitutional provision for the High Court.
[513] Article 144. There is no corresponding constitutional provision for the High Court.
[514] Article 142. There is no corresponding constitutional provision for the High Court.
[515] Article 145. There is no corresponding constitutional provision for the High Court.
[516] Article 146. The corresponding constitutional provision for the High Court is Article 229.

expenses of the Supreme Court, including expenses related to its officers and 'servants' shall be charged upon the Consolidated Fund of India.[517]

314. Significantly, no discussion shall take place in Parliament with respect to the conduct of a judge of the Supreme Court or the High Court, except in proceedings for impeachment.[518] Similarly, the Legislature of a State shall not discuss the conduct of a judge of the Supreme Court or the High Court in the discharge of his or her duties.[519]

315. In addition to the above, there are other general protections available to an individual judge or to the institution as such. Through Article 50[520] which is a provision in Part IV of the Constitution (Granville Austin in 'The Constitution: Cornerstone of a Nation' describes Part III and Part IV of the Constitution as 'the conscience of the Constitution')[521] the judiciary shall be insulated from executive interference. Justice Krishna Iyer speaking for himself and Justice Fazl Ali pointed out in ***Sankalchand Sheth*** that:

> "Under the general law of civil liability (Tort) words spoken or written in the discharge of his judicial duties by a Judge of the High Court are absolutely privileged and no action for defamation can lie in respect of such words. This absolute immunity is conferred on the Judges on the ground of public policy, namely, that they can thereby discharge their duty fearlessly."[522]

316. Similarly, Section 3 of the Judges (Protection) Act, 1985 provides, inter alia, that no court shall entertain or continue any civil or criminal proceeding against any person who is or was a judge for any act, thing or

[517] Article 146. The corresponding constitutional provision for the High Court is Article 229.
[518] Article 121
[519] Article 211
[520] Article 50: The State shall take steps to separate the judiciary from the executive in the public services of the State.
[521] Page 50
[522] Paragraph 77

word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function. This is in addition to the protection given by Section 77 of the Indian Penal Code which provides that: 'Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.'

317. In the overall conspectus and structure of the independence of the judiciary, it was stated in the ***First Judges case*** by Justice D.A. Desai that: 'Independence of judiciary under the Constitution has to be interpreted within the framework and the parameters of the Constitution.'[523] It may be added that the framework and parameters of the law are also required to be taken into consideration. Justice Bhagwati put it quite succinctly when he said:

> "The concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong."[524]

318. Generally speaking, therefore, the independence of the judiciary is manifested in the ability of a judge to take a decision independent of any external (or internal) pressure or fear of any external (or internal) pressure and that is 'decisional independence'. It is also manifested in the ability of the institution to have 'functional independence'. A comprehensive and

[523] Paragraph 709
[524] Paragraph 27

composite definition of 'independence of the judiciary' is elusive but it is easy to perceive.

319. The Constituent Assembly fully appreciated the necessity of having an independent judiciary and perhaps devoted more time to discussing this than any other issue. Granville Austin points out the following:

> "The subjects that loomed largest in the minds of Assembly members when framing the Judicial provisions were the independence of the courts and two closely related issues, the powers of the Supreme Court and judicial review. The Assembly went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect of the provisions. If the beacon of the judiciary was to remain bright, the courts must be above reproach, free from coercion and from political influence."[525]

Separation between the judiciary and the executive

320. Another facet of the discussion relating to the independence of the judiciary can be resolved by considering Article 50 of the Constitution.[526] This Article was referred to in the ***Second Judges case*** and, according to learned counsel for the petitioners, overlooked in the ***First Judges case***. It was urged that that Article is of great importance in as much as the Constituent Assembly was quite explicit that there should be a separation between the executive and the judiciary. The learned Attorney-General submitted, on the other hand, that the separation postulated by Article 50 of the Constitution was only limited to the public services of the State and not the judiciary as a whole.

321. Article 50 was incorporated in the Constitution in the chapter on

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[525] Granville Austin – "Indian Constitution: Cornerstone of a Nation" pages 164-164

[526] 50. Separation of judiciary from executive.-The State shall take steps to separate the judiciary from the executive in the public services of the State.

Directive Principles of State Policy at the instance of Dr. Ambedkar who moved a proposal on 24th November, 1948 to insert Article 39A in the Draft Constitution.[527]

322. Explaining the necessity of inserting Article 39A in the Draft Constitution, Dr. Ambedkar said that it had been the desire for a long time that there should be a separation of the judiciary from the executive and a demand for this had been continuing ever since the Congress (party) was founded. The British Government, however, did not give any effect to this demand. Dr. Ambedkar moved for the insertion of Article 39A in the Draft Constitution in the following words:

> "I do not think it is necessary for me to make any very lengthy statement in support of the amendment which I have moved. It has been the desire of this country from long past that there should be separation of the judiciary from the executive and the demand has been continued right from the time when the Congress was founded. Unfortunately, the British Government did not give effect to the resolutions of the Congress demanding this particular principle being introduced into the administration of the country. We think that the time has come when this reform should be carried out. It is, of course, realized that there may be certain difficulties in the carrying out of this reform; consequently this amendment has taken into consideration two particular matters which may be found to be matters of difficulty. One is this: that we deliberately did not make it a matter of fundamental principle, because if we had made it a matter of fundamental principle it would have become absolutely obligatory instantaneously on the passing of the Constitution to bring about the separation of the judiciary and the executive. We have therefore deliberately put this matter in the chapter dealing with directive principles and there too we have provided that this reform shall be carried out within three years, so that there is no room left for what might be called procrastination in a matter of this kind. Sir, I move."[528]

323. Mr. B. Das (Orissa: General) opposed the amendment on the ground that when the people were harassed by the British Government, the feeling

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[527] 39-A. That State shall take steps to secure that, within a period of three years from the commencement of this Constitution, there is separation of the judiciary from the executive in the public services of the State.

[528] http://parliamentofindia.nic.in/ls/debates/vol7p12.htm

was that no justice was given and that is why there was a demand for the separation of the judiciary from the executive. After Independence that suspicion did not exist and therefore it was essential to examine whether separation was necessary.

324. The debate continued the next day on 25th November, 1948 when, as soon as the Constituent Assembly met, Dr. Ambedkar moved an amendment for the deletion of certain words from Article 39A of the Draft Constitution. As a result of this proposed amendment, Article 39A would read as follows:

> "The State shall take steps to separate the judiciary from the executive in the public services of the State."

325. During the course of the debate on 25th November, 1948 a self-evident truth came into focus. It was pointed out by Pandit Jawaharlal Nehru (United Provinces: General) that the Constitution is expected to last a long time and that it should not be rigid. As far as the 'basic nature' of the Constitution is concerned it must deal with fundamental aspects of the political, social, economic and other spheres and not with the details which are matters for legislation. It was stated in this context as follows:

> "Coming to this present amendment, if I may again make some general observations with all respect to this House, it is this: that I have felt that the dignity of a Constitution is not perhaps maintained sufficiently if one goes into too great detail in that Constitution. A Constitution is something which should last a long time, which is built on a strong foundation, and which may of course be varied from time to time – it should not be rigid – nevertheless, one should think of it as something which is going to last, which is not a transitory Constitution, a provisional Constitution, a something which you are going to change from day to day, a something which has provisions for the next year or the year after next and so on and so forth. It may be necessary to have certain transitory provisions. It will be necessary, because there is a change to have some such provisions, but so far as the basic nature of the Constitution is concerned, it must deal with

> the fundamental aspects of the political, the social, the economic and other spheres, and not with the details which are matters for legislation. You will find that if you go into too great detail and mix up the really basic and fundamental things with the important but nevertheless secondary things, you bring the basic things to the level of the secondary things too. You lose them in a forest of detail. The great trees that you should like to plant and wait for them to grow and to be seen are hidden in a forest of detail and smaller trees. I have felt that we are spending a great deal of time on undoubtedly important matters, but nevertheless secondary matters – matters which are for legislation, not for a Constitution. However, that is a general observation."[529]

326. The significance of the view expressed by Pandit Jawaharlal Nehru is that the existence of the 'basic nature' of the Constitution was recognized and it appears that this is what we call today as the basic structure or basic features of the Constitution. Undoubtedly there was an acknowledgement of certain fundamental aspects of the Constitution but it was not possible to go into details in respect of each and every one of them. Explaining this in the context of the 'matters of extreme moment' Pandit Jawaharlal Nehru said that India is a very mixed country 'politically, judicially, economically and in many ways and any fixed rule of thumb to be applied to every area may be disadvantageous and difficult in regard to certain areas. On the one hand, that rule will really prevent progress in one area, and on the other hand, it may upset the apple-cart in some other area. Therefore, a certain flexibility is desirable.'[530]

327. The views expressed by Dr. Bakshi Tek Chand (East Punjab: General) are extremely important in this regard. The Hon'ble Member gave a detailed historical background for the demand of separation of the executive and the

[529] http://parliamentofindia.nic.in/ls/debates/vol7p13.htm
[530] http://parliamentofindia.nic.in/ls/debates/vol7p13.htm

judiciary and expressed the view that as far back as in 1852 when public opinion in Bengal began to express itself in an organized manner that the matter of separation was first mooted. In other words, the separation of the executive from the judiciary had been in demand for almost 100 years.

328. Dr. Bakshi Tek Chand was of the view that with Independence, the necessity of this reform had become greater. The Hon'ble Member cited three illustrative instances of interference with the judiciary by Ministers of some Provinces and members of political parties in the fair administration of justice. Dr. Bakshi Tek Chand gave these extremely telling examples and it is best to quote what was said:

> "One word more I have to say in this connection and that is, that with the advent of democracy and freedom, the necessity of this reform has become all the greater. Formerly it was only the district magistrate and a few members of the bureaucratic Government from whom interference with the judiciary was apprehended, but now, I am very sorry to say that even the Ministers in some provinces and members of political parties have begun to interfere with the administration of justice. Those of you, who may be reading news paper reports of judicial decisions lately, must have been struck with this type of interference which has been under review in the various High Courts lately. In one province we found that in a case pending in a Criminal Court, the Ministry sent for the record and passed an order directing the trying Magistrate to stay proceedings in the case. This was something absolutely unheard of. The matter eventually went up to the High Court and the learned Chief Justice and another Judge had to pass very strong remarks against such executive interference with the administration of justice
>
> In another province a case was being tried against a member of the Legislative Assembly and a directive went from the District Magistrate to the Magistrate trying the case not to proceed with it further and to release the man. The Magistrate who was a member of the Judicial Service and was officiating as a Magistrate had the strength to resist this demand. He had all those letters put on the record and eventually the matter went to the High Court and the Chief Justice of the Calcutta High Court made very strong remarks about this matter.
>
> Again in the Punjab, a case has recently occurred in which a Judge of the High Court, Mr. Justice Achru Ram, heard a habeas corpus petition and delivered a judgment of 164 pages at the conclusion of which he observed that the action taken by the District Magistrate and the Superintendent of

> Police against a member of the Congress Party was mala fide and was the result of a personal vendetta. These were his remarks.
> In these circumstances, I submit that with the change of circumstances and with the advent of freedom and the introduction of democracy, it has become all the more necessary to bring about the separation of the judiciary from the executive at the earliest possible opportunity."[531]

329. The debate concluded on 25th November, 1948 with the Constituent Assembly eventually accepting the insertion of Article 39A in the Draft Constitution. This is now Article 50 in our Constitution.

330. The importance of the debate must be looked at not only from a historical perspective but also what was intended for the future by the Constituent Assembly. In the past there had been unabashed interference by the executive in the administration of justice by the subordinate judiciary and this definitely needed to be checked. In that sense, the debate on 24th and 25th November, 1948 was a precursor to the debate on Article 103 of the Draft Constitution held on 23rd and 24th May, 1949. By that time it was becoming clear (if it was not already clear) to the Constituent Assembly that there should be no interference by the executive in the administration of justice and that it was not necessary to provide for every detail in the Draft Constitution. That constitutional conventions existed prior to Independence were known, but that they were required to be continued after Independence was of equal significance.

331. With the need for avoiding details in the Constitution, the Draft Constitution did not specifically provide for the independence of the judiciary other than the subordinate judiciary. If this is looked at quite plainly, it would

[531] http://parliamentofindia.nic.in/ls/debates/vol7p13.htm

appear anachronistic to hold a view that Article 39A of the Draft Constitution required the subordinate judiciary to be independent and separate from the executive but it was not necessary for the superior judiciary to be independent or separate. Such an obvious anachronism cannot be attributed to the Constituent Assembly. One must, therefore, assume that either the superior judiciary was already independent (and this needed no iteration) or that if it was not independent then, like the subordinate judiciary, it must be made independent, with the executive not being permitted to interfere in the administration of justice. Either way, separation between the judiciary and the executive with the intention of having an independent judiciary was a desirable objective.

332. No one can doubt and, indeed, even the learned Attorney-General did not doubt that the independence of the judiciary is absolutely necessary. But, the independence of the judiciary is not an end in itself. 'Instead, the aim is to secure an independent judiciary that will discharge its fundamental responsibilities, which include a crucial role in upholding the rule of law.'[532] In addition, the judiciary should clearly be separate from the executive.

333. By way of digression, a word may also be said about the financial independence of the judiciary. In a letter of 15th June, 2008 forwarding the Report of the Task Force on 'Judicial Impact Assessment' it was pointed out by Justice M. Jagannadha Rao (Retired) to the Minister for Law and Justice

[532] J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law) paragraph 0.2.9

that 'the Planning Commission and Finance Commission must make adequate provision in consultation with the Chief Justice of India, for realization of the basic human rights of 'access to justice' and 'speedy justice' both civil and criminal. The present allocation of 0.071%, 0.078% and 0.07% of the Plan outlay in the 9th, 10th and 11th Plan are wholly insufficient.' Financial independence is one area which is also critical to the independence of the judiciary but is among the least discussed.

Independence of the judiciary and the appointment process

334. We must proceed on the basis that the independence of the judiciary is vital to democracy and there ought to be a separation between the executive and the judiciary. The independence of the judiciary begins with the appointment of a judge. Granville Austin says: 'An independent judiciary begins with who appoints what calibre of judges.'[533] It must be appreciated and acknowledged that methodological independence, namely, the recommendation and appointment of judges to a superior Court is an important facet of the independence of the judiciary.[534] If a person of doubtful ability or integrity is appointed as a judge, there is a probability of his/her succumbing to internal or external pressure and delivering a tainted verdict. This will strike at the root of the independence of the judiciary and destroy the faith of the common person in fair justice delivery. Therefore, there is a great obligation and responsibility on all constitutional

[533] Granville Austin – "Working a Democratic Constitution: The Indian Experience" page 124
[534] Second Judges case, paragraph 49, 335 and 447.

functionaries, including the Chief Justice of India and the President, to ensure that not only are deserving persons appointed as judges, but that deserving persons are not denied appointment.[535]

335. Chief Justice Marshall in ***Marbury v. Madison*** observed that in respect of the commissioning of all officers of the United States, the clauses in the Constitution and the laws of the United States 'seem to contemplate three distinct operations', namely:

> "1. The nomination. This is the sole act of the president, and is completely voluntary.
> 2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.
> 3. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."[536]

336. Transposing this to the appointment of judges in our country, the first step is a recommendation (or nomination) of persons for appointment as judges. Historically, the recommendation is made by the Chief Justice of India for the appointment of a judge of the Supreme Court and by the Chief Justice of a High Court for appointment of a judge to the High Court. Occasionally, the Chief Minister of a State also makes a recommendation, but that is required to be routed through the Chief Justice of the High Court. There is no instance of the President recommending any person for appointment as a judge of the Supreme Court.

337. The second step is the appointment of a judge and this is possible only

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[535] 14th Report of the LCI, Chapter 5
[536] Pages 155 and 156

through a consultative participatory process between the President and the Chief Justice of India. It is in this process that there has been some interpretational disagreement, but the ***Second Judges case*** and the ***Third Judges case*** have laid that to rest with a shared primacy and responsibility between the President and the Chief Justice of India. This has already been discussed above.

338. The third step is the issuance of a warrant of appointment (or commission). It is quite clear that the warrant of appointment can be issued only by the President. There is not and cannot be any dispute about this. Under the circumstances it is clear that the executive function of the President remains intact, unlike what the learned Attorney-General says and there is no scope for the recitation of the 'judges appointing judges' mantra.

339. It is perhaps this simple three-step process that the Constituent Assembly intended. But this got distorted over the years, thanks to the interference by the political executive in the first and second steps.

340. In a Report entitled 'Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights'[537] the interplay between the Rule of Law, the independence of the judiciary and the appointment of judges is commented upon and in a reference to international standards, it is said that the appointment of judges plays a key role in safeguarding the independence of the judiciary. This is what was said:

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[537] Contributors: Professor Dr Jutta Limbach, Professor Dr Pedro Villalon, Roger Errera, The Rt Hon Lord Lester of Herne Hill QC, Professor Dr Tamara Morschakova, The Rt Hon Lord Justice Sedley, Professor Dr Andrzej Zoll. Available at http://www.interights.org/document/142/index.html

> "The independence of the judiciary is one of the cornerstones of the rule of law. Rather than being elected by the people, judges derive their authority and legitimacy from their independence from political or other interference. It is clear from the existing international standards that the selection and appointment of judges plays a key role in the safeguarding of judicial independence and ensuring the most competent individuals are selected."

341. India is a part of the Commonwealth and The Commonwealth Principles on the accountability of and the relationship between the three branches of government[538] provide, inter alia, with regard to the appointment of judges, as follows:

> "An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country. To secure these aims: (a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure: equality of opportunity for all who are eligible for judicial office; appointment on merit; and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;"[539]

342. Jack Straw was the Lord Chancellor in the United Kingdom from 2007 to 2010. He delivered the 64th series of Hamlyn Lectures in 2012 titled 'Aspects of Law Reform – An Insider's Perspective'. The 3rd lecture in that series was delivered by him on 4th December, 2012 on 'Judicial Appointments'. In that lecture, he says:

> "The appointment of judges - by whom, according to what standards and process, and with what outcome – is of critical importance. To maintain a judiciary that is independent, which makes good decisions, and in whom the public can continue to have confidence, we need to appoint the most meritorious candidates and secure a judiciary that is as reflective as possible of the society it is serving.

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[538] As agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003

[539] http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf

> And we need to get it right first time, every time, because, once appointed to a full-time salaried position, judges may not be removed from office other than in the most extreme of circumstances."[540]

343. Therefore, in the appointment of a judge, it is not only (negatively expressed) that a 'wrong person' should not be appointed but (positively expressed) the best talent, amongst lawyers and judicial officers should be appointed as judges of the High Court and the best amongst the judges of the High Courts or amongst advocates or distinguished jurists should be appointed to the Supreme Court. It has been stated in the 14th Report of the LCI that the selection of judges is of pivotal importance to the progress of the nation and that responsibility must be exercised with great care.

344. In the Report on Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights, great emphasis was laid on the procedure for the appointment of judges and the criteria for appointment. It was said:

> "The issue of how judges are appointed is important in two respects. First, appointment procedures impact directly upon the independence and impartiality of the judiciary. Since the legitimacy and credibility of any judicial institution depends upon public confidence in its independence, it is imperative that appointment procedures for judicial office conform to—and are seen to conform to—international standards on judicial independence. It would be anomalous and unacceptable if the Court [European Court of Human Rights] failed to meet the international human rights standards that it is charged with implementing, including the requirement that cases are heard by an independent and impartial court of law.
>
> Second, without the effective implementation of 'objective and transparent criteria based on proper professional qualification,' there is the very real possibility that the judges selected will not have the requisite skills and abilities to discharge their mandate. Declining standards will ultimately impact negatively on the standing of the Court [European Court of Human Rights], as well as on the application and development of human rights law on the international and (ultimately) national level."

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[540] Page 52

345. In the ***First Judges case***, the question of appointment of judges as being integral to the independence of the judiciary was not an issue but Justice Venkataramiah expressed the view that it is difficult to hold that if the appointment of judges is left to the executive, it will impair the independence of the judiciary. The learned judge was of the view that it is only 'after such appointment the executive should have no scope to interfere with the work of a judge.'[541] This view is, with respect, far too narrow and constricted. However, Justice D.A. Desai held a different view which was expressed in the following words:

> "Now, the independence of the judiciary can be fully safeguarded not by merely conferring security on the Judges during their term of office but by ensuring in addition that persons who are independent, upright and of the highest character are appointed as Judges. Moreover, there is always the fear that appointments left to the absolute discretion of the appointing executive could be influenced by party considerations."[542]

346. In the ***Second Judges case*** Justice Pandian was quite explicit and expressed the view that the selection and appointment of a proper and fit candidate to the superior judiciary is inseparable from the independence of the judiciary and a vital condition in securing it.[543] Similarly, Justice Kuldip Singh also held that there cannot be an independent judiciary when the power of appointment of judges rests with the executive and that the independence of the judiciary is 'inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary.'[544]

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[541] Paragraph 1033
[542] Paragraph 886
[543] Paragraph 49
[544] Paragraph 335

Justice Verma, speaking for the majority, expressed the view that all constitutional authorities involved in the process of appointing judges of the superior courts 'should be fully alive to the serious implications of their constitutional obligation and be zealous in its discharge in order to ensure that no doubtful appointment can be made.'[545] The learned judge further said that the independence of the judiciary can be safeguarded by preventing the influence of political consideration in making appointment of judges to the superior judiciary.[546]

347. There is, therefore, no doubt that the appointment of a judge to the Supreme Court or the High Court is an integral part of the independence of the judiciary. It is not possible to agree with the learned Attorney-General when he says that though the appointment of a judge is a part of the independence of the judiciary, it is but a small part and certainly not a predominant part. I would say that it is really the foundational part of the independence of the judiciary.

348. Shimon Shetreet has this to say on the appointment of judges:

> "In any system, the methods of appointment have direct bearing on both the integrity and independence of the judges. Weak appointments lower the status of the judiciary in the eyes of the public and create a climate in which the necessary independence of the judiciary is likely to be undermined. Similarly, political appointments that are seen by the public as not based on merit may arouse concern about the judge's independence and impartiality on the bench. The quality of judicial appointments depends upon the process and standards applied by the appointing authorities, yet every appointment system has its limitation. It is difficult to predict what sort of judge a man or woman will be and irreversible mistakes in judicial appointments are bound to occur, even when the method of appointment is fair and efficient and the standards are high, as

[545] Paragraph 431
[546] Paragraph 447

> they are in England. Such errors in selection apply equally to appointing persons who were unfit for occupying a judicial office as well as failing to appoint a person who might have been a good judge."[547]

349. How do international conventions look at this issue? The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region[548] provides, inter alia, as follows:

> "Independence of the Judiciary requires that; a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.[549]

> To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.[550]
> The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed."[551]

This document was signed by Justice S.C. Agrawal of this Court representing Chief Justice A. M. Ahmadi.

350. The Bangalore Principles of Judicial Conduct, 2002 which lay down six essential values for a judge (and which are accepted world-wide both in civil law and common law countries) would be totally unworkable if a person appointed as a judge, at the time of appointment, lacks basic competence and independence.[552] Given all these considerations, it must be

[547] Judges on Trial: The Independence and Accountability of the English Judiciary, Chapter 4
[548] As amended at Manila on 28th August, 1997. This has been referred to in Vishaka v. State of Rajasthan, (1997) 6 SCC 241 in paragraph 11 of the Report.
[549] Clause 3
[550] Clause 11
[551] Clause 12
[552] The six values are: Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence

held and is held that the process for appointment and the actual appointment of a judge to a High Court or the Supreme Court is a predominant part of the independence of the judiciary and, therefore, an integral part of the basic structure of the Constitution.

351. Therefore, the procedure for the appointment of judges of the Supreme Court or the High Courts can impact on the independence of the judiciary and the basic structure of the Constitution.

The recommendation process

352. How can the President ensure that the most deserving persons are appointed as judges or that they are not denied appointment? This is the nub of the controversy before us and this is ***the*** problem that has vexed the executive, the judiciary, academia, the legal fraternity and civil society over several decades. Since justice delivery is undoubtedly the responsibility of the judiciary, therefore, the judiciary (symbolized as it were by the Chief Justice of India) is obliged to ensure that only the most deserving persons are considered for appointment as judges.[553]

353. The process of consideration of a person for appointment as a judge is important both at a stage prior to the recommendation being made by the Chief Justice of India in consultation with his/her colleagues, constituting a 'collegium' and also after the recommendation is sent by the Chief Justice of

[553] It is not necessary, for the purposes of this discussion, to get into the controversy whether the recommendation of a person to be considered for appointment should originate from the executive or the judiciary.

India to the executive. At both stages, the process is participatory. In the pre-recommendation stage, it is a participatory process involving the Chief Justice of India and his/her colleagues, constituting the collegium.[554] It is at this stage that the Chief Justice of India takes the opinion of the other judges and anybody else, if deemed necessary. This stage also includes the participation of the executive because it is at this stage that the Chief Justice of India receives inputs from the executive about the frailties, if any, of a person who may eventually be appointed a judge. In the post-recommendation stage also the process is participatory but primarily with the executive in the event the executive has some objection to the appointment of a particular person for strong and cogent reasons to be recorded in writing.[555] Therefore, when a person is considered for appointment as a judge, there is extensive and intensive participatory consultation within the judiciary before the Chief Justice of India actually recommends a person for appointment as a judge; and after the recommendation is made, there is consultation between the executive and the judiciary before the process is carried further. What can be a more meaningful consultation postulated by Article 124(2) of the Constitution?

354. If a person is not recommended for appointment by the Chief Justice of India or the Chief Justice of a High Court, the chapter of his/her appointment closes at that stage. And, if there is no difference of opinion

[554] Second Judges case, paragraph 293 and 428
[555] Second Judges case, paragraph 442, 450, 461, 486 and 509

between the constitutional functionaries about the suitability of a person for appointment then, of course, there are no hurdles to the issuance of a warrant of appointment.

355. The difficulty in considering and accepting a recommendation arises only if there is a difference of opinion during consultations between the executive and the judiciary. The ***Second Judges case*** effectively resolves this controversy.

356. At the pre-recommendation stage, it is quite possible that the executive is in possession of material regarding some personal trait or weakness of character of a lawyer or a judge that is not known to the Chief Justice of India or the Chief Justice of the High Court and which may potentially disentitle that person from being appointed a judge. It is then for the executive, as a consultant, to bring this information or material to the notice of the Chief Justice of India.[556] Since the judiciary has the responsibility of recommending an appropriate candidate for appointment as a judge, primacy is accorded to the view of the judiciary (symbolized by the view of the Chief Justice of India) that will weigh and objectively consider the material or information and take a final decision on the desirability of the appointment.[557] The Chief Justice of India may, for good reason, accept the view of the executive or may, also for good reason, not accept the view of the executive. It is in this sense that 'consultation' occurring in Article 124(2)

[556] Second Judges case paragraph 462 and 478(6)
[557] Second Judges case paragraph 467, 468 and 478(6)

and Article 217(1) of the Constitution has to be understood. Primacy to the judiciary is accorded only to this limited extent, but subject to a proviso which will be discussed a little later.

357. Why is it that limited primacy has been accorded to the judiciary? That the judiciary is the best suited to take a decision whether a person should be appointed a judge or not is implicit in Article 124(2) and Article 217(1) of the Constitution. In Article 124(2) of the Constitution, the President is mandated to consult the Chief Justice of India and 'such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary.' That the President may choose to consult eminent persons from the legal fraternity or civil society is another matter, but the President is not required to do so. One of the possible reasons for this could be that the Constitution framers were of the opinion that ultimately what is important is the opinion of judges and not necessarily of others. Similarly, for the appointment of a judge of the High Court under Article 217(1) of the Constitution, the President is required to consult the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court – again not anybody else from the legal fraternity or civil society.

358. Similarly, limited primacy is accorded to the political executive. In the event the judiciary does not make a unanimous recommendation for the appointment of a judge of the Supreme Court or the High Courts, the President is entitled to turn down the recommendation. But if the

recommendation is unanimous but returned for reconsideration by the President and thereafter unanimously reiterated by the judiciary, then the Council of Ministers is bound by the decision of the judiciary and must advise the President accordingly.

359. Since the Constitution is a flexible document, neither the President nor the Chief Justice of India is precluded from taking the advice of any person, lay or professional. In fact, Justice Verma stated in an interview in this regard as follows:

> "Can you throw light on how, during your tenure as the CJI, appointments took place?
> For every Supreme Court appointment, I consulted senior lawyers like Fali S. Nariman and Shanthi Bhushan. I used to consult five or six top lawyers. I used to consult even lawyers belonging to the middle level. Similar consultation took place in the case of High Courts. I recorded details of every consultation. I wish all my correspondence is made public. After the appointment, why should it be secret? If there is a good reason to appoint the Judges, then at least the doubts people cast on them even now will not be there. And if there is a good reason why they should not have been appointed, then it would expose the persons who were responsible for their appointment."[558]

360. It is this pragmatic interpretation of the Constitution that was postulated by the Constituent Assembly, which did not feel the necessity of filling up every detail in the document, as indeed it was not possible to do so.

361. Leaving aside the discussion on the textual interpretation of the constitutional provisions and the Constituent Assembly debates, a constitutional convention has evolved over the last more than seven decades of accepting the opinion of the Chief Justice in the appointment of a person as a judge of a superior Court. This constitutional convention has existed, if

[558] Frontline, Volume 25 – Issue 20: September 27-October 10, 2008

not from the days of the Government of India Act, 1919 then certainly from the days of the Government of India Act, 1935. This constitutional convention has been exhaustively dealt with by Justice Kuldip Singh in the ***Second Judges case*** and it was concluded that a constitutional convention is as binding as constitutional law.[559] In any event, there is no cogent reason to discard a constitutional convention if it is working well. At this stage, it is useful to recall the comment of Chief Justice Beg in ***State of Rajasthan v. Union of India***[560] that: '… constitutional practice and convention become so interlinked with or attached to constitutional provisions and are often so important and vital for grasping the real purpose and function of constitutional provisions that the two cannot often be viewed apart.' This is precisely what has happened in the present case where constitutional conventions and practices are so interlinked to the constitutional provisions that they are difficult to disassemble.

362. It is this constitutional interpretation and constitutional convention that results in binding the recommendation of the Chief Justice of India on the executive that is objected to by the learned Attorney-General as being contrary to the Constitution as framed and it is this that is sought to be 'corrected' by the 99th Constitution Amendment Act.

363. The issue may be looked at from yet another angle. Assuming, the executive rejects the recommendation of the Chief Justice of India even after

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[559] Second Judges case paragraph 353 and 376
[560] (1977) 3 SCC 592 at paragraph 56

its unanimous reiteration, what is the solution to the impasse that is created? The answer is to be found in ***Samsher Singh*** and reiterated in ***Sankalchand Sheth***. It was held in ***Samsher Singh*** that in such an event, the decision of the executive is open to judicial scrutiny. It was said:

> "In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India."[561]

This view was reiterated in ***Sankalchand Sheth***.[562] Of course, it is another matter that no one has a right to be appointed as a judge, but certainly if the unanimous recommendation of the judiciary through the Chief Justice of India is not accepted by the President, if nothing else, at least the record will be put straight and the possible damage to the dignity, reputation and honour of the person who was recommended by the Chief Justice of India will be restored, at least to some extent. 364. But is judicial review necessarily the only answer to a problem of this nature? Should the executive and the judiciary ever be on a collision course in the appointment of a judge? Not only did Dr. Ambedkar think that such a situation would not occur, he never visualized it. Dr. Ambedkar made provision for virtually every contingency, except a stalemate or deadlock situation - he never imagined that such an eventuality would ever arise.

365. That there would be no difference or little difference or a manageable difference of opinion between the President and the Chief Justice of India or

[561] Paragraph 149
[562] Paragraph 41

that the judiciary should have a final say in the matter so as not to make the consultation process a mere formality, is quite apparent from the fact that the Constituent Assembly deliberately drew a distinction between the appointment by the President of a judge of the Supreme Court and a judge of the High Court (on the one hand) and the appointment by the President of other constitutional authorities. For the appointment of a judge, it is mandated in the Constitution that the President must consult the Chief Justice of India. However, to appoint the Comptroller and Auditor General under Article 148 of the Constitution (for example), the President is under no such obligation to consult anybody even though the position is one of vital importance. Dr. Ambedkar had said in this regard:

> "I cannot say I am very happy about the position which the Draft Constitution, including the amendments which have been moved to the articles relating to the Auditor-General in this House, assigns to him. Personally speaking for myself, I am of opinion that this dignitary or officer is probably the most important officer in the Constitution of India. He is the one man who is going to see that the expenses voted by Parliament are not exceeded, or varied from what has been laid down by Parliament in what is called the Appropriation Act. If this functionary is to carry out the duties - and his duties, I submit, are far more important than the duties even of the judiciary - he should have been certainly as independent as the Judiciary. But, comparing the articles about the Supreme Court and the articles relating to the Auditor-General, I cannot help saying that we have not given him the same independence which we have given to the Judiciary, although I personally feel that he ought to have far greater independence than the Judiciary itself."[563]

Similarly, the appointment of the Chief Election Commissioner and the Election Commissioners under Article 324 of the Constitution does not require the President to consult anybody, even though free and fair elections are undoubtedly vital to our democracy. Since the consultation provision was

[563] http://parliamentofindia.nic.in/ls/debates/vol8p11a.htm

incorporated only for the appointment of judges, surely, the Constituent Assembly had good reasons for making this distinction. Justice Khehar has referred to other Presidential appointments in his draft judgment and it is not necessary to repeat them. What is

important is the 'message' sought to be conveyed by the Constituent Assembly and the sanctity given to a recommendation by the Chief Justice of India for the appointment of a judge of the Supreme Court or the High Court.

366. It is trite that the Constitution is a living document.[564] Keeping this in mind, could it be said that a strained interpretation has been given to Article 124(2) and Article 217(1) of the Constitution particularly when the substitution of 'consultation' with 'concurrence' in the draft of Article 124 was discussed in the Constituent Assembly and not accepted?[565] Definitely not, particularly if one looks at the context in which 'consultation' is used and the purpose for which it is used, namely, to fetter the discretion of the President by someone who knows what is in the best interests of the judiciary.

367. But, as mentioned earlier, it is not necessary to dwell at length upon the correctness or otherwise of the procedure for the appointment of a judge as laid down in the ***Second Judges case*** and the ***Third Judges case***. The question really is whether the change in the procedure of appointment of

[564] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1 paragraph 42
[565] Foot Note 16

judges violates the basic structure of the Constitution. Can the Judiciary be independent if the appointment process is in the hands of the National Judicial Appointments Commission?

Amendment of the Constitution through Article 368

368. Proceeding on the basis, as we should, that the independence of the judiciary is a part of the basic structure of the Constitution, and that the appointment of a judge to the Supreme Court or a High Court is an integral and foundational part of the independence of the judiciary, the question that arises is to what extent, if at all, can the appointment process be tinkered with by Parliament.

369. Article 368 of the Constitution provides for the 'Power of Parliament to amend the Constitution and procedure therefor'. While the power is vast, empowering Parliament to add, vary or repeal any provision of the Constitution, the breadth of that power has inherent limitations as explained in ***Kesavananda Bharati*** which is that the basic structure of the Constitution cannot be altered. What constitutes the basic structure of the Constitution has been considered in several decisions of this Court and democracy (for example) or free and fair elections or judicial review of legislative action or separation (or distribution) of powers between the Legislature, the Executive and the Judiciary have all been held to be a part of the basic structure of the Constitution. There is no doubt, and no one has disputed it, that the

independence of the judiciary is also a part of the basic structure of the Constitution.

370. The constitutional requirement for amending the Constitution is: (a) The amendment may be initiated only by the introduction of a Bill for the purpose;

(b) The Bill may be moved in either House of Parliament; (c) The Bill ought to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting; (d) The Bill shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of that Bill.

371. There is a proviso to Article 368 of the Constitution and for the present purposes, the further requirement is that 'if such amendment seeks to make any change' in Chapter IV of Part V (The Union Judiciary) and Chapter V of Part VI (The High Courts in the States) the amendment 'shall also require to be ratified by the Legislatures of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.'

372. As far the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is concerned, there is no doubt or dispute that the procedure mentioned above was followed and that it received the assent of the

President on 31st December, 2014. To that extent the Constitution (Ninety-ninth) Amendment Act, 2014 is a procedurally valid legislation.

Limitations to amending the Constitution

373. To appreciate the inherent limitations placed on Parliament with regard to an amendment to the Constitution, it is necessary to consider the views constituting the majority in ***Kesavananda Bharati***. In that case, the question before this Court (as framed by Chief Justice Sikri) was: What is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2) on Parliament?

374. The learned Chief Justice noted that the word 'amendment' has not been defined in the Constitution. In some provisions of the Constitution it has a narrow meaning, while in other provisions it has an expansive meaning. This view was expressed by Justice Shelat and Justice Grover as well, who observed that the words 'amendment' and 'amend' have been used to convey different meanings in different provisions of the Constitution. In some Articles these words have a narrow meaning while in others the meaning is much larger or broader. The word is not one of precise import and has not been used in different provisions of the Constitution to convey the same meaning. This is of some significance since it is on this basis that this Court referred to the CAD to interpret the words 'amendment' and 'amend'.

375. On a reading of various provisions of the Constitution the learned Chief Justice concluded that the expression 'amendment of this Constitution' occurring in Article 368 thereof would mean any addition or change in any provision of the Constitution 'within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the directive principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated, reasonable abridgments of fundamental rights can be effected in the public interest.'[566] In this context, the learned Chief Justice referred to the Universal Declaration of Human Rights to conclude that certain rights of individuals are inalienable.[567]

376. The learned Chief Justice concluded by holding, inter alia:

> "The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article."[568]

377. Justice Shelat and Justice Grover looked at the text of Article 368 as it stood prior to its amendment by the 24th Constitution Amendment Act and observed that there is intrinsic evidence to suggest that the amending power of Parliament is limited. However widely worded the power might be, it cannot be used to render the Constitution to lose its character or nature or identity and it has to be exercised within the framework of the Constitution.

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[566] Paragraph 287

[567] Article 8 and 10 of the UDHR are relevant in this regard:

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

[568] Paragraph 475

It was observed that an unlimited power of amendment cannot be conducive to the survival of the Constitution. On this basis, it was concluded that:

> "The meaning of the words "amendment of this Constitution" as used in Article 368 must be such which accords with the true intention of the Constitution-makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various articles including Article 368. It is neither possible to give it a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution."[569]

378. Justice Hegde and Justice Mukherjea observed that Article 368 cannot be interpreted in a narrow and pedantic manner but must be given a broad and liberal interpretation. It was observed that the word 'amendment' has no precise meaning and that it is a 'colourless' word. In fact, the words 'amendment' and 'amend' have been used in the Constitution in different places with different connotations. Notwithstanding this, the learned judges were of the view that the meaning of these expressions cannot be as expansive as to enable Parliament to change the 'personality' of the Constitution since its scheme and structure proceed 'on the basis that there are certain basic features which are expected to be permanent.' Therefore, the amending power under Article 368 of the Constitution is subject to implied limitations.

379. Having considered all these factors, the learned judges concluded that:

> "On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the

[569] Paragraph 546

> citizens. Nor has the Parliament the power to revoke the mandate to build a welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligation imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good. We are unable to agree with the contention that in order to build a welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution."[570]

380. Justice Khanna dwelt on the basic structure of the Constitution and expressed the view that 'amendment' postulates the survival of the 'old' Constitution without loss of its identity and the retention of the basic structure or framework of the 'old' Constitution. It was held:

> "Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution."

381. Thereafter, Justice Khanna travelled much further than necessary and held that as long as the basic structure and framework of the Constitution is retained, the plenary power of amendment 'would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights.' The rationale for this was given a little later in the judgment in the following words:

> "The word "amendment" in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion, should hold good when we deal with

[570] Paragraph 666

> amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with fundamental right, and the scope and width of that power when it deals with provisions not concerned with fundamental rights."[571]

382. The conclusion arrived at by Justice Khanna is stated by the learned judge in the following words:

> "The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence, or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles."[572]

383. It may be mentioned *en passant* that the aforesaid view expressed by Justice Khanna generated much controversy. That was adverted to by the learned judge in ***Indira Nehru Gandhi*** and it was clarified in paragraphs 251 and 252 of the Report that the 'offending' passages were in the context of the extent of the amending power and not in the context of the basic structure of the Constitution. The learned judge clarified that fundamental rights were a part of the basic structure of the Constitution but the right to property was not.[573]

384. Simplistically put, the sum and substance of the decision in ***Kesavananda Bharati*** is that it recognized that the Constitution has a basic structure and that the basic structure of the Constitution is unalterable.

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[571] Paragraph 1435
[572] Paragraph 1537
[573] Paragraphs 251 and 252. Justice Bhagwati also adverts to this in Minerva Mills v. Union of India, (1980) 3 SCC 625.

Perhaps to avoid any doubts and since as many as nine judgments were delivered by the thirteen judges constituting the Bench, a summary of the conclusions was prepared. This summary was signed by nine of the thirteen judges. Among the nine signatories were two learned judges who were in the minority. One of the conclusions agreed upon by the nine learned judges who signed the summary was: 'Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.'

Judicial review of an amendment to the Constitution

385. In ***Indira Nehru Gandhi*** it was held that an amendment to the Constitution can be challenged only on the ground of violation of the basic structure, while a statute cannot be so challenged. A statute can be challenged only if it is passed by a Legislature beyond its legislative competence or if it offends Article 13 of the Constitution.[574]

> "The constitutional amendments may, on the ratio of the *Fundamental Rights case*,[575] be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the *Fundamental Rights case* that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (*1*) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the

[574] **13. Laws inconsistent with or in derogation of the fundamental rights** — (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(*a*) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(*b*) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

[575] Kesavananda Bharati

> Constitution, and (*2*) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. "Basic structure", by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. "The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features — this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution."

386. A similar view was taken in ***State of Karnataka v. Union of India***[576] wherein the above passage from ***Indira Nehru Gandhi*** was quoted with approval. It was said by Justice Untwalia in a concurring judgment for himself, Justice Shinghal and Justice Jaswant Singh:

> "Mr. Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental backbone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of *Smt Indira Nehru Gandhi* v. *Shri Raj Narain* such an argument was expressly rejected by this Court. We may rest content by referring to a passage from the judgment of our learned brother Chandrachud, J. which runs thus……."

387. In ***Kuldip Nayar v. Union of India***[577] a Constitution Bench reiterated the above view in the following words:

> "The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners."

388. Finally, in ***Ashoka Kumar Thakur v. Union of India***[578] it was held that a law can be challenged if it violates a provision of the Constitution but an amendment to the Constitution can be challenged only if it violates a

[576] (1977) 4 SCC 608 paragraph 238 (Seven Judges Bench)
[577] (1996) 7 SCC 1 paragraph 107 (Five Judges Bench)
[578] (2008) 6 SCC 1 paragraph 116 (Five Judges Bench)

basic feature of the Constitution which is a part of its basic structure. It was held:

> "For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It may be noticed that it is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution."

389. A different opinion was expressed in ***Madras Bar Association v. Union of India***[579] wherein it was held that the view that an amendment to the Constitution can be challenged on the ground of violation of the basic structure of the Constitution is made applicable to legislation also. This was assumed to be a logical extension of a principle. It was held:

> "This Court has repeatedly held that an amendment to the provisions of the Constitution would not be sustainable if it violated the "basic structure" of the Constitution, even though the amendment had been carried out by following the procedure contemplated under "Part XI" of the Constitution. This leads to the determination that the "basic structure" is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the "basic structure" would be unacceptable."

390. For the purposes of the present discussion, I would prefer to follow the view expressed by a Bench of seven learned judges in ***State of Karnataka v. Union of India*** that it is only an amendment of the Constitution that can be challenged on the ground that it violates the basic structure of the Constitution – a statute cannot be challenged on the ground that it violates

[579] (2014) 10 SCC 1 paragraph 109 (Five Judges Bench)

the basic structure of the Constitution. [The only exception to this perhaps could be a statute placed in the Ninth Schedule of the Constitution]. The principles for challenging the constitutionality of a statute are quite different.

Challenge to the 99th Constitution Amendment Act – the preliminaries
(a) Limitations to the challenge

391. The first submission made by the learned Attorney-General for upholding the constitutionality of the 99th Constitution Amendment Act was on the basis of ***Kesavananda Bharati***. It was submitted that a Constitution Amendment Act can be challenged as violating the basic structure of the Constitution within limited parameters, that is, only if it 'emasculates' the Constitution, or 'abrogates' it or completely changes its fundamental features so as to destroy its identity or personality or shakes the pillars on which it rests. While accepting that the independence of the judiciary is one such pillar, it was submitted that a change in the method and procedure in the appointment of a judge of the Supreme Court or a High Court does not emasculate, abrogate or shake the foundations or the pillars of the independence of the judiciary. Consequently the 99th Constitution Amendment Act does not fall foul of the basic structure of the Constitution.

392. This argument fails to appreciate that a majority of the learned judges constituting the Bench that decided ***Kesavananda Bharati*** were of the opinion that it is enough to declare a constitutional amendment as violating the basic structure if it alters the basic structure. Undoubtedly, some of the learned judges have used very strong words in the course of their judgment –

emasculate, destroy, abrogate, and substantially change the identity etc. but when it came to stating what is the law actually laid down, the majority decided that 'Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.'[580]

393. This was reiterated and explained by Justice Khanna in ***Indira Nehru Gandhi***. The words 'destroy' and 'abrogate' etc. were used with reference to the words 'amendment' and 'amendment of the Constitution' which is to say that 'amendment' and 'amendment of the Constitution' cannot be interpreted expansively as meaning 'destroy' or 'abrogate' etc. but have a limited meaning. The words 'destroy' and 'abrogate' etc. were not used in the context of destroying or abrogating the basic structure of the Constitution. The learned judge clearly said that 'the power of amendment under Article 368 [of the Constitution] does not enable the Parliament to alter the basic structure of [or] framework of the Constitution….' In fact, this was the precise submission of learned counsel for the election petitioner, namely, that the constitutional amendment 'affects the basic structure or framework of the Constitution and is, therefore, beyond the amending power under Article 368 [of the Constitution].'[581] The learned judge explained this crucial distinction in the following words:

> "The proposition that the power of amendment under Article 368 does not enable Parliament to alter the basic structure of framework of the Constitution was laid down by this Court by a majority of 7 to 6 in the case of *His Holiness Kesavananda Bharati* v. *State of Kerala*. Apart from other

[580] Justice Khanna refers to this conclusion in paragraph 198 in the decision rendered in ***Indira Nehru Gandhi***

[581] Paragraph 173

> reasons which were given in some of the judgments of the learned Judges who constituted the majority, the majority dealt with the connotation of the word "amendment". It was held that the words "amendment of the Constitution" in Article 368 could not have the effect of destroying or abrogating the basic structure of the Constitution. Some of us who were parties to that case took a different view and came to the conclusion that the words "amendment of the Constitution" in Article 368 did not admit of any limitation. Those of us who were in the minority in *Kesavananda case* may still hold the same view as was given expression to in that case. For the purpose of the present case, we shall have to proceed in accordance with the law as laid down by the majority in that case."[582]

394. While dealing with the constitutional validity of Clause (4) of Article 329-A of the Constitution as introduced by the 39th Constitution Amendment Act, Justice Khanna expressed the view that if a principle, imperative rule or postulate of the basic structure of the Constitution is violated, then the constitutional amendment loses its immunity from attack.

> "The question to be decided is that if the impugned amendment of the Constitution violates a principle which is part of the basic structure of the Constitution, can it enjoy immunity from an attack on its validity because of the fact that for the future, the basic structure of the Constitution remains unaffected. The answer to the above question, in my opinion, should be in the negative. What has to be seen in such a matter is whether the amendment contravenes or runs counter to an imperative rule or postulate which is an integral part of the basic structure of the Constitution. If so, it would be an impermissible amendment and it would make no difference whether it relates to one case or a large number of cases. If an amendment striking at the basic structure of the Constitution is not permissible, it would not acquire validity by being related only to one case. To accede to the argument advanced in support of the validity of the amendment would be tantamount to holding that even though it is not permissible to change the basic structure of the Constitution, whenever the authority concerned deems it proper to make such an amendment, it can do so and circumvent the bar to the making of such an amendment by confining it to one case. What is prohibited cannot become permissible because of its being confined to one matter."[583]

In conclusion it was said by Justice Khanna as follows:

> "As a result of the above, I strike down clause (4) of Article 329-A on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic

[582] Paragraphs 175 and 176
[583] Paragraph 210

> structure of the Constitution inasmuch as (1) it abolishes the forum without providing for another forum for going into the dispute relating to the validity of the election of the appellant and further prescribes that the said dispute shall not be governed by any election law and that the validity of the said election shall be absolute and not consequently be liable to be assailed, and (2) it extinguishes both the right and the remedy to challenge the validity of the aforesaid election."[584]

395. Similarly, Justice K.K. Mathew who was in the minority in ***Kesavananda Bharati*** expressed the view (in ***Indira Nehru Gandhi***) that the majority decision was that by an amendment, the basic structure of the Constitution cannot be damaged or destroyed, and the learned judge proceeded on that basis and held that Clause (4) of Article 329-A of the Constitution as introduced by the 39th Constitution Amendment Act damaged or destroyed the basic structure of the Constitution.[585]

396. Justice Y.V. Chandrachud who too was in the minority in ***Kesavananda Bharati*** took the view that according to the majority opinion in that decision the principle that emerged was that Article 368 of the Constitution 'does not confer power on Parliament to alter the basic structure or framework of the Constitution.'[586] The learned judge further said that the *ratio decidendi* in ***Kesavananda Bharati*** was that 'the power of amendment [in Article 368 of the Constitution] cannot be exercised to damage or destroy the essential elements or basic structure of the Constitution, whatever these expressions may comprehend.'[587]

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[584] Paragraph 213
[585] Paragraph 264 and 265
[586] Paragraph 651
[587] Paragraph 663

397. The issue again came up for consideration in ***Minerva Mills v. Union of India***.[588] The question in that case was whether Section 4 and Section 55 of the 42nd Constitution Amendment Act transgress the limitation of the amending power of Article 368 of the Constitution. Speaking for himself and the other learned judges in the majority (Justice A.C Gupta, Justice N.L. Untwalia and Justice P.S. Kailasam) it was held by Chief Justice Chandrachud that:

> "In *Kesavananda Bharati*, this Court held by a majority that though by Article 368 Parliament is given the power to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure. The question for consideration in this group of petitions under Article 32 is whether Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 transgress that limitation on the amending power."[589]

A little later in the judgment, it was held as follows:

> "The summary of the various judgments in *Kesavananda Bharati* was signed by nine out of the thirteen Judges. Para 2 of the summary reads to say that according to the majority, "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". Whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view.
> The question which we have to determine on the basis of the majority view in *Kesavananda Bharati* is whether the amendments introduced by Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 damage the basic structure of the Constitution by destroying any of its basic features or essential elements."[590]

It appears from the above exposition of the *ratio decidendi* in ***Kesavananda Bharati*** that the words 'alter' and 'damage' are used interchangeably. Similarly, 'damage the basic features' and 'destroy the basic structure' are used interchangeably with 'damage the basic structure' and 'destroy the

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[588] (1980) 3 SCC 625 (Five Judges Bench)
[589] Paragraph 1
[590] Paragraphs 12 and 13

basic features'.[591] The bottom line is what is contained in the 'summary' of ***Kesavananda Bharati***, namely: Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. There are two reasons for this. Firstly, it is a contemporaneous exposition of the views of the majority in ***Kesavananda Bharati*** and there is no other or different exposition and secondly, the exposition is by the majority of judges themselves (including two in the minority) and by no other.

398. It may be mentioned that some misgivings were expressed 'about' ***Minerva Mills*** in ***Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd.***[592] The misgivings were not spelt out by the Bench except that it is stated that the case 'has left us perplexed' seemingly for the reason that no question had arisen regarding the constitutional validity of Section 4 and Section 55 of the 42nd Constitution Amendment Act.[593] This is rather odd since the majority decision in ***Minerva Mills*** begins by stating: 'The question for consideration in this group of petitions under Article 32 is whether Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 transgress that limitation on the amending power.' Justice Bhagwati who partly dissented from the views of the majority also stated that the constitutional validity of Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 were under challenge.[594] However, it is not necessary to enter into this thicket, but

[591] I am unable to agree with Justice Chelameswar when he says that the 'basic structure' and 'basic features' convey different ideas. Lexicographically – yes, but constitutionally speaking – no. they are two dimensions of the same picture. In any event, for the present discussion, the distinction, if any, is not relevant.
[592] (1983) 1 SCC 147 (Five Judges Bench)
[593] Paragraph 11
[594] Paragraph 77-A

it must be noted that ***Sanjeev Coke*** did not disagree with ***Minerva Mills*** in its understanding of ***Kesavananda Bharati***.

399. More recently, in ***M. Nagaraj v. Union of India***[595] it was held (rephrasing Justice Khanna in ***Indira Nehru Gandhi***) that the basic structure doctrine is really a check on the amending power of Parliament. The basic structure of the Constitution consists of constitutional principles that are so fundamental that they limit the amending power of Parliament. It was concluded that the basic structure theory is based on the concept of constitutional identity (rephrasing Justice Bhagwati in ***Minerva Mills***). It was then said:

> "The basic structure jurisprudence is a preoccupation with constitutional identity. In *Kesavananda Bharati* v. *State of Kerala* it has been observed that "one cannot legally use the Constitution to destroy itself". It is further observed "the personality of the Constitution must remain unchanged". Therefore, this Court in *Kesavananda Bharati* while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati*. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty….. The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day."

400. The 'controversy' is now set at rest with the decision rendered in ***I.R. Coelho*** where alteration of the basic structure has been accepted as the test to

[595] (2006) 8 SCC 212 (Five Judges Bench)

determine the constitutional validity of an amendment to the Constitution. It was said:

> "The decision in *Kesavananda Bharati case* was rendered on 24-4-1973 by a thirteen-Judge Bench and by majority of seven to six *Golak Nath case*[596] was overruled. The majority opinion held that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution."[597]

And again,

> "In *Kesavananda Bharati case* the majority held that the power of amendment of the Constitution under Article 368 did not enable Parliament to alter the basic structure of the Constitution."[598]

The attack, therefore, is not on the basic structure of the Constitution but on the amending power of Parliament.

401. The learned Attorney-General placed reliance on the following passage from the judgment of Justice Krishna Iyer in ***Bhim Singhji v. Union of India***[599] to contend that for a constitutional amendment to violate the basic structure, it must be shocking, unconscionable or an unscrupulous travesty of the quintessence of equal justice. That case dealt with the constitutional validity of the Urban Land (Ceiling and Regulation) Act, 1976 which was placed in the Ninth Schedule to the Constitution by the 40th Constitution Amendment Act, 1976 and therefore had the protection of Article 31-B and Article 31-C of the Constitution. In that context, it was held that the question of the basic structure of the Constitution does not arise if the constitutional validity of legislation (as distinguished from a constitutional amendment) is under challenge. It was then said:

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[596] [1967] 2 SCR 762 (Eleven Judges Bench)
[597] Paragraph 21
[598] Paragraph 119
[599] (1981) 1 SCC 166 (Five Judges Bench)

> "The question of basic structure being breached cannot arise when we examine the vires of an ordinary legislation as distinguished from a constitutional amendment. *Kesavananda Bharati* cannot be the last refuge of the proprietariat when benign legislation takes away their "excess" for societal weal. Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure. Peripheral inequality is inevitable when large-scale equalisation processes are put into action. If all the Judges of the Supreme Court in solemn session sit and deliberate for half a year to produce a legislation for reducing glaring economic inequality their genius will let them down if the essay is to avoid even peripheral inequalities. Every large cause claims some martyr, as sociologists will know. Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty."[600]

402. This decision dealt with a statute placed in the Ninth Schedule of the Constitution and is, therefore, a class apart as far as the present discussion is concerned.

403. From this analysis, it must be concluded that if a constitutional amendment alters the basic structure of the Constitution, then it can and should be declared unconstitutional. What is of importance is the 'width of power' test propounded by Mr. Palkhivala in ***Kesavananda Bharati*** and adopted in ***M. Nagaraj*** and now rechristened in ***I.R. Coelho*** as the direct impact and effect test 'which means the form of an amendment is not relevant, its consequence would be [the] determinative factor.'[601]

404. In the light of the above discussion the question, therefore, is this: How does the 99th Constitution Amendment Act alter the basic structure of the Constitution, if at all? There is no doubt or dispute that the independence of the judiciary is a basic structure of the Constitution. I have already held

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[600] Paragraph 20
[601] Paragraph 70 and 151

that the appointment of a judge to the Supreme Court and a High Court is an integral part of the independence of the judiciary. Therefore, has the introduction of the National Judicial Appointments Commission by the 99th Constitution Amendment Act so altered the appointment process as to impact on the independence of the judiciary thereby making the 99th Constitution Amendment Act unconstitutional? The learned Attorney-General

answered this in the negative.

(b) Presumption of constitutionality

405. The learned Attorney-General submitted that there is a presumption in law that the 99th Constitution Amendment Act is constitutionally valid and that the petitioners have not been able to rebut that presumption.

406. In ***Charanjit Lal Chowdhuri v. Union of India***[602] Justice Fazal Ali expressed the view that 'the presumption is always in favour of the constitutionality of an enactment.'

407. Similarly, in ***Ram Krishna Dalmia v. Justice S.R. Tendolkar***[603] it was held, on a consideration of the decisions of this Court by Chief Justice S.R. Das that 'there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgressions of the constitutional principles.'

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[602] [1950] SCR 869 (Five Judges Bench)
[603] [1959] SCR 279 (Five Judges Bench)

408. In ***Kesavananda Bharati*** it was held by Justice Hegde and Justice Mukherjea that:

> "But the courts generally proceed on the presumption of constitutionality of all legislations. The presumption of the constitutional validity of a statute will also apply to constitutional amendments."[604]

409. Finally, in ***R.K. Garg v. Union of India***[605] it was held by Justice Bhagwati, speaking for the Court as follows:

> "Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."[606]

410. It is not possible to disagree with the learned Attorney-General in this regard. A statute or a constitutional amendment must always be deemed to be constitutionally valid and it is for those challenging the validity to demonstrate a violation of the Constitution or an alteration of the basic structure of the Constitution, as the case may be. As far as the petitioners are concerned, it is for them to conclusively show that the 99th Constitution Amendment Act alters the basic structure of the Constitution in that it replaces a well thought-out and fully- discussed method of appointment of

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[604] Paragraph 661
[605] (1981) 4 SCC 675 (Five Judges Bench)
[606] Paragraph 7

judges with another wherein the constitutional role giving significant value to the opinion of the Chief Justice of India is substantively diminished or perhaps eliminated and substituted by the NJAC. The question is not whether the alternative model is good or not good but whether it is constitutionally valid or not.

(c) Basis of judgment is removed

411. The third submission was that Article 124(2) of the Constitution has been amended by the 99th Constitution Amendment Act and, therefore, the basis of the judgment delivered by this Court in the ***Second Judges case*** has been completely taken away or that the Constitution has been amended with the result that that judgment cannot now be used to interpret Article 124(2) of the Constitution as it is today. In other words, the challenge to the 99th Constitution Amendment Act will have to be adjudicated independently and regardless of the law laid down in the ***Second Judges case*** or the ***Third Judges case***.

412. In ***Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality***[607] it was said by Chief Justice Hidayatullah that granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so

[607] (1969) 2 SCC 283 (Five Judges Bench)

fundamentally altered that the decision could not have been given in the altered circumstances. It was said:

> "Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation."[608]

413. Similarly, in ***Indira Nehru Gandhi*** it was held by Chief Justice Ray as follows:

> **"**The effect of validation is to change the law so as to alter the basis of any judgment, which might have been given on the basis of old law and thus make the judgment ineffective. A formal declaration that the judgment rendered under the old Act is void, is not necessary. If the matter is pending in appeal, the appellate court has to give effect to the altered law and reverse the judgment. The rendering of a judgment ineffective by changing its basis by legislative enactment is not an encroachment on judicial power but a legislation within the competence of the Legislature rendering the basis of the judgment *non est*."

414. In ***K. Sankaran Nair v. Devaki Amma Malathy Amma***[609] it was observed as follows:

> "It is now well settled that the legislature cannot overrule any judicial decision without removing the substratum or the foundation of that

[608] Paragraph 4
[609] (1996) 11 SCC 428

> judgment by a retrospective amendment of the legal provision concerned."[610]

It was further stated, relying upon ***Shri Prithvi Cotton Mills Ltd.*** as follows:

> "It is now well settled by a catena of decisions of this Court that unless the legislature by enacting a competent legislative provision retrospectively removes the substratum or foundation of any judgment of a competent court the said judgment would remain binding and operative and in the absence of such a legislative exercise by a competent legislature the attempt to upset the binding effect of such judgments rendered against the parties would remain an incompetent and forbidden exercise which could be dubbed as an abortive attempt to legislatively overrule binding decisions of courts."[611]

415. Similarly, in ***Bhubaneshwar Singh v. Union of India***[612] reliance was placed on ***Shri Prithvi Cotton Mills Ltd***. and a host of other decisions rendered by this Court and a similar conclusion arrived at in the following words:

> "From time to time controversy has arisen as to whether the effect of judicial pronouncements of the High Court or the Supreme Court can be wiped out by amending the legislation with retrospective effect. Many such Amending Acts are called Validating Acts, validating the action taken under the particular enactments by removing the defect in the statute retrospectively because of which the statute or the part of it had been declared ultra vires. Such exercise has been held by this Court as not to amount to encroachment on the judicial power of the courts. The exercise of rendering ineffective the judgments or orders of competent courts by changing the very basis by legislation is a well-known device of validating legislation. This Court has repeatedly pointed out that such validating legislation which removes the cause of the invalidity cannot be considered to be an encroachment on judicial power. At the same time, any action in exercise of the power under any enactment which has been declared to be invalid by a court cannot be made valid by a Validating Act by merely saying so unless the defect which has been pointed out by the court is removed with retrospective effect. The validating legislation must remove the cause of invalidity. Till such defect or the lack of authority pointed out by the court under a statute is removed by the subsequent enactment with retrospective effect, the binding nature of the judgment of the court cannot be ignored."[613]

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[610] Paragraph 5
[611] Paragraph 5
[612] (1994) 6 SCC 77
[613] Paragraph 11

416. In ***Re Cauvery Water Disputes Tribunal***[614] it was pithily stated, on a review of several decisions of this Court that:

> "The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision *inter partes* and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal."[615]

417. More recently, in ***State of Tamil Nadu*** this Court approved the following conclusion arrived at in ***Indian Aluminium Co. v. State of Kerala***[616]:

> "In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof."[617]

418. Without commenting on the view canvassed by the learned Attorney-General that the 99th Constitution Amendment Act has actually

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[614] (1993) Supp (1) SCC 96
[615] Paragraph 76
[616] (1996) 7 SCC 637
[617] Paragraph 111

removed the basis of the judgment delivered by this Court in the ***Second Judges case*** the constitutional validity of the said amendment will nevertheless need to be tested on that assumption, keeping in mind the above decisions.

(d) Wisdom of an amendment to the Constitution

419. The next submission of the learned Attorney-General was that the wisdom of Parliament in enacting the 99th Constitution Amendment Act cannot be disputed. Hence, this Court ought not to substitute its own views on the necessity or otherwise of the 99th Constitution Amendment Act over the law laid down in the ***Second Judges case***.

420. In ***Lochner v. New York***[618] Justice Oliver Wendell Holmes famously stated (in dissent) almost a century ago:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."

In other words, one may or may not agree with the content or wisdom of a legislation, but that has nothing to do with the correctness or otherwise of the majority decision taken by a Legislature. This view has been followed in our country as well.

421. The Courts in our country do not question the wisdom or expediency of the Legislature enacting a statute, let alone a constitutional amendment.

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[618] 198 US 45

422. In one of the earliest cases relating to the wisdom of Parliament in enacting a law, it was contended in ***A.K. Gopalan v. The State of Madras***[619] that the Preventive Detention Act, 1950 was unconstitutional. Justice Das expressed the view that:

> "The point to be noted, however, is that in so far as there is any limitation on the legislative power, the Court must, on a complaint being made to it, scrutinise and ascertain whether such limitation has been transgressed and if there has been any transgression the Court will courageously declare the law unconstitutional, for the Court is bound by its oath to uphold the Constitution. But outside the limitations imposed on the legislative powers our Parliament and the State Legislatures are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature."

423. The Payment of Bonus Act, 1965 and the scheme for payment of minimum bonus were under challenge in ***Jalan Trading Company (P) Ltd v. Mill Mazdoor Sabha Union***.[620] Speaking for the Court, Justice J.C. Shah observed that the wisdom of the scheme selected by the Legislature may be open to debate but it would not be invalid merely because some fault can be found with the scheme. It was said:

> "Whether the scheme for payment of minimum bonus is the best in the circumstances, or a more equitable method could have been devised so as to avoid in certain cases undue hardship is irrelevant to the enquiry in hand. If the classification is not patently arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden. With a view to secure a particular object a scheme may be selected by the Legislature, wisdom whereof may be open to debate; it may even be demonstrated that the scheme is not the best in the circumstances and the choice of the legislature may be shown to be erroneous, but unless the enactment fails to satisfy the dual test of intelligible classification and rationality of the relation with the object of the law, it will not be subject to judicial interference under Article 14. Invalidity of legislation is not established by merely finding faults with the scheme adopted by the Legislature to achieve the purpose it has in view.

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[619] [1950] 1 SCR 88 (Five Judges Bench)
[620] [1967] 1 SCR 15 (Five Judges Bench)

424. In ***Kesavananda Bharati*** it was observed by Chief Justice Sikri that: 'It is of course for Parliament to decide whether an amendment [to the Constitution] is necessary. The Courts will not be concerned with the wisdom of the amendment.'[621] The learned Chief Justice further observed: 'If Parliament has power to pass the impugned amendment acts, there is no doubt that I have no right to question the wisdom of the policy of Parliament.'[622]

425. Similarly, Justice Shelat and Justice Grover held:

> "It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution-makers or for the Parliament or the legislature."[623]

426. Justice A.N. Ray expressed his view in the following words: 'Courts are not concerned with the wisdom or policy of legislation. The Courts are equally not concerned with the wisdom and policy of amendments to the Constitution.'[624]

427. Justice Jaganmohan Reddy expressed the same sentiments when the learned judge said:

> "The citizen whose rights are affected, no doubt, invokes the aid of the judicial power to vindicate them, but in discharging its duty, the Courts have nothing to do with the wisdom or the policy of the Legislature."[625]

428. On the question of the wisdom of a constitutional amendment which ostensibly improves an existing situation, Justice Khanna expressed the view

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[621] Paragraph 288
[622] Paragraph 317
[623] Paragraph 532
[624] Paragraph 909
[625] Paragraph 1106

that this was not justiciable. The Court cannot substitute its opinion for that of Parliament in this regard. It was held:

> "Whether the amendment is in fact, an improvement or not, in my opinion, is not a justiciable matter, and in judging the validity of an amendment the courts would not go into the question as to whether the amendment has in effect brought about an improvement. It is for the special majority in each House of Parliament to decide as to whether it constitutes an improvement; the courts would not be substituting their own opinion for that of the Parliament in this respect. Whatever may be the personal view of a judge regarding the wisdom behind or the improving quality of an amendment, he would be only concerned with the legality of the amendment and this, in its turn, would depend upon the question as to whether the formalities prescribed in Article 368 have been complied with."[626]

429. With reference to the ***Lochner*** dissent, Justice Khanna noted that the view was subsequently accepted by the US Supreme Court in ***Ferguson v. Skrupa***[627] in the following words:

> "In the face of our abandonment of the use of the 'vague contours' of the Due Process clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner*[628] is as mistaken as would be adherence to *Adkins* v. *Children's Hospital*[629] overruled by *West Coast Hotel Co.* v. *Parrish*[630] ……. We refuse to sit as a 'super legislature to weigh the wisdom of legislation', and we emphatically refuse to go back to the time when courts used the Due Process clause 'to strike down State laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought'."[631]

430. Justice Khanna reiterated his views in ***Indira Nehru Gandhi*** wherein the learned judge held:

> "Before dealing with the question as to whether the impugned amendment affects the basic structure of the Constitution, I may make it clear that this Court is not concerned with the wisdom behind or the propriety of the impugned constitutional amendment. These are matters essentially for those who are vested with the authority to make the constitutional

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[626] Paragraph 1436. This view was reiterated in paragraph 1534.
[627] 372 US 726
[628] 244 U.S. 590 (1917)
[629] 261 U.S. 525 (1923)
[630] 300 U.S. 379 (1937)
[631] Paragraph 1442

> amendment. All that this Court is concerned with is the constitutional validity of the impugned amendment."[632]

431. Justice Chandrachud also expressed the same view, that is to say:

> "The subject-matter of constitutional amendments is a question of high policy and courts are concerned with the interpretation of laws, not with the wisdom of the policy underlying them."[633]

432. A similar view was expressed in ***Karnataka Bank Ltd. v. State of Andhra Pradesh***[634] wherein it was specifically observed by this Court that:

> "In pronouncing on the constitutional validity of a statute, the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a court may think of it."[635]

433. In view of the judicial pronouncements, there is absolutely no difficulty in accepting this proposition canvassed by the learned Attorney-General. The constitutional validity of the 99th Constitution Amendment Act has to be tested on its own merit. The question of any Court substituting its opinion for that of the Legislature simply cannot and does not arise. A judge may have a view one way or the other on the collegium system of appointment of judges and on the manner of its implementation – but that opinion cannot colour the application and interpretation of the law or the reasoning that a judge is expected to adopt in coming to a conclusion whether the substitute introduced by the 99th Constitution Amendment Act is constitutionally valid or not. Similarly, a judge may have an opinion about the National Judicial Appointments Commission – but again that view

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[632] Paragraph 176
[633] Paragraph 661
[634] (2008) 2 SCC 254
[635] Paragraph 19

cannot replace a judicial interpretation of the 99th Constitution Amendment Act or the NJAC Act.

434. The collegium system of appointment of judges has undoubtedly been the subject of criticism. In fact, Mr. Fali Nariman who led the submissions on behalf of the Advocates on Record Association was quite critical of the collegium system of appointments. Some of the learned counsel for the respondents went overboard in their criticism. But personal opinions do not matter. Lord Templeman of the House of Lords was of the view that the collegium system of appointments is best suited to ensure the independence of the judiciary – but there are other eminent persons who are critical of the ***Second Judges case***.

435. In the final analysis, therefore, the Courts must defer to the wisdom of the Legislature and accept their views, as long as they are within the parameters of the law, nothing more and nothing less. The constitutional validity of the 99th Constitution Amendment Act cannot be tested on opinions, however strong they may be or however vividly expressed.

(e) Needs of the people

436. It was also submitted by the learned Attorney-General that Parliament is aware of the needs of the people and the people want a change from the collegium system of appointment of judges. Parliament has responded to this demand and this Court should not reject this demand only because it believes that the collegium system is working well and that the 99th Constitution

Amendment Act introduces a different system which reduces the role of the judiciary in making appointments by taking away its primacy in this regard.

437. Apart from the presumption that an enactment is constitutionally valid, there is also a presumption that the Legislature understands and correctly appreciates the needs of the people. This was observed in ***Charanjit Lal Chowdhuri*** and reliance was placed on the following passage from ***Middleton v. Texas Power and Light Co.***[636]:

> "It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds."

438. Similarly, in ***Ram Krishna Dalmia*** the presumption that the Legislature understands and correctly appreciates the needs of the people was reiterated.

439. Finally in ***Mohd. Hanif Quareshi v. State of Bihar***[637] this view was endorsed by Chief Justice S.R. Das speaking for this Court (though it may be mentioned that this decision was subsequently overruled on another issue) in the following words:

> "The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds."

440. It was observed (on an issue relating to the constitutionality of the death penalty) in ***Makwanyane***[638] as follows:

> "Public opinion may have some relevance to the enquiry, but in itself, it is

[636] 249 US 152, 157 paragraph 11
[637] [1959] SCR 629 (Five Judges Bench)
[638] Per Chaskalon, J paragraphs 88 and 89

> no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution…….
>
> This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public. Justice Powell's comment in his dissent in *Furman v Georgia* bears repetition:
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> > ...the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery - not the core - of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function.[639]
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> So too does the comment of Justice Jackson in *West Virginia State Board of Education v Barnette*:
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> > The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[640]

To put it differently: 'The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.'[641] Public opinion, manifested through Parliament or otherwise, really pales into insignificance over the law that is interpreted impartially and in a non-partisan manner.

441. It must be appreciated that the debate cannot be reduced to the acceptance of an unconstitutional but popular decision versus a constitutional

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[639] 408 U.S. 238, 290 (1972)
[640] 319 U.S. 624, 638 (1943)
[641] Mistretta v. United States, 488 U.S. 361, 407 (1989)

but unpopular decision. All of us are bound by the Constitution and judges have to abide by the oath of office to uphold the Constitution and the laws, even if the decision is unpopular or unacceptable to Parliament. This is the essence of judicial review otherwise no law passed by Parliament (obviously having a popular mandate) could be struck down as unconstitutional.

(f) Passage of time

442. Finally, it was submitted by the learned Attorney-General that the passage of time over the last over sixty years has shown that the system of appointment of judges that was originally operational (in which the executive has the 'ultimate power') and the collegium system (in which the judiciary had shared responsibility) had both yielded some negative results. It was submitted that millions of cases are pending, persons who should have been appointed as judges were not recommended for appointment and persons who did not deserve to be judges were not only appointed but were brought to this Court. The 99th Constitution Amendment Act seeks to correct the imbalances created over a period of time and since constitutional experiments are permissible, the 99th Constitution Amendment Act should be allowed to pass muster.

443. There is no doubt that with the passage of time changes take place in society and in the development of the law. In fact, the only constant is change. In ***State of West Bengal v. Anwar Ali Sarkar***[642] it was

[642] [1952] SCR 284 (Seven Judges Bench)

acknowledged by Justice Mehr Chand Mahajan that good faith and knowledge of existing conditions on the part of the Legislature has to be presumed. Appreciating this, it was later observed in ***Ram Krishna Dalmia*** that:

> "In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

444. In ***Kesavananda Bharati*** Justice Hegde and Justice Mukherjea observed that: 'The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of the generation to come.'[643]

445. Justice Khanna expressed the view (and this was relied on by the learned Attorney-General) that the Constitution is also intended for the future and must contain ample provision for experiment and trial. This is what Justice Khanna said:

> "It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration. A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. It had its roots in the past, its continuity is reflected in the present and it is intended for the unknown future."[644]

446. A little later on in the judgment, the learned judge cited ***Abrams v. United States***[645] and quoting Justice Holmes said:

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[643] Paragraph 634
[644] Paragraph 1437
[645] 250 US 616 (1919)

> "The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment." If the experiment fails, there must be provision for making another."[646]

447. Fortunately for the people of the country, the independence of the judiciary is not a 'task of administration' nor is the Constitution of India a failed experiment nor is there any need for 'making provision for another'. If the basic structure of the Constitution is to be changed, through experimentation or otherwise, then its overthrow is necessary. It is not a simple document that can be experimented with or changed through a cut and paste method. Even though the independence of the judiciary is a basic structure of the Constitution and being a pillar of democracy it can be experimented with, but only if it is possible without altering the basic structure. The independence of the judiciary is a concept developed over centuries to benefit the people against arbitrary exercise of power. If during experimentation, the independence of the judiciary is lost, it is gone forever and cannot be regained by simply concluding that the loss of independence is a failed experiment. The independence of the judiciary is not physical but metaphysical. The independence of the judiciary is not like plasticine that it can be moulded any which way.

448. This is not to say that the Constitution must recognize only physical changes with the passage of time – certainly not. New thoughts and ideas are generated with the passage of time and a line of thinking that was

[646] Paragraph 1563

acceptable a few decades ago may not be acceptable today and what is acceptable today may not be acceptable a decade hence. But basic concepts like democracy, secularism, Rule of Law, independence of the judiciary, all of which are constituents of the basic structure of our Constitution are immutable as concepts, though nuances may change. A failed experiment of these basic concepts would lead to disastrous consequences. It is not possible as an experiment to try out a monarchy or a dictatorship or to convert India into a religious State for about ten or fifteen years and see how the experiment works. Nor is it possible to suspend the Rule of Law or take away the independence of the judiciary for about ten or fifteen years and see how the experiment works. These concepts are far too precious for experimentation.

449. Yes, the Constitution has to be interpreted as a living organic document for years and years to come, but within accepted parameters. It was said by Chief Justice Dickson of the Canadian Supreme Court in ***The Queen v. Beauregard***[647]:

> "The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people. Accordingly, if the Constitution can accommodate, as it has, many subjects unknown in 1867--airplanes, nuclear energy, hydroelectric power -- it is surely not straining section 100 too much to say that the word 'pensions', admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of 'pensions'."[648]

[647] [1986] 2 SCR 56 paragraph
[648] Paragraph 46

450. It is this that Justice Khanna possibly had in mind when the learned judge spoke of the 'unknown future'.

Challenge to a statute and the package deal

451. The learned Attorney-General also adverted to the legal bases for challenging a statute. This was necessary since he desired to segregate the challenge to the 99th Constitution Amendment Act and the NJAC Act. In principle, the segregation would be justified, but as far as this case is concerned, the learned Attorney-General had argued that the 99th Constitution Amendment Act and the NJAC Act were a 'package deal' and in this he is correct. Both were discussed and debated in both Houses of Parliament almost at the same time, both were sent to the President for assent at the same time and were in fact assented to at the same time and finally both were notified at the same time. The only difference was that while the 99th Constitution Amendment Act had to undergo the ratification process, the NJAC Act did not. It was therefore a 'package deal' presented to the country in which the 99th Constitution Amendment Act and the NJAC Act were so interlinked that one could not operate without reference to the other. In fact, Mr. Nariman submitted that the NJAC Act should also have undergone the ratification process, but he was unable to support his argument with any law, judicial precedent, convention or practice. This question is left open for greater discussion at an appropriate stage should the occasion arise.

452. Be that as it may, in the context of a challenge to a statute, it was submitted by the learned Attorney-General that the principles for such a challenge are quite different from a challenge to a constitutional amendment. He is right in this submission.

453. The accepted view is that a Parliamentary statute can be struck down only if it is beyond legislative competence or violates Art.13 or the fundamental rights. The basic structure doctrine is not available for striking down a statute. It was held in ***State of A.P. v. McDowell & Co***[649] that:

> "The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground."

454. This view was followed in ***Public Services Tribunal Bar Assn v. State of U.P.***[650] in the following words:

> "The constitutional validity of an Act can be challenged only on two grounds viz. (*i*) lack of legislative competence; and (*ii*) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provisions. In *State of A.P.* v. *McDowell & Co* this Court has opined that except the above two grounds there is no third ground on the basis of which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds."

455. Earlier, this Court had taken a much broader view of the issue of a challenge to a statute in ***Chhotabhai Jethabhai Patel v. Union of India***.[651] It was held therein that apart from the question of legislative competence and violation of Article 13 of the Constitution, a statute could be challenged if its

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[649] (1996) 3 SCC 709 paragraph 43
[650] (2003) 4 SCC 104 paragraph 26
[651] 1962 Supp (2) SCR 1 = AIR 1962 SC 104 (Five Judges Bench)

enactment was prohibited by a provision of the Constitution. It was held as follows:

> "If by reason of Article 265 every tax has to be imposed by "law" it would appear to follow that it could only be imposed by a law which is valid by conformity to the criteria laid down in the relevant Articles of the Constitution. These are that the law should be (*1*) within the legislative competence of the legislature being covered by the legislative entries in Schedule VII of the Constitution; (*2*) the law should not be prohibited by any particular provision of the Constitution such as for example, Articles 276(2), 286 etc., and (*3*) the law or the relevant portion thereof should not be invalid under Article 13 for repugnancy to those freedom which are guaranteed by Part III of the Constitution which are relevant to the subject-matter of the law."

456. This view was taken forward in ***Kihoto Hollohan v. Zachillhu***[652] wherein it was held that the procedure for enacting a 'law' should be followed. Although it is not expressly stated, but it appears that if the procedure is not followed then the 'law' to that extent will have no effect. In this case, it was held that Paragraph 7 of the Tenth Schedule to the Constitution needed ratification in terms of clause (b) of the proviso to Article 368(2) of the Constitution. It was held:

> "That having regard to the background and evolution of the principles underlying the Constitution (Fifty-second Amendment) Act, 1985, insofar as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of Paragraph 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to sub-article (2) of Article 368 of the Constitution of India."

457. Strictly speaking, therefore, an amendment to the Constitution can be challenged only if it alters the basic structure of the Constitution and a law can be challenged if: (1) It is beyond the competence of the Legislature; (2) It violates Article 13 of the Constitution; (3) It is enacted contrary to a

[652] 1992 Supp (2) SCC 651 paragraph 61 and 62 (Five Judges Bench)

prohibition in the Constitution; and (4) It is enacted without following the procedure laid down in the Constitution.

458. At the same time, it has been emphasized by this Court that the possibility of abuse of a provision of a statute is not a ground for striking it down. An abuse of power can always be checked through judicial review of the action complained of. In ***D.K. Trivedi & Sons v. State of Gujarat***[653] it was said:

> "Where a statute confers discretionary powers upon the executive or an administrative authority, the validity or constitutionality of such power cannot be judged on the assumption that the executive or such authority will act in an arbitrary manner in the exercise of the discretion conferred upon it. If the executive or the administrative authority acts in an arbitrary manner, its action would be bad in law and liable to be struck down by the courts but the possibility of abuse of power or arbitrary exercise of power cannot invalidate the statute conferring the power or the power which has been conferred by it."

459. Similarly, Justice B.P. Jeevan Reddy (speaking for Justice J.S. Verma, Justice S.C. Agrawal, Justice A.S. Anand, Justice B.N. Kirpal and himself) held in ***Mafatlal Industries Ltd. v. Union of India***[654]:

> "It is equally well-settled that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding the provision procedurally or substantively unreasonable. In *Collector of Customs* v. *Nathella Sampathu Chetty*, this Court observed: "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." It was said in *State of Rajasthan* v. *Union of India*, "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief". (Also see *Commr., H.R.E.* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*." (Internal citations omitted)

Article 122 of the Constitution

[653] 1986 Supp SCC 20 in paragraph 50
[654] (1997) 5 SCC 536 in paragraph 88

460. Before dealing with the substantive issue of the challenge before us, it may be mentioned that Mr. Fali S. Nariman contended that Parliament did not have the competence to pass the NJAC Act until the 99th Constitution Amendment Act was brought into force or at least it had the assent of the President. It is not possible to accept this submission since the passage of the 99th Constitution Amendment Act and the NJAC Act was contemporaneous, if not more or less simultaneous. In view of Article 122(1) of the Constitution which provides that the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure, it is not possible to delve into the proceedings in Parliament.

461. In ***Babulal Parate v. State of Bombay***[655] this Court added, by way of a post-script, its view on Article 122(1) of the Constitution. It was observed that in a given hypothetical situation the question will not be the validity of proceedings in Parliament but the violation of a constitutional provision. It was said as follows:

> "It is advisable, perhaps, to add a few more words about Art. 122(1) of the Constitution. Learned counsel for the appellant has posed before us the question as to what would be the effect of that Article if in any Bill completely unrelated to any of the matters referred to in Cls. (a) to (e) of Art. 3 an amendment was to be proposed and accepted changing (for example) the name of a State. We do not think that we need answer such a hypothetical question except merely to say that if an amendment is of such a character that it is not really an amendment and is clearly violative of Art. 3, the question then will be not the validity of proceedings in Parliament but the violation of a constitutional provision."

[655] [1960 (1) SCR 605 (Five Judges Bench)

462. In ***Raja Ram Pal v. Lok Sabha***[656] the question of the extent of judicial review of parliamentary matters came up for consideration. Speaking for Justices K.G. Balakrishnan, D.K. Jain and himself, it was held by Chief Justice Sabharwal, with reference to the CAD that procedural irregularities in Parliament cannot undo or vitiate what happens within its four walls, that is, internal parliamentary proceedings. However, proceedings that are substantively illegal or unconstitutional, as opposed to irregular are not protected from judicial scrutiny by Article 122(1) of the Constitution.[657]

463. Insofar as the NJAC Act is concerned, nothing has been shown by way of any substantive illegality in its passage or anything unconstitutional in its passage in the sense that any provision of the Constitution or any substantive rule regulating parliamentary activity has been violated. At best, it can be argued that procedurally there was a violation but our attention was drawn to the rules of procedure and the decision taken in accordance with the rules which indicate that there was no procedural violation in the introduction of the NJAC Act and its passage. Justice Khehar has elaborately dealt with this issue in substantial detail in his draft judgment and it is not necessary to repeat what has been said.

The amendments that are challenged - discussion

464. Though no one has a right to be appointed a judge either of the

[656] (2007) 3 SCC 184 (Five Judges Bench)
[657] Paragraphs 360 (Two), 366

Supreme Court or a High Court, it does not mean that the President can decline to appoint a person as a judge without any rhyme or reason nor does it mean that the President can appoint any eligible person as a judge. Under the Government of India Act, 1919 and the Government of India Act, 1935 the Crown had the unfettered discretion to do both or either. The Constituent Assembly did not give this unfettered power to the President and, therefore, mandated consultation between the President and the Chief Justice of India for the appointment of a judge of the Supreme Court. There were reasons for this as mentioned above. Prior to the 99th Constitution Amendment Act, under Article 124(2) of the Constitution, the President had the discretion to consult some other judges of the Supreme Court or the High Courts, as the President thought necessary for the purpose. The same constitutional position prevailed (mutatis mutandis) so far as the appointment of a judge of a High Court under Article 217(1) of the Constitution was concerned. Article 124(2) of the Constitution had three basic ingredients: The power of the President to appoint a judge of the Supreme Court; a mandatory requirement of consultation with the Chief Justice of India; a discretionary consultation with other judges of the Supreme Court and the High Courts.

465. The 99th Constitution Amendment Act has completely changed this constitutional position and has changed the role of the President in the appointment process as also substantially modified the mandatory consultation with the Chief Justice of India and substituted or replaced the

entire process by a recommendation of the NJAC. The table below gives the textual changes made in Article 124(2) of the Constitution.

Pre- Amendment provisions	**Post-Amendment provisions**
124. *Establishment and constitution of Supreme Court.* - (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.	124. *Establishment and constitution of Supreme Court.* - (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal **after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose** and shall hold office until he attains the age of sixty-five years:	(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal **on the recommendation of the National Judicial Appointments Commission referred to in article 124A** and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:	**omitted**
Provided further that— (a) a Judge may, by writing under his hand addressed to the President, resign his office; (b) a Judge may be removed from his office in the manner provided in clause (4).	**Provided that**- (a) a Judge may, by writing under his hand addressed to the President, resign his office; (b) a Judge may be removed from his office in the manner provided in clause (4).

466. The composition of the NJAC is provided for in Article 124A of the Constitution. Therefore, Article 124A of the Constitution and Article 124(2) are required to be read in conjunction with each other. The Chief Justice of India is the Chairperson of the NJAC. The members of the NJAC are two other judges of the Supreme Court next to the Chief Justice of India, the Union Minister in charge of Law and Justice and two eminent persons to be

nominated by a Committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha, failing which the leader of the single largest Opposition Party in the Lok Sabha.

467. The duty of the NJAC as provided for in Article 124B of the Constitution is to recommend persons for appointment as the Chief Justice of India, judges of the Supreme Court, Chief Justices of High Courts and other judges of High Courts and to recommend the transfer of Chief Justices and other judges of a High Court from one High Court to any other High Court. The NJAC has the duty to ensure that the person recommended has ability and integrity.

468. Article 124C of the Constitution provides that Parliament may by law regulate the procedure for the appointment of the Chief Justice of India and other judges of the Supreme Court, the Chief Justice and other judges of the High Courts. The Article empowers the NJAC to lay down, by regulations, the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary.

469. Simultaneous with the above amendments in the Constitution, the NJAC Act was passed by Parliament. The NJAC Act provides for recommending the senior-most judge of the Supreme Court as the Chief Justice of India 'if he is considered fit to hold the office' and for recommending names for appointment as a judge of the Supreme Court

persons who are eligible to be so appointed. Interestingly, the NJAC 'shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation' (Section 5 of the NJAC Act). A somewhat similar procedure has been provided for recommending the appointment of the Chief Justice of a High Court and a judge of a High Court (Section 6 of the NJAC Act).

470. The President may accept the recommendation of the NJAC for the appointment of a particular person as a judge, but may also require the NJAC to reconsider its recommendation. If the NJAC affirms its earlier recommendation the President shall issue the warrant of appointment (Section 7 of the NJAC Act).

471. The officers and employees of the NJAC shall be appointed by the Central Government in consultation with the NJAC and the convener of the NJAC shall be the Secretary to the Government of India in the Department of Law and Justice (Section 8 of the NJAC Act).

472. The procedure for the transfer of judges from one High Court to another has been left to be determined by regulations to be framed by the NJAC (Section 9 of the Act). Similarly, the NJAC shall frame regulations with regard to the procedure for the discharge of its functions (Section 10 of the Act).

473. The Central Government is empowered to make Rules to carry out the provisions of the NJAC Act (Section 11 thereof) and the Commission may

make Rules to carry out the provisions of the NJAC Act (Section 12 thereof). The Rules and Regulations framed by the Central Government and by the NJAC shall be laid before Parliament and these may be modified if both the Houses of Parliament agree to the modification and Parliament may also provide that a Rule or Regulation shall have no effect (Section 13 thereof).

474. The sum and substance of the controversy is this: If the establishment of the NJAC by the 99th Constitution Amendment Act alters the basic structure of the Constitution, the 99th Constitution Amendment Act and the NJAC Act must be declared unconstitutional. Since the establishment of the NJAC by Article 124A of the Constitution is integral to the 99th Constitution Amendment Act and the NJAC Act and they are not severable and cannot stand alone, they too must be declared unconstitutional.

475. While considering the constitutional validity of the 99th Constitution Amendment Act and the NJAC Act it is necessary to deal with a submission made with reference to the Constitutional Reform Act 2005 (CRA) passed by the British Parliament. This is because it was referred, in the course of submissions, on more than one occasion. It was sought to be suggested that judges in the UK Supreme Court are appointed by the Judicial Appointments Commission constituted in terms of the CRA and there is nothing wrong if a somewhat similar procedure is adopted by our Parliament where judges of the High Courts and the Supreme Court are recommended by the NJAC.

476. The CRA and its working was adverted to by Jack Straw, the Lord Chancellor from 2007 to 2010. At that time the Lord Chief Justice was the head of the judiciary in the UK but the Lord Chancellor was nevertheless responsible 'for upholding the independence of the judiciary'. In the 3rd lecture on 'Judicial Appointments' delivered on 4th December, 2012 of the 64th series of Hamlyn Lectures titled 'Aspects of Law Reform – An Insider's Perspective' he said:

> "The CRA provided for the establishment of an independent Judicial Appointments Commission (JAC).
> The JAC was made responsible for operating the appointments process and making recommendations to the Lord Chancellor for all but the most senior appointments. For these very senior appointments (to the Court of Appeal, and the offices of Head of Division, Lord Chief Justice, and the president, deputy president and members of the UK Supreme court), separate provision was made for recommendations to be made to the Lord Chancellor by specially constituted selection panels.
> For each appointment, the JAC, or the specially constituted selection panel,
> was required to make one recommendation to the Lord Chancellor."[658]
>
> "In practice, as I found out through painful experience, there were a number of problems with this set-up."[659]
>
> "I accept that the role of the Lord Chancellor in relation to High Court and Court of Appeal appointments should be limited. But for the two groups of our most senior judges, and for different reasons, in my view the Lord Chancellor should have a greater role than is provided for by the Constitutional Reform Act, or than is likely to be provided for by the current Crime and Courts Bill.
> The two groups of judges I am talking about are, first, the most senior members of the Court of Appeal – that is, the Heads of Division and Lord Chief Justice- and, second, the members of the UK Supreme Court. The conclusion is the same, but the arguments are different."[660]

The 'specially constituted selection panel' for the appointment of judges of the UK Supreme Court (for example) is provided for in Section 26(5) of the

[658] Page 54
[659] Page 55
[660] Page 56

CRA read with Schedule 8 thereof and the selection panel consists of (a) the President of the Supreme Court, (b) the Deputy President of the Supreme Court, (c) one member each of (i) the Judicial Appointments Commission, (ii) the Judicial Appointments Board for Scotland, (iii) the Northern Ireland Judicial Appointments Commission. At least one member in category (c) must be 'non-legally qualified'. With this sort of a composition of the 'specially constituted selection panel' Jack Straw could not go against the wishes of the judiciary in respect of one appointment, as obliquely referred to by him below:

> "All of this is already recognized, in principle at least, by the Constitutional Reform Act, which provides that these two groups of very senior appointments should not be made by the normal Judicial Appointments Commission process.
> The reality of a connection between the senior judiciary and the executive is also recognized in almost every other jurisdiction. By far the most usual approach elsewhere in the world, including in well-functioning common-law jurisdictions, is for the relevant minister to be recommended three to five names, and for that minister then to be able to choose from among these nominees. In the United Kingdom we are very unusual in insisting that the minister receives one name alone. This is explicable only in the context of where we have come from: the untrammeled discretion of the Lord Chancellor until the mid 1990s, the non-statutory nature of the pre-2005 arrangements, the opaque decision-making process and the mounting criticism of it.
> But these literally peculiar arrangements for these very senior appointments, intended to create a partnership approach between the judiciary and the Lord Chancellor in recognition of the requirements of the offices in question, have proved to be unsatisfactory.
> Both the detailed wording and the expectation in practice make it very difficult for the Lord Chancellor to exercise even his limited powers to reject or request a reconsideration of a recommendation. As is a matter of record in the press, there was one occasion when, as Lord Chancellor, I sought to use these powers.
> Since I have always observed the confidentiality necessary for the consideration of such appointments, I am not here going into any detail. I hope, however, that it will be accepted that I would not have sought to exercise these powers unless I believed that I had good grounds within the Act for doing so I did – good grounds, as many can now see. I went to considerable lengths to ensure that my actions could not be construed, which they were not remotely, as party political. In the event, the matter

> was not seen through to a conclusion. Partisans to the appointment – not anyone directly involved in the process – leaked extensive detail to the press, an election was looming; I confirmed the appointment."[661]

477. Adverting to this lecture and the actual working of the CRA, it is said that for making senior level judicial appointments, it is 'impossible for the Lord Chancellor to against the wishes of the judiciary'. In a recent article published in *Public Law* it is said:

> "Judicial appointments are the next biggest change, responsibility for which has shifted from the executive in the form of the Lord Chancellor, to the judiciary. Formally the process is managed by the independent Judicial Appointments Commission (JAC), but in practice the process is heavily influenced by the judiciary at every stage. The Lord Chief Justice is consulted at the start of each competition. Judges prepare case studies and qualifying tests. Judges write references. A judge sits on the panels that interview candidates; and judges are consulted in statutory consultation. On the JAC, 7 of the 15 commissioners are judges. Once the JAC has completed its selection, at lower levels (Circuit judges and below) all judicial appointments are now formally made by the Lord Chief Justice, and tribunal appointments are made by the Senior President of Tribunals. The Lord Chief Justice and SPT are now responsible for 97 per cent of all judicial appointments. At more senior levels appointments are still formally decided by the Lord Chancellor; but in practice it has proved impossible for the Lord Chancellor to go against the wishes of the judiciary."[662]

So much for the appointment process in the UK and the 'judges appointing judges' criticism in India!

478. It is not possible for any one of us to comment (one way or another) on the CRA except to say that it is not advisable to rely on values of judicial independence and conventions and systems of the appointment of judges in other countries without a full understanding of their problems and issues. We ought to better understand the situation in our country (and the decisions

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[661] Page 57-59

[662] Public Law (2015): Judicial Independence and Accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005 by Robert Hazell

rendered by this Court) and how best to protect and preserve judicial independence in the circumstances that exist in our country and not have grand illusions of the systems in place in other countries.

Validity of Articles 124A and 124(2) of the Constitution - the package deal

479. The submission of the learned Attorney-General (as mentioned above) is that the 99th Constitution Amendment Act and the NJAC Act are a 'package deal' and one cannot be appreciated without the other. The discussion will be in the light of this submission.

480. At the outset, it is important to note that the package is incomplete. The 99th Constitution Amendment Act and the NJAC Act raise a series of unanswered questions. For example, how is the NJAC expected to perform its duties? Will there be any transparency in the working of the NJAC and if so to what extent? Will privacy concerns of the 'candidates' be taken care of? Will issues of accountability of the NJAC be addressed? The learned Attorney-General submitted that a large number of hypothetical issues and questions have been raised not only by the petitioners but also by the Bench and it is not possible to answer all of them in the absence of a composite law and regulations being framed in accordance with the postulates of the 99th Constitution Amendment Act. This submission of the learned Attorney-General cannot be appreciated particularly in view of his contention, raised on more than one occasion, that what is enacted by the 99th Constitution Amendment Act is a package deal. Unless all eventualities are

taken care of, the package deal presented to the country is an empty package with the wrapping paper in the form of the NJAC Act and a ribbon in the form of the 99th Constitution Amendment Act. If it is not possible to answer all the questions in the absence of a composite law, rules and regulations, what was the hurry in bringing the 99th Constitution Amendment Act and the NJAC Act into force as a half-baked measure?

481. It is true that the Constitution cannot specify and incorporate each and every detail, particularly procedural details.[663] But the same time, the substantive requirements of the NJAC scheme must be apparent from the 99th Constitution Amendment Act read with the NJAC Act, particularly when it seeks to overthrow an existing method of appointment of judges that maintains the independence of the judiciary. Vital issues cannot be left to be sorted out at a later date through supplementary legislation or supplementary subordinate legislation, otherwise an unwholesome hiatus would be created, making matters worse.

482. The package deal must survive as whole or fall as a whole – there cannot be piecemeal existence.

483. Viewed in this light, the constitutional validity of Article 124(2) read with Article 124A of the Constitution as introduced by the 99th Constitution Amendment Act is suspect for several reasons.

(a) The NJAC and the role of the President

[663] See State of Punjab v. Salil Sablok, (2013) 5 SCC 1 paragraph 115 of the Report.

484. Article 124(2) of the Constitution requires the NJAC constituted under Article 124A thereof to make a recommendation to the President for the appointment of a judge of the Supreme Court or a High Court. Mr. Fali S. Nariman pointed out that as far as the NJAC is concerned, it is not clear whether the President means the President acting in his/her individual capacity or the Council of Ministers. The President certainly cannot mean the individual otherwise the procedure for appointment of judges postulated by the 99th Constitution Amendment Act and the NJAC Act would be creating an *Imperium in Imperio* which the Constituent Assembly deliberately avoided. On the other hand, if the President means the Council of Ministers, then on what basis can the Council of Ministers/President ask the NJAC (under the proviso to Section 7 of the NJAC Act) to reconsider its view? The Council of Ministers/President is already represented as a 'voting member' in the NJAC through the Law Minister. Can the President/Council of Ministers/Prime Minister ask for reconsideration of a recommendation made by the NJAC to which the Law Minister (a member of the Cabinet) is a party? Would this be permissible particularly since the Law Minister represents the Union Government/President in the NJAC and would it not go against the well established principle of Cabinet responsibility? Alternatively, would it not undermine the authority of the Law Minister if in a given case the Law Ministers agrees to an appointment but the Council of

Ministers does not accept it? More importantly, is the Council of Ministers/President an oversight body as far as the NJAC is concerned?

485. Assuming (despite the above doubts) that the Council of Ministers/President requires the NJAC to reconsider its recommendation and on reconsideration the NJAC reiterates its recommendation, the President will be bound thereby even if it means overruling the objections of the Chief Justice of India. The objection to this process of appointment of judges is two-fold. Firstly, the authority that is statutorily conferred on the NJAC to bind the President by the NJAC Act is well beyond the power conferred by Article 124(2) of the Constitution or the 99th Constitution Amendment Act. Secondly, in the event of such a reiteration, the opinion of the Chief Justice of India eventually counts for nothing, contrary to the intention of the Constituent Assembly and the constitutional conventions followed over decades. Historically, no appointment (except perhaps one) has been made without the consent of the Chief Justice of India. Is the 99th Constitution Amendment Act intended, wittingly or unwittingly, to give a short shrift to the views of the Constituent Assembly and constitutional conventions and to sublimate the views of the Chief Justice of India? This procedure may be contrasted with the collegium system of appointment in which the President could turn down a recommendation made by the collegium if it was not unanimous. In the present dispensation, this entitlement of the President is

taken away, even if the recommendation is not unanimous, and thereby the importance of the President is considerably downsized.

486. Additionally, the decision of the President is, in one sense, made to depend upon the opinion of two members of the NJAC, who may in a given case be the two eminent persons nominated to the NJAC in terms of Article 124A(1)(d) of the Constitution. These two eminent persons can actually stymie a recommendation of the NJAC for the appointment of a judge by exercising a veto conferred on each member of the NJAC by the second proviso to sub-section (2) of Section 5 of the NJAC Act, and without assigning any reason. In other words, the two eminent persons (or any two members of the NJAC) can stall the appointment of judges without reason. That this may not necessarily happen with any great frequency is not relevant – that such a situation can occur is disturbing. As a result of this provision, the responsibility of making an appointment of a judge effectively passes over, in part, from the President and the Chief Justice of India to the members of the NJAC, with a veto being conferred on any two unspecified members, without any specific justification. This is a very significant constitutional change brought about by the 99th Constitution Amendment Act which not only impinges upon but radically alters the process of appointment of judges, by shifting the balance from the President and the Chief Justice of India to the NJAC. To make matters worse, the President cannot even seek the views of anybody (other judges or lawyers or civil society) which was

permissible prior to the 99th Constitution Amendment Act and a part of Article 124(2) of the Constitution prior to its amendment. It may be recalled that Article 124(2) of the Constitution enables the President to consult judges of the Supreme Court and the High Court but that entitlement is now taken away by the 99th Constitution Amendment Act. The President, in the process, is actually reduced to a dummy.

487. It may also be recalled that the President (as an individual) had expressed a viewpoint as reported in *India Today* magazine of 25th January, 1999 concerning the appointment of judges of the Supreme Court. The existence of such a possibility is now not possible since the President (as an individual) has really no role to play in the appointment process except issuing a warrant of appointment when asked to do so.

488. The sum and substance of this discussion is that there is no clarity on the role of the President. In any event, the discretion available to the President to consult judges of the Supreme Court in the matter of appointment of judges is taken away; the decision of the President is subject to the opinion of two eminent persons neither of whom is constitutionally accountable; there is a doubt on the well established principle of Cabinet responsibility; a statute - the NJAC Act, not the Constitution binds the President contrary to the constitutional framework; the 99th Constitution Amendment Act makes serious and unconstitutional inroads into Article 124(2) of the Constitution, as originally framed.

(b) Role of the Chief Justice of India and the Judiciary

489. The Chief Justice of India is undoubtedly the Chairperson of the NJAC. However, the participation of the Chief Justice of India as an individual and the participation of the judiciary as an institution in the NJAC is made farcical by the 99th Constitution Amendment Act and the NJAC Act. Even though the opinion of the Chief Justice of India, a pre-eminent constitutional authority in the judiciary, regarding the suitability of a person for appointment as a judge is acceptable to a majority of members of the NJAC, it can be thumbed down by two of its other members in terms of Section 5 of the NJAC Act. These two persons might be the Law Minister (representing the President) and an eminent person or two eminent persons neither of whom represent or purport to represent the President, the other pre-eminent constitutional authority in the appointment process under Article 124(2) of the Constitution prior to its amendment.

490. The 99th Constitution Amendment Act reduces the Chief Justice of India, despite being the head of the judiciary, to one of six in the NJAC making a recommendation to the President thereby denuding him/her of conventional, historical and legitimate constitutional significance and authority and substantially skewing the appointment process postulated by the Constituent Assembly and the Constitution. The opinion of the Chief Justice of India had 'graded weight' or the 'greatest weight' prior to the 99th Constitution Amendment Act. But now with the passage of the 99th

Constitution Amendment Act and the NJAC Act the Chief Justice of India is reduced to a mere voting statistic. Designating the Chief Justice of India as the Chairperson of the NJAC is certainly not a solace or a solution to downsizing the head of the Judiciary.

491. The participation of the judiciary as an institution in the NJAC is also farcical. The 99th Constitution Amendment Act does not postulate a 'veto' being conferred on any person in the NJAC. But the NJAC Act effectively gives that power to all members of the NJAC despite the 99th Constitution Amendment Act. This is evident from the provisions of the NJAC Act which enable two persons, one of them being the Law Minister to veto the unanimous opinion of the three participating judges (including the Chief Justice of India). Therefore, even if the Judiciary as a whole and as an institution (that is the three participating judges) is in favour of a particular appointment, that unanimous opinion can be rendered worthless by any two other members of the NJAC, one of whom may very well include the Law Minister representing the political executive and another having perhaps nothing to do with justice delivery. This is certainly not what the Constitution, as framed, postulated or intended.

492. To get over this outlandish situation it was suggested (as an alternative argument) by Mr. K.K. Venugopal appearing for the State of Madhya Pradesh that the unanimous opinion of the three participating judges should have overriding weight, that is a veto over a veto or a 'tie break vote'. Mr.

Venugopal puts this Court in a Catch-22 situation. The alternative suggested would clearly amount to judicial overreach and the judiciary rewriting the statute. The only rational course is to interpret the law as it is and if it is constitutionally valid so be it and if it is constitutionally invalid so be it. It is not advisable or possible to rewrite the law when the language of the statute is express.

493. As mentioned above in considerable detail, the independence of the judiciary took up so much discussion time of several Committees, the Constituent Assembly and various other bodies and institutions. Several legal luminaries have also devoted considerable effort and given a thoughtful study to the independence of the judiciary. There was a purpose to it, namely, that the independence should not be subverted via external or internal pressures. Through the medium of the 99th Constitution Amendment Act and the NJAC Act, this independence is subtly put to jeopardy. The President has virtually no role to play in the appointment of judges, the Chief Justice of India is sidelined in the process and a system that is subject to possible erosion is put in place. Justice O'Connor said: 'Judicial independence doesn't happen all by itself….. It's tremendously hard to create, and easier than most people imagine to destroy.' The 99th Constitution Amendment Act and the NJAC Act puts us face to face with this truism in respect of the fragile bastion.

494. The sum and substance of this discussion is that the unanimous opinion of the Judiciary can be rejected by two eminent persons or one

eminent person and the Law Minister (whose opinion is subject to the opinion of the Council of Ministers, whom he/she represents); the unanimous opinion of the judiciary as an institution, an opinion that was respected (and deservedly so) counts for virtually nothing with the passage of the 99th Constitution Amendment Act and the NJAC Act; the Chief Justice of India is rendered, by the 99th Constitution Amendment Act to a mere voting statistic and one among six in the NJAC virtually stripping him/her of the constitutional responsibility of appointing judges to the superior courts and denuding him/her of the authority conferred by history, constitutional convention and the Constitution; the Chief Justice of India and the institution of the judiciary is now subject to a veto by civil society in its decisions. The entire scheme of appointment of judges postulated by the Constituent Assembly is made topsy-turvy by the 99th Constitution Amendment Act and the NJAC Act. If this does not alter the basic structure of the Constitution, what does?

(c) Eminent persons and the veto

495. The inspiration for having eminent persons in the NJAC comes from the Report of the NCRWC which made this recommendation as a part of the democratic process of selecting a judge of the Supreme Court or the High Court. Article 124A(1)(d) of the Constitution provides for two eminent persons to be nominated as members of the NJAC. The nomination is by a Committee consisting of the Prime Minister, the Chief Justice of India and

the Leader of the Opposition in the Lok Sabha or where there is no such Leader, then the Leader of the single largest Opposition Party in the Lok Sabha. The first proviso mandates that one of the eminent persons shall be nominated from amongst persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women.

496. The apprehension expressed by some learned counsel appearing for the petitioners is that since no guidelines have been laid down for the nomination of the two eminent persons, there is a possibility that persons who are not really eminent may be nominated to the NJAC or that their appointment will be politically motivated. So also, acknowledged eminent persons might not be nominated to the NJAC. But then, who is an eminent person?

497. In ***A.K. Roy v. Union of India***[664] reference was made to the difficulty in framing precise definitions. Although the decision pertained to preventive detention and criminal law, the following observation is pertinent in the context of the present discussion:

> "The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature. But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending to them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined."[665]

[664] (1982) 1 SCC 271 (Five Judges Bench)
[665] Paragraph 61

498. It is also necessary to notice the view expressed in the ***Second Judges case*** by Justice Verma speaking for the majority. The learned judge was of the opinion that arbitrariness in the exercise of discretion can be minimized through a collective decision. It was observed as follows:

> **"**The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any individual, be he the Chief Justice of India or the Prime Minister."[666]

499. Justice Pandian in a separate but concurring opinion held the same view and expressed it in the following words:

> "It is essential and vital for the establishment of real participatory democracy that all sections and classes of people, be they backward classes or Scheduled Castes or Scheduled Tribes or minorities or women, should be afforded equal opportunity so that the judicial administration is also participated in by the outstanding and meritorious candidates belonging to all sections of the society and not by any selective or insular group." [667]

500. In ***Centre for PIL v. Union of India***[668] the question related to the appointment of the Central Vigilance Commissioner and the Vigilance Commissioners under the Central Vigilance Commission Act, 2003. The

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[666] Paragraph 468
[667] Paragraph 216(3)
[668] (2011) 4 SCC 1

relevant provision was to the effect that a Selection Committee consisting of the Prime Minister, the Minister of Home Affairs and the Leader of the Opposition in the Lok Sabha would make a recommendation to the President who would then appoint the Central Vigilance Commissioner or the Vigilance Commissioners, as the case may be, by warrant under his or her hand and seal. In this context, this Court held that Parliament had put its faith in a High Powered Committee and it is presumed that the High Powered Committee entrusted with wide discretion would exercise its powers in accordance with the Act objectively and in a fair and reasonable manner.

501. It was pointed out by Mr. Arvind Datar, learned senior counsel appearing for one of the petitioners that a large number of statutes mention the presence of eminent persons in a body, including some that are subject specific. However, it was pointed out by the learned Attorney-General that in a random sampling of some of these statutes, it has been found that none of them has such a High Powered Committee as in the Central Vigilance Commission Act for nominating or recommending a person for appointment to a post.

502. Apart from anything else, it was submitted by the learned Attorney-General that the presence of eminent persons in the NJAC would lend diversity in the composition of the 'selection panel' and that this would necessarily reflect the views of society. Reference in this context was made

to ***Registrar General, High Court of Madras v. R. Gandhi***[669] wherein it was held as follows:

> "Appointments cannot be exclusively made from any isolated group nor should it be pre-dominated by representing a narrow group. Diversity therefore in judicial appointments to pick up the best legally trained minds coupled with a qualitative personality, are the guiding factors that deserve to be observed uninfluenced by mere considerations of individual opinions. It is for this reason that collective consultative process as enunciated in the aforesaid decisions has been held to be an inbuilt mechanism against any arbitrariness."[670]

503. Under these circumstances, there can be little objection to the participation by eminent persons as consultants in the appointment process. In fact, Justice Verma acknowledged that he had sought the views of eminent lawyers while considering recommendations for the appointment of judges. If the Committee cannot be trusted to nominate 'eminent' persons, perhaps no other committee can. The trust placed on the Committee is not a simple or statutory trust but a constitutional trust. In this regard, it is worth recalling the words of Justice Krishna Iyer in ***Bhim Singhji***:

> "The confusion between the power and its oblique exercise is an intellectual fallacy we must guard against. Fanciful possibilities, freak exercise and speculative aberrations are not realistic enough for constitutional invalidation. The legislature cannot be stultified by the suspicious improvidence or worse of the Executive."[671]

504. It is, therefore, not advisable to be alarmist, as some learned counsel for the petitioners were, but at the same time possible abuse of power cannot be wished away, as our recent history tells us. Perhaps far better and precise legislative drafting coupled with a healthy debate is a solution, but, what is

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[669] (2014) 11 SCC 547
[670] Paragraph 16
[671] Paragraph 20

of significance is the decision-taking (as distinguished from decision-making) process of the Committee. It was pointed out in ***Centre for PIL*** that in a situation such as the present, where no procedure in the functioning of the Committee is laid out, the nomination of eminent persons will be through a majority decision of the members of the Committee.[672] What this means is that the Chief Justice of India would have a subsidiary role in the nomination process if he/she is in the minority. What this also means is that an executive cum legislative influence would sneak in in the process of nomination of eminent persons. In other words, from the word 'go' the Chief Justice of India is sidelined, directly or indirectly, in the process of appointment of judges of the High Courts and the Supreme Court.

505. It is also not possible to accept the contention that the presence of eminent persons with a voting right in the NJAC would have no impact on the independence of the judiciary, but would be beneficial in terms of bringing about diversity. The same result could very well be achieved, as suggested by Justice Verma without altering the basic structure of the Constitution, without conferring a veto on the consultants.

506. What makes matters worse is that in the absence of a quorum or unanimity in the nomination of eminent persons, the Committee could make the nomination without consulting the Chief Justice of India. Therefore, if for some valid reason, the Chief Justice of India is unable to attend a meeting, the Committee could nominate eminent persons (perhaps believing

[672] The discussion in paragraphs 79 to 86 of the Report is quite useful.

in the concept of a committed judiciary) to the NJAC and influence its decisions to accept a committed judiciary rather than an independent judiciary.[673] It is unlikely that this would happen, but if the political executive is determined, at some point of time, to have a committed judiciary, the nomination of politically active eminent persons to the NJAC disregarding the view of the Chief Justice of India is a real possibility.

507. Another objection raised to the 'eminent person' category is that such a person might not have any knowledge of the requirements of the judiciary and would not be able to make any effective contribution in the selection of a judge. It was submitted that the eminent person must have some background of law and the judiciary. In principle this argument is quite attractive, but really has little substance. Several members of the Constituent Assembly had no training or background in law and yet they contributed in giving us a glorious Constitution. One of the finest minds that we have today - Professor Amartya Sen - has had no training or background in law and yet has given us *The Idea of Justice* an important contribution to jurisprudence, the idea of justice in an organizational sense (*niti*) and the idea of realized justice (*nyaya*). Therefore, it would not be correct to say that an eminent person in the NJAC (or as an outside consultant) must have some connection with the law or justice delivery. If the eminent person does have that 'qualification' it might be useful, but it certainly need not be absolutely necessary.

[673] It was held in Ishwar Chandra v. Satyanarain Sinha, (1972) 3 SCC 383 in paragraph 10 of the Report: "… where there is no rule or regulation or any other provision for fixing the quorum, the presence of the majority of the members would constitute it a valid meeting and matters considered thereat cannot be held to be invalid."

508. Finally, it was argued that the requirement that one eminent person should be from a specified category as mentioned in the first proviso to Article 124A(1)(d) of the Constitution is discriminatory and serves no purpose at all. In response, the learned Attorney-General submitted that the presence of an eminent person, outside the field of law would bring about a much needed diversity in the appointment of judges. The experience in the United Kingdom, as explained by Jack Straw, does not seem to bear out this assumption. In his lecture, he stated: 'The assumption on diversity – naïve as it turned out – was that if we changed the process, we would change the outcome.' In any event, which category should or should not be represented in the NJAC through an eminent person is essentially a matter of policy and that policy does not appear to be perverse in any manner, but does require a rethink.

509. The real cause for unhappiness is the second proviso to Section 5(2) of the NJAC Act which effectively confers a veto on each member of the NJAC. What is objectionable about the veto (a part of the package deal referred to by the learned Attorney-General) is that it can also be exercised by two eminent persons whose participation in the appointment process was not even imagined by the Constituent Assembly. Article 124(2) of the Constitution (prior to its amendment) had only two constitutional authorities involved in the appointment process – the President and the Chief Justice of India. The 99th Constitution Amendment Act has introduced a third and a

previously non-constitutional 'authority' namely an eminent person. Two eminent persons who had no role to play in the appointment process prior to the 99th Constitution Amendment Act have suddenly assumed Kafkaesque proportions and together they can paralyze the appointment process, reducing the President and the Chief Justice of India to ciphers for reasons that might have nothing to do with the judicial potential or fitness and suitability of a person considered for appointment as a judge. That they might not do so is another matter altogether but in a constitutional issue as grave as the appointment of judges, all possibilities require to be taken into consideration since it affects the independence of the judiciary and eventually the rights, including the fundamental rights, of the people. The conferment of a veto to any member of the NJAC, eminent person or otherwise, is clearly an unconstitutional check on the authority of the President and the Chief Justice of India.

510. The sum and substance of this discussion is that in principle, there can be no objection to consultation with eminent persons from all walks of life in the matter of appointment of judges, but that these eminent persons can veto a decision that is taken unanimously or otherwise by the Chief Justice of India (in consultation with other judges and possibly other eminent persons) is unthinkable – it confers virtually a monarchical power on the eminent persons in the NJAC, a power without any accountability; the categories of eminent persons ought not to be limited to scheduled castes, scheduled

tribes, other backward classes, minorities or women but that is a matter of policy and nothing more can be said about this, except that a rethink is necessary; there can be no guidelines for deciding who is or is not an eminent person for the purposes of nomination to the NJAC, but that the choice is left to a high powered committee is a sufficient check, provided the decision of the committee is unanimous.

(d) Law Minister

511. The presence of the Law Minister in the NJAC was objected to by the petitioners for several reasons. Principally, it was contended that the Union of India is the biggest litigant in the courts and to have the Law Minister as a member of the NJAC might prove detrimental to a fair selection, if not counter-productive.

512. It is true that the Union of India is the largest litigant in the country and that was recognized in the ***Second Judges case***. It was said by Justice Pandian as follows:

> "No one can deny that the State in the present day has become the major litigant and the superior courts particularly the Supreme Court, have become centres for turbulent controversies, some of which with a flavour of political repercussions and the Courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to continue, the independence of judiciary in the long run will sink without any trace."[674]

513. Similarly, Justice Kuldip Singh also mentioned that the Union of India is the single largest litigant in the country. The learned judge said:

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[674] Paragraph 207

> "In *S.P. Gupta case* this Court construed the words in Articles 124(2) and 217(1) of the Constitution by taking the clock back by forty years. The functioning of the Apex Judiciary during the last four decades, the expanding horizon of, 'judicial review', the broader concept of 'independence of judiciary', practice and precedents in the matter of appointment of judges which ripened into conventions and the role of the executive being the largest single litigant before the courts, are some of the vital aspects which were not adverted to by this Court while interpreting the constitutional provisions."[675]

514. The learned judge expressed the same sentiment far more emphatically in the following words:

> "Then the question which comes up for consideration is, can there be an independent judiciary when the power of appointment of judges vests in the executive? To say yes, would be illogical. The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. 'Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the Framers of the Constitution could have never intended to give this power to the executive. Even otherwise the Governments - Central or the State - are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication before the Apex Court. The executive - in one form or the other - is the largest single litigant before the courts. In this view of the matter the judiciary being the mediator - between the people and the executive - the Framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the executive. This Court in *S.P. Gupta case* proceeded on the assumption that the independence of judiciary is the basic feature of the Constitution but failed to appreciate that the interpretation, it gave, was not in conformity with broader facets of the two concepts - 'independence of judiciary' and 'judicial review' - which are interlinked."[676]

In view of this, there can be no doubt that the Government of India is a major litigant and for a Cabinet Minister to be participating (and having a veto) in the actual selection of a judge of a High Court or the Supreme Court is extremely anomalous.[677]

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[675] Paragraph 327
[676] Paragraph 335
[677] The position that the State is a major litigant in the country remains the same even today.

515. Historically, and I have quoted chapter and verse from virtually every relevant committee in this regard, the executive was always intended to be kept out of the decision-taking process in the matter of appointment of judges. What is sought to be achieved by including the Law Minister in the NJAC is to cast a doubt on the wisdom of legal luminaries, Dr. Ambedkar and the Constituent Assembly in keeping the executive out of the decision-taking process in the appointment of judges.

516. Nevertheless, it is true that inputs from the executive are important in the process of taking a decision whether a person should or should not be appointed as a judge of a High Court or the Supreme Court. But providing inputs by the executive is quite different from the process of taking a decision by the executive or the executive being involved in the process of taking a decision. While it must be acknowledged that the Law Minister is only one of six in the NJAC but being a Cabinet Minister representing the entire Cabinet and the Government of India in the NJAC, the Law Minister is undoubtedly a very important and politically powerful figure whose views can, potentially, have a major impact on the views that other members of the NJAC may hold. Since the Law Minister is, by virtue of the office held, potentially capable of influencing the decision of a member of the NJAC, it would be inappropriate for the Law Minister to be a part of the decision-taking process. The selection process must not only be fair but must appear to be fair.

517. It must be realized and appreciated that the tectonic shift in several countries towards constituting a judicial appointment commission is taking place only to ensure that the executive does not have a role in the appointment of judges. The learned Attorney-General supported the shift but if the trend is to be taken seriously, the Law Minister can have no place in any commission or, as in the present case, in the NJAC. Therefore, while the 99th Constitution Amendment Act and the NJAC Act attempt to set up a body intended to be independent of the executive, the NJAC that has been set up has an important member of the political executive as a part of this body, which is rather anachronistic.

518. It must also be realized that as mentioned in the ***First Judges case*** two countries Australia (today having a total of about 200 judges in the High Court and the State Supreme Courts) and New Zealand (today having a total of about 20 judges [in the Supreme Court and in the Court of Appeal]) were veering round to having a judicial appointment commission for the higher judiciary.[678] We were informed during the hearing of these petitions that these countries have not, even after four decades, established such commissions, while our country seems to be in a great rush to do so. The issues, debates, discussions and considerations in these countries would be

[678] Justice Bhagwati: "We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary. As recently as July 1977 the Chief Justice of Australia publicly stated that the time had come for such a commission to be appointed in Australia. So also in New Zealand, the Royal Commission on the Courts chaired by Mr Justice Beattle, who has now become the Governor-General of New Zealand, recommended that a Judicial Commission should consider all judicial appointments including appointments of High Court Judges." [Paragraph 31]

different from ours, but merely because these and other countries are looking towards a judicial appointment commission is no reason for India to do so. A reference was also made to South Africa but, as everyone knows, diversity issues in that country are of great concern post apartheid. It is, therefore, odious to compare the judicial appointment systems in other countries with our country and to lift ideas and concepts that might be workable in those countries without considering whether they could be adopted or adapted in our country.

519. In Australia, an article suggesting adoption of the UK Judicial Appointments Commission introduced by the CRA has this to say about judicial appointments and political patronage (which might be possible in the NJAC as established):

> "While the collective strength and quality of the Australian judiciary is not in doubt, it is the case that particular appointments have attracted criticism, either in relation to the character and ability of the individual chosen or their conduct while in office. It is a notorious fact that judicial officers have been appointed, including to the High Court, whose character and intellectual and legal capacities have been doubted and whose appointments have been identified as instances of political patronage.
> ……
> What is essential is that *decisional* independence be guaranteed to judicial officers. The core of judicial independence is freedom from influence in the central judicial task of adjudicating disputes about legal rights that arise between private parties, between the State and private parties, and (in a federation) between components of the State. The core is protected through institutional arrangements such as tenure, remuneration and the jurisdictional separation of powers. As we have already noted, it is inescapable that politics will have a role to play in the appointment process. However, if appointments are perceived to be made on the basis of political patronage there is a threat to (at least the appearance of) decisional independence. It is impossible — and undesirable — to remove the political entirely from the appointments process. Indeed, in our view, 'political' considerations, *in the sense of responsibility and accountability for appointments*, need to be intensified rather than obscured. What an appointments model should attempt to do is attenuate the direct influence of the political branch on the appointment process and subject its

> involvement in the appointment process to greater transparency and accountability, while preserving all the existing constitutional arrangements for ensuring decisional independence. "[679]

520. In South Africa, while dealing with judicial appointments, Justice Yvonne Mokgoro, former judge of the Constitutional Court had this to say:

> "Thus, judicial transformation in South Africa must include a new judicial appointments procedure which is open and independent of external influence; changing the demographics of the Bench, in particular with regards to race and gender as critical aspects of shaping the form of a judiciary which serves an open and democratic society; appreciating that judicial competence and how judges manage their judicial power and independence are major aspects of enhancing access to justice and judicial accountability. Enforcing and embracing the principles and values of a fundamentally new legal order is also a critical attitudinal change that will have substantive implications for the judicial interpretation of the law and the creation of a new constitutional jurisprudence. These reforms are all no doubt necessary considerations for judicial transformation. Courts must therefore function efficiently so that judges can dispense justice to all, most competently. Fundamental to this principle is that when appointing judges consideration must be given to the need for the judiciary to reflect *broadly* the racial and gender composition of South Africa.
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> In a society such as ours, where patriarchy is so deeply entrenched, affecting adversely the everyday lives of so many women, including women in the law, the strategic value of women's participation on the Bench and positions of power and authority should not be underestimated. Their development management style, the influence of the unique perspectives they bring to the adjudicative task and even the mere symbolism of their presence there could bring enormous returns for the transformation process itself and respect for women in society at large. The need for women both in the judiciary as a whole and in leadership positions in particular cannot be exaggerated. Although, we have come a long way, we must agree that we have just scratched the surface. We must step up our efforts. Some things must change."[680]

The considerations in different countries are, to put it simply, different. We need to have our own indigenous system suited to our environment and our own requirements.

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[679] Appointing Australian Judges: A New Model by Simon Evans and John Williams, [2008] Sydney Law Review Volume 30 page 295. See http://sydney.edu.au/law/slr/slr30_2/Evans.pdf

[680] http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf

521. In a Position Paper of 11th December, 2011 on the Appointment of Judges, the Law Society of Botswana emphasized that different legal systems require different responses in the appointment of judges. It was said:

> "Throughout the region, the relevance of judicial independence to the rule of law, democracy and the protection and promotion of human rights is undisputed. This acknowledgment notwithstanding, judicial independence continues to face threats that compromise not only individual judges but more so the institutions vested with the responsibility of dispensing justice. To that end, judicial independence remains one of the cornerstones of democracy and constitutionalism the world over, remaining the central goal of most legal systems. It has been noted that the independence of the judiciary necessitates that there should be freedom from influence or control from the executive and legislative branches of the Government.
> To achieve this important goal, systems of appointment of judicial officers are seen as crucial to ensuring that the independence of the judiciary is achieved. Whilst there is general consensus on the importance of judicial independence, different legal systems have utilized various methods of appointing occupants of judicial office. These include; a) appointment by political institutions; b) appointment by the judiciary itself; c) appointment by a judicial council (which may include non-judge members) and sometimes d) selection through an electoral system. This diversity at the very least indicates that there exists no general consensus on the best approach to guarantee judicial independence. That notwithstanding, the mechanisms for the appointment of judges remain crucial in maintaining judicial independence and public confidence in the judiciary."[681]

522. It was pointed out by the learned Attorney-General that at all times since Independence, the Law Minister has been a part of the process in the appointment of judges. In fact it is through the Law Minister that important inputs are placed before the Chief Justice of India particularly with regard to matters that the Chief Justice of India may not be aware of, such as the antecedents and personal traits of the person being considered for appointment as a judge. There is, therefore, no reason to now exclude the Law Minister from this process.

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[681] http://www.lawsociety.org.bw/news/Position%20Paper%20on%20Appointment%20of%20Judges%20Final%2014%20june%202012%20'Final'.pdf

523. There is a distinction, as mentioned above, between the Law Minister providing inputs to the Chief Justice of India and the Law Minister having a say in the final decision regarding the appointment of a judge of a High Court or the Supreme Court. While the former certainly cannot be objected to and in fact would be necessary, it is the participation in the decision-taking process that is objectionable. In other words, the Law Minister might be a part of the decision-making process (as the position was prior to the 99th Constitution Amendment Act) but ought not to be a part of the decision-taking process. This distinction is quite crucial. The voting participation of the Law Minister in the decision-taking process goes against the grain of the debates in the Constituent Assembly and clearly amounts to an alteration of the basic structure of the Constitution.

524. It was faintly contended by Mr. Nariman that having only the Law Minister of the Government of India as a member of the NJAC and not having his/her counterpart from the State Government as a member of the NJAC may have an impact on federalism in our Constitution. Apart from mentioning it, no serious argument was advanced in this regard, perhaps because the principal objection is to the representation of the Government of India in the NJAC. In view of the fact that no detailed submissions were made in this regard, I would not like to express any opinion on this contention.

525. The sum and substance of this discussion is that the struggle for the

independence of the judiciary has always been pivoted around the exclusion of the executive in decision-taking, but the inclusion of the Law Minister in the NJAC is counter-productive, historically counter-majoritarian and goes against the grain of various views expressed in various committees – more so since the Law Minister can exercise a veto in the decision-taking body; the presence of the Law Minister in the NJAC is totally unnecessary and ill-advised; the presence of the Law Minister in the NJAC casts a doubt on the principle of Cabinet responsibility.

(e) The NJAC and the impact on mandatory consultation

526. Article 124(2) of the Constitution as originally framed made it mandatory for the President to consult the Chief Justice of India in the appointment of judges. The rationale behind this has already been discussed. The 99th Constitution Amendment Act completely does away with the mandatory consultation. The President is not expected to consult anybody in the appointment process – he/she is expected to act only on the recommendation of the NJAC. The authority that the President had to turn down a recommendation made by the collegium, if it was not unanimous, is now taken away from the President who is obliged to accept a recommendation from the NJAC even if it is not unanimous. This is a considerable whittling down of the authority of the President and a drastic change in the appointment process and in a sense reduces the President (as

an individual) to a rubber stamp.[682] Similarly, as mentioned above the Chief Justice of India is reduced to just another number in the NJAC.

527. Mandatory consultation between the President and the Chief Justice of India was well thought out by the Drafting Committee and the Constituent Assembly but has now been made farcical by the 99th Constitution Amendment Act, for the reasons mentioned above. Article 124(2) of the Constitution (prior to its amendment) placed the President and the Chief Justice of India on an equal pedestal. It is this that made the consultation between these two constitutional authorities meaningful and made one constitutional authority act as a check on the other. This was the 'partnership approach' that the Constituent Assembly had in mind and this was given flesh and blood through, what Dr. Rajeev Dhavan referred to as 'institutional participation' in the ***Second Judges case***. The importance of the ***Second Judges case*** lies not so much in the shared responsibility but the 'institutional participation' of the judiciary in the appointment process integrated with the participation of the President. This is now missing.

528. What is the importance of the mandatory consultation? There are two crucial factors to be carefully considered before a person is appointed as a judge of the Supreme Court or a High Court. These are: (1) The professional skills, judicial potential, suitability and temperament of a person to be a good judge, and (2) The personal strengths, weaknesses, habits and traits of that

[682] This may be contrasted with the direct exchange of views between the President and the Chief Justice of India referred to earlier.

person. As far as the professional skills, judicial potential, suitability and temperament of a person being a good judge is concerned, the most appropriate person to make that assessment would be the Chief Justice of India (in consultation with the other judges) and not somebody from outside the legal fraternity. On the other hand, as far as the personal strengths, weaknesses, habits and traits of a person are concerned, appropriate inputs can come only from the executive, since the Chief Justice of India and other judges may not be aware of them. It is for this reason that the Constituent Assembly made it mandatory for consultation between the Chief Justice of India (as the head of the Judiciary) having vital inputs on the potential of a person being a good judge and the President (as the Head of State acting through the Council of Ministers with the Prime Minister as the head of the Executive) being the best judge to assess the personal traits of a person being considered for appointment as a judge. In other words, the Chief Justice of India is the 'expert' with regard to potential while the executive is the 'expert' with regard to the antecedents and personal traits. Since these two facets of the personality of a would-be judge are undoubtedly distinct, there cannot be a difference of opinion between the judiciary and the executive in this regard since they both express an opinion on different facets of a person's life. The Chief Justice of India cannot comment upon the 'expert opinion' of the executive nor can the executive comment upon the 'expert opinion' of the Chief Justice of India.

529. It is for the Chief Justice of India as the head of the judiciary to manage the justice delivery system and it is for him/her to take the final call whether the antecedents or personal traits of a person will or will not interfere in the discharge of functions as a judge or will, in any manner, impact on the potential of becoming a good judge. As stated by Jack Straw, what is important is that it is necessary to get it right the first time and every time. There can be a situation where the personal traits of a person may be such as to disqualify that person from being appointed as a judge and there can be a situation where the personal traits, though objected to, would not have any impact whatsoever on the potential of that person becoming a good judge. For example, in the recent past, there has been considerable debate and discussion, generally but not relating to the judiciary, with regard to issues of sexual orientation. It is possible that the executive might have an objection to the sexual orientation of a person being considered for appointment as a judge but the Chief Justice of India may be of the opinion that that would have no impact on his/her ability to effectively discharge judicial functions or the potential of that person to be a good judge.[683] In situations such as this, it is the opinion of the Chief Justice of India that should have greater weight since, as mentioned earlier, it is for the Chief Justice of India to efficiently and effectively manage the justice delivery system and, therefore, the last word should be with the Chief Justice of India,

[683] Australia and South Africa have had a gay judge on the Bench. The present political executive in India would perhaps not permit the appointment of a gay person to the Bench.

unanimously expressed.

530. The 99th Constitution Amendment Act and the NJAC Act not only reduce the Chief Justice of India to a number in the NJAC but also convert the mandatory consultation between the President and the Chief Justice of India to a dumb charade with the NJAC acting as an intermediary. On earlier occasions, Parliament enhanced its power through constitutional amendments, which were struck down, inter alia, in ***Indira Nehru Gandhi*** and ***Minerva Mills***.[684] The 99th Constitution Amendment Act unconstitutionally minimizes the role of the Chief Justice of India and the judiciary to a vanishing point in the appointment of judges. It also considerably downsizes the role of the President. This effaces the basic structure of the independence of the judiciary by sufficiently altering the process of appointment of judges to the Supreme Court and the High Court, or at least alters it unconstitutionally thereby striking at the very basis of the independence of the judiciary.

531. The entire issue may be looked at in another light: Why did the Constituent Assembly make it mandatory for the President to consult the Chief Justice of India for the appointment of judges of the Supreme Court or the High Court when equally important, if not more important constitutional

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[684] In I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1 this Court observed in paragraph 138 of the Report: "The relevance of *Indira Gandhi case*, *Minerva Mills case* and *Waman Rao case* [(1981) 2 SCC 362] lies in the fact that every improper enhancement of its own power by Parliament, be it clause (4) of Article 329-A or clauses (4) and (5) of Article 368 or Section 4 of the 42nd Amendment has been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like judicial review. They made directive principles en bloc a touchstone for obliteration of all the fundamental rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms."

authorities could be appointed by the President without consulting anybody and in his/her 'unfettered discretion'? The reason for the 'special' treatment in the case of appointments to the judiciary is because the Constituent Assembly appreciated and acknowledged and, therefore, accepted the necessity of preserving and protecting the independence of the judiciary, a significant pillar of parliamentary democracy. It also acknowledged that the most appropriate person to guide and advice the President in the appointment of judges would be none other than the Chief Justice of India. It was known to the Constituent Assembly that the rights of the people, including their fundamental rights, need protection against arbitrary executive power and excessive legislative action and unless the judiciary steps in and grants that protection, such arbitrary power or excessive action can be misused and abused. This had happened in pre Independent India and has happened in our recent history. The 99th Constitution Amendment Act and the NJAC Act positively indicate (unconstitutionally) that now the Chief Justice of India and the other judges are not necessarily the best persons to advise the President on the appointment of judges.

532. Underscoring the importance of the appointment of independent judges (to Americans, and this would equally apply to Indians) it has been said that:

> "Judicial appointments are important because judges matter, not just to academics, politicians, and practitioners, but to all Americans. Judges play an increasingly significant role in everyday life decisions. It follows that the process by which they are selected matters. It likewise follows that

> because of the perceived importance of appointing judges, the appointments process breeds contention."[685]

533. Without an independent judiciary, not only 'everyday life decisions' are affected but a dominant executive can ensure that the statutory rights would have no meaning and the fundamental rights of the people of the country can be easily trampled upon. Highlighting the impact of the judiciary (generally) on the Rule of Law and particularly on the rights and interests of individuals, Chief Justice Mason of Australia had this to say:

> "Another factor relevant to the mode of selection of judges is the judiciary's position as an important branch or institution of government. The judges exercise public power in a way that has substantial impact upon the rights and interests of individuals and upon the making of important decisions by government, government agencies and other organisations."[686]

534. The Constituent Assembly was well aware of the misuse and abuse of power by the executive, having fought for our freedom and knew and understood the value of an independent judiciary. It is for this reason that the Constituent Assembly gave prime importance to the independence of the judiciary and perhaps spent more time debating it than any other topic.

535. In this regard, it is worth recalling the submission of Mr. Palkhivala in ***Kesavananda Bharati*** while laying the basis for the 'width of power' test (later adopted in ***M. Nagaraj***) that:

> "…the test of the true width of a power is not how probable it is that it may be exercised but what can possibly be done under it; that the abuse or misuse of power is entirely irrelevant; that the question of the extent of the power cannot be mixed up with the question of its exercise and that when the real question is as to the width of the power, expectation that it will

[685] Carly Van Orman, *Introduction to the Symposium: The Judicial Process Appointments Process*, 10 Wm. & Mary Bill Rts. J. 1 (2001), http://scholarship.law.wm.edu/wmborj/vol10/iss1/2

[686] 'The Appointment and Removal of Judges' by Sir Anthony Mason AC KBE, formerly Chief Justice of Australia http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm

> never be used is as wholly irrelevant as an imminent danger of its use. The court does not decide what is the best and what is the worst. It merely decides what can possibly be done under a power if the words conferring it are so construed as to have an unbounded and limitless width, as claimed on behalf of the respondents."[687]

536. Now, consider this - given the width of the power available under the 99th Constitution Amendment Act if committed judges are appointed (as was propagated at one point of time and it can get actualized after the 99th Constitution Amendment Act) then no one can expect impartial justice as commonly understood from a 'committed' Supreme Court or a High Court. The Constituent Assembly wished to completely avoid this and that is why considerable importance was given to the process of appointing judges and the independence of the judiciary. 'Common to all forms of judicial function is independent, impartial and neutral adjudication, though there is a question as to the possibility of achieving completely neutral adjudication.'[688] The 99th Constitution Amendment Act and the NJAC Act lead to the clear possibility of a committed judiciary being put in place. If this does not violate the basic structure of the Constitution, what does?

537. The sum and substance of this discussion is that mandatory consultation between the President and the Chief Justice of India postulated in the Constitution is by-passed – bringing about a huge alteration in the process of appointment of judges; the 99th Constitution Amendment Act and the NJAC Act have reduced the consultation process to a farce – a

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[687] Paragraph 531

[688] 'The Appointment and Removal of Judges' by Sir Anthony Mason AC KBE, formerly Chief Justice of Australia http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm

meaningful participatory consultative process no longer exists; the shared responsibility between the President and the Chief Justice of India in the appointment of judges is passed on to a body well beyond the contemplation of the Constituent Assembly; the possibility of having committed judges and the consequences of having a committed judiciary, a judiciary that might not be independent is unimaginable.

(f) The NJAC and the appointment of High Court judges

538. As far as the appointment of a judge of a High Court is concerned, the 99th Constitution Amendment Act and the NJAC Act have made two extremely significant changes in the process of appointment. Firstly, the mandatory requirement for consultation with the Chief Justice of the High Court has been completely dispensed with. Article 217(1) of the Constitution as it was originally enacted made it mandatory for the President to consult the Governor of the State and the Chief Justice of the High Court in the appointment of a judge of a High Court. The Chief Justice has now been left out in the cold. Secondly, the constitutional obligation and constitutional convention that has developed over the last several decades is that a recommendation for the appointment of a judge of the High Court originates from the Chief Justice of the High Court. This has now been given a go-bye by the 99th Constitution Amendment Act and the NJAC Act. The entire initiation of the appointment process has now been overhauled.

539. In terms of Section 6(2) of the NJAC Act, the recommendation for the

appointment of a judge of a High Court cannot originate from the Chief Justice of the High Court but the NJAC will seek a nomination for that purpose from the Chief Justice of the High Court. In other words, the initiative for the appointment of a judge of the High Court is wrested from the Chief Justice of the High Court by the NJAC. There is a qualitative difference between the Chief Justice of a High Court nominating a person for appointment as a judge of a High Court on the initiative of the NJAC (Section 6(2) of the NJAC Act) and the Chief Justice of a High Court recommending a person for appointment as a judge of a High Court (Article 217(1) of the Constitution). With such a major departure from the constitutional obligation and the constitutional convention established over the last several decades, the dispensation might encourage canvassing support for a nomination – a somewhat similar occurrence was looked down upon by the LCI in its 14th Report.

540. However, what is more disturbing and objectionable is that the consultation process with the Chief Justice of the High Court after a nomination is made by him/her of a person for appointment as a judge of that High Court has been done away with. The process of consultation is an integrated and participatory process but by virtue of the 99th Constitution Amendment Act and the NJAC Act only a nomination is sought from the Chief Justice of a High Court by the NJAC. Thereafter, the Chief Justice has no role to play. This is clear from Section 6(7) of the NJAC Act which

mandates the NJAC to elicit in writing the views of the Governor and the Chief Minister of the State before recommending a person for appointment as a judge of the High Court, but not the views of the Chief Justice, who is reduced to a mere nominating officer, whose assigned task is over as soon as the nomination is made.

541. The combined effect of the 99th Constitution Amendment Act and Section 6 of the NJAC Act is that the entire control over the appointment of a judge of a High Court is taken over by the NJAC and the paradigm is completely altered with the Chief Justice of a High Court downgraded from a mandatory consultant, and the originator of a recommendation for appointment as postulated by Article 217(1) of the Constitution as conventionally understood, to someone who merely makes a nomination and thereafter is not required to be consulted one way or the other with respect to the nomination made. This drastic change in the process of appointment of a judge of a High Court obviously has a very long term impact since it is ultimately from the 'cadre' of High Court judges that most Supreme Court judges would be appointed, if the existing practice is followed. This in turn will obviously have a long term impact on the independence of the judiciary apart from completely altering the process for appointment of a judge of a High Court.

542. The appointment of judges is a very serious matter and it is difficult to understate its importance. Referring to a view expressed by Shimon

Shetreet[689] it is stated by Sarkar Ali Akkas of the University of Rajshahi, Bangladesh that:

> "The appointment of judges is an important aspect of judicial independence which requires that in administering justice judges should be free from all sorts of direct or indirect interference or influences. The principle of the independence of the judiciary seeks to ensure the freedom of judges to administer justice impartially, without any fear or favour. This freedom of judges has a close relationship with judicial appointment because the appointment system has a direct bearing on the impartiality, integrity and independence of judges."[690]

543. Essentially, the 99th Constitution Amendment Act replaces or substitutes the collegium system of appointment of judges by the NJAC. It must be realized that a judicial appointments commission (by whatever name called) is a worldwide reaction to the executive taking over and appointing judges. No system following the Rule of Law would like to retain a system of appointment of judges where the executive plays a major role or has the last word on the subject, hence the occasional clamour for a judicial appointments commission. As the Hamlyn lecture of Jack Straw illustrates, the executive desires greater control in the appointment of judges but the judiciary eventually has the upper hand, as it should – but not so with the NJAC.

544. The decision of this Court in ***Kumar Padma Prasad v. Union of India***[691] is an example of how wrong the executive can be in the matter of appointment of judges. In that case, a judicial officer was recommended for appointment as a judge of the Gauhati High Court at the instance of the

[689] Shimon Shetreet, *Judges on Trial* (North-Holland Publishing Company, Amsterdam, (1976), p 46.
[690] Akkas, Sarkar Ali (2004) "Appointment of Judges: A Key Issue of Judicial Independence," *Bond Law Review*: Vol. 16: Iss. 2, Article 8. Available at: http://epublications.bond.edu.au/blr/vol16/iss2/8
[691] (1992) 2 SCC 428

Chief Minister of Mizoram. The recommendation was agreed to by the Chief Justice of India and the warrant of appointment of the recommended person was issued by the President but it was subsequently not given effect to since the person was found not qualified to be appointed as a judge of the High Court. Recently, the Canadian Supreme Court answered a reference made by the Governor General in Council as a result of which the appointment and swearing in of a judge of the Supreme Court was declared void *ab initio* since he did not possess the eligibility requirement.[692] Instances of this nature, fortunately few and far between have shaken public confidence in a system of appointment of judges where primacy is with the executive, hence the desire to shift to an efficacious alternative. While there might be a need for a more efficient or better system of appointment of judges, the NJAC is not the stairway to Heaven, particularly in view of the various gaps in its functioning, the NJAC system downgrading the President and the Chief Justice of India and incorporating a host of other features that severely impact on the appointment of judges and thereby on the independence of the judiciary and thereby on the basic structure of the Constitution.

545. It was submitted by the learned Attorney-General that there is a disenchantment with the collegium system of appointment of judges and that is why it needs to be replaced or substituted and that is precisely what the 99th Constitution Amendment Act has achieved. The learned Attorney-General referred to the NJAC as the third chapter in the

[692] Reference Re Supreme Court Act, sections 5 and 6, [2014] 1 SCR 433

appointment of judges - the first chapter being one in which the executive had the 'ultimate power' in the appointment process and the second chapter being one in which the Executive and the Judiciary have a shared responsibility with the judiciary having institutional participation. This may be so, but through the 99th Constitution Amendment Act the NJAC takes away the responsibility not only of the executive but also the shared responsibility of the judiciary and the executive, completely decapitating the appointment system given to us by the Constituent Assembly – a system that ensures the independence of the judiciary.

546. Working within the parameters suggested by the learned Attorney-General, namely, the presumption of constitutionality of the 99th Constitution Amendment Act, that the basis of the judgment in the ***Second Judges case*** has been removed, the wisdom of Parliament and the needs of the people cannot be questioned and that this Court must recognize that society and its requirements have changed with the passage of time, it is not possible to uphold the constitutional validity of the 99th Constitution Amendment Act. The recipe drastically alters the process of appointment of judges of the Supreme Court and the High Courts by taking away its essential ingredients leading to a constitutional challenge that must be accepted. 547. Taking an overall and composite view of the 99th Constitution Amendment Act and the NJAC Act, rather than a piecemeal discussion or a dissection of each provision, there can be little doubt that

Article 124A of the Constitution (as amended) is unconstitutional. Article 124A of the Constitution having been declared unconstitutional, there is nothing of substance left in Article 124B and Article 124C of the Constitution and the other provisions of the 99th Constitution Amendment Act, which are not severable and therefore these provisions must be and are declared unconstitutional being in violation of and altering the basic structure of the Constitution.

548. The sum and substance of this discussion is that the process of initiating a recommendation for the appointment of a judge, generally accepted since Independence, has been radically changed, with well entrenched constitutional conventions being given short shrift; the Chief Justice of the High Court has been reduced to the role of a nominating officer, whose opinion is taken only for nomination purposes but not taken as a consultant in so vital a matter as the appointment of a judge; the constitutional importance given to the Chief Justice of a High Court has been completely whittled down virtually to a vanishing point.

Convenor of the NJAC

549. There are some peripheral issues that need to be discussed. The involvement of the executive in the NJAC does not stop with the Law Minister being one of its

members. The Secretary to the Government of India in the Department of Justice is the convenor of the NJAC in terms of Section 8(3) of the NJAC Act. The duties and responsibilities of the convenor have not been delineated in the NJAC Act and, as mentioned above, the rules and regulations under the Act have not been framed. It is therefore difficult to appreciate the functions that the convenor is expected to perform.

550. That apart, the Secretary is an officer of the government and is not answerable to the NJAC. The Secretary is paid a salary and allowances from the government coffers. This is quite unlike officers of the High Courts or the Supreme Court who are directly answerable to their respective Chief Justice. Moreover, their salary and allowances are charged upon the Consolidated Fund of India. The 'independence' of these officers is maintained while that of the Secretary to the Government of India in the Department of Justice is not. Moreover, the Secretary holds a transferable position and can be changed at the whims and fancies of the executive, depriving the NJAC of continuity and, in a sense, leaving it high and dry whenever it pleases the executive. This is clearly objectionable. However, to be fair to the learned Attorney-General, it was submitted that if necessary a Registrar in the Supreme Court may be appointed as the convenor, but with respect that is not at all an answer to the issue raised.

Transparency

551. In the context of confidentiality requirements, the submission of the learned Attorney-General was that the functioning of the NJAC would be completely transparent. Justifying the need for transparency it was submitted that so far the process of appointment of judges in the collegium system has been extremely secret in the sense that no one outside the collegium or the Department of Justice is aware of the recommendations made by the Chief Justice of India for appointment of a judge of the Supreme Court or the High Courts. Reference was made to ***Renu v. District Judge***[693] to contend that in the matter of appointment in all judicial institutions 'complete darkness in the light house has to be removed.'[694]

552. In addition to the issue of transparency a submission was made that in the matter of appointment of judges, civil society has the right to know who is being considered for appointment. In this regard, it was held in ***Indian Express Newspapers v. Union of India***[695] that the people have a right to know. Reliance was placed on ***Attorney General v. Times Newspapers Ltd***.[696] where the right to know was recognized as a fundamental principle of the freedom of expression and the freedom of discussion.

553. In ***State of U.P. v. Raj Narain***[697] the right to know was recognized as having been derived from the concept of freedom of speech.

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[693] (2014) 14 SCC 50
[694] Paragraph 4
[695] (1985) 1 SCC 641
[696] 1973 3 All ER 54
[697] (1975) 4 SCC 428

554. Finally, in ***Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd***.[698] it was held that the right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution.

555. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney-General that the proceedings of the NJAC will be completely transparent and any one can have access to information that is available with the NJAC. This is a rather sweeping generalization which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a judge of the High Court or in the first instance as a judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.

556. It is possible to argue that information voluntarily supplied by a person who is recommended for appointment as a judge might not have a right to

[698] (1988) 4 SCC 592

privacy, but at the same time, since the information is supplied in confidence, it is possible to argue that it ought not to be disclosed to third party unconcerned persons. Also, if the recommendation is not accepted by the President, does the recommended person have a right to non-disclosure of the adverse information supplied by the President? These are difficult questions to which adequate thought has not been given and merely on the basis of a right to know, the reputation of a person cannot be whitewashed in a dhobi-ghat.

Doctrine of Revival

557. The learned Solicitor-General submitted that when a law is amended and the amendment is declared unconstitutional, the pre-amendment law does not revive. Therefore, even if the 99th Constitution Amendment Act is declared as altering the basic structure of the Constitution, Article 124(2) of the Constitution as it existed prior to the 99th Constitution Amendment Act will not automatically revive and the collegium system will not resurface.

558. An interesting discussion is to be found in this regard in ***West U.P. Sugar Mills Assn. v. State of U.P.***[699] This Court referred to ***B.N. Tewari v. Union of India***[700] and ***Firm A.T.B. Mehtab Majid & Co.*** **v.** ***State of Madras***[701] in both of which it was held that if a statutory rule substitutes a rule and the new rule is struck down or declared invalid, the substituted or old rule does not revive since it ceased to exist on its substitution. The same

[699] (2002) 2 SCC 645
[700] AIR 1965 SC 1430 (Five Judges Bench)
[701] AIR 1963 SC 928 (Five Judges Bench)

rationale was applied to a notification in ***Indian Express Newspapers (Bom) (P) Ltd.*** **v.** ***Union of India***.[702]

559. However, it was further held that if a subsequent law is held to be void such as in a case where the Legislature had no competence to enact the law, then the earlier or the old law would revive. It was held:

> "It would have been a different case where a subsequent law which modified the earlier law was held to be void. In such a case, the earlier law shall be deemed to have never been modified or repealed and, therefore, continued to be in force. Where it is found that the legislature lacked competence to enact a law, still amends the existing law and subsequently it is found that the legislature or the authority was denuded of the power to amend the existing law, in such a case the old law would revive and continue."[703]

560. In ***State of T.N. v. K. Shyam Sunder***[704] the two extant views on the subject have been noted. In paragraph 56 of the Report, it is pointed out that on the repeal of a statute it is effectively obliterated from the statute books and even if the amending [repealing] statute is declared unconstitutional on the ground of lack of legislative competence in the Legislature, the repealed statute will not revive. This is what was said:

> "In *State of U.P.* v. *Hirendra Pal Singh* this Court held: (SCC p. 314, para 22)
>
> > "*22*. It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. The object of repeal is to obliterate the Act from the statutory books, except for certain purposes as provided under Section 6 of the General Clauses Act, 1897. Repeal is not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly i.e. pro tanto repeal…."
>
> Thus, undoubtedly, submission made by the learned Senior Counsel on behalf of the respondents that once the Act stands repealed and the amending Act is struck down by the Court being invalid and ultra vires/unconstitutional on the ground of legislative incompetence, the repealed Act will automatically revive is preponderous [preposterous] and

[702] (1985) 1 SCC 641
[703] Paragraph 15
[704] (2011) 8 SCC 737

> needs no further consideration. This very Bench in *State of U.P.* v. *Hirendra Pal Singh*, after placing reliance upon a large number of earlier judgments particularly in *Ameer-un-Nissa Begum* v. *Mahboob Begum*, *B.N. Tewari* v. *Union of India*, *India Tobacco Co. Ltd.* v. *CTO*, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, *West U.P. Sugar Mills Assn.* v. *State of U.P.*, *Zile Singh* v. *State of Haryana*, *State of Kerala* v. *Peoples Union for Civil Liberties* and *Firm A.T.B. Mehtab Majid and Co.* reached the same conclusion." (Internal citations omitted)

On the other hand, it is pointed out in paragraph 57 of the Report that if a statute is repealed and the new statute is declared unconstitutional on the ground that it violates the fundamental rights chapter, then the repealed statute revives. It was said:

> "There is another limb of this legal proposition, that is, where the Act is struck down by the Court being invalid, on the ground of arbitrariness in view of the provisions of Article 14 of the Constitution or being violative of fundamental rights enshrined in Part III of the Constitution, such Act can be described as void ab initio meaning thereby unconstitutional, stillborn or having no existence at all. In such a situation, the Act which stood repealed, stands revived automatically. (See *Behram Khurshid Pesikaka* and *Mahendra Lal Jaini*.)" (Internal citations omitted)

There does appear to be a doubt (if not a subtle conflict of views) that needs to be resolved in the sense that if a statute is repealed and obliterated from the statute books, under what circumstances does the obliteration vanish, if at all. However, none of these decisions make any reference to an amendment of the Constitution, and for the present it is not necessary to dive into that controversy. This is for the simple reason that the issue requires considerable debate, of which we did not have the benefit. Justice Khehar has elaborately dealt with this issue in his draft judgment but I would like to leave the question open for debate on an appropriate occasion. 561.But, quite apart from this, if the contention of the learned Solicitor-General is accepted, then

on the facts of this case, the result would be calamitous. The simple reason is that if the 99th Constitution Amendment Act is struck down as altering the basic structure of the Constitution and if Article 124(2) in its original form is not revived then Article 124(2) of the Constitution minus the words deleted (by the 99th Constitution Amendment Act) and minus the words struck down (those inserted by the 99th Constitution Amendment Act) would read as follows:

Article 124(2) as it was originally	Article 124(2) after the 99th Constitution Amendment Act	Article 124(2) after the 99th Constitution Amendment is struck down and the original Article 124(2) is not revived
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:	(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A and shall hold office until he attains the age of sixty-five years:	(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal and shall hold office until he attains the age of sixty-five years:

562. This would give absolute power to the President to appoint a judge to the Supreme Court without consulting the Chief Justice of India (and also to appoint a judge to a High Court). The result of accepting his submission would be to create a tyrant, as James Madison put it in the Federalist Papers No. 47:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

563. This was put to the learned Solicitor-General and it was also put to him that if his submissions are correct, then it would be better for the Union of India to have the 99th Constitution Amendment Act struck down so that absolute power resides in the President making him/her an *Imperium in Imperio* as far as the appointment of judges is concerned. The learned Solicitor-General smiled but obviously had no answer to give. It must, therefore, be held that the constitutional provisions amended by the 99th Constitution Amendment Act spring back to life on the declaration that the 99th Constitution Amendment Act is unconstitutional.

Conclusions

564. Very briefly, Dr. Ambedkar was of the view that the President should have some discretion but not unfettered discretion in the appointment of judges. The ***Second Judges case*** acknowledged that the President has the discretion to turn down a recommendation made by the Chief Justice of India, but only under certain circumstances. This was the fetter on the discretion of the President. However, the 99th Constitution Amendment Act and the NJAC Act have completely taken away the discretion of the President to turn down a recommendation for the appointment of a judge, reducing the constitutional significance of the President.

565. Dr. Ambedkar was of the view that the President should have the discretion to consult judges of the Supreme Court and the High Courts in respect of a recommendation for appointment by the Chief Justice of India. The President was

presented, by ***Second Judges case*** and the ***Third Judges case***, with the result of the consultation exercise carried out by the Chief Justice of India which the Chief Justice of India was mandated to do. It is over and above this that the President was entitled to consult other judges of the Supreme Court or the High Courts. However, the 99th Constitution Amendment Act and the NJAC Act have taken away this freedom of consultation from the President, who has no option but to take into account only the recommendation of the NJAC and not travel beyond that. Once again, the constitutional significance and importance of the President is considerably reduced, if not taken away.

566. Dr. Ambedkar was opposed to the concurrence of the Chief Justice of India (as an individual) in respect of every appointment of a judge. The ***Second Judges case*** made it mandatory for the Chief Justice of India to take the opinion of other judges and also left it open to the Chief Justice of India to consult persons other than judges in this regard. The opinion of the Chief Justice of India ceased to be an individual opinion (as per the 'desire' of Dr. Ambedkar) but became a collective or institutional opinion, there being a great deal of difference between the two. However, the 99th Constitution Amendment Act and the NJAC Act have considerably limited and curtailed

the authority of the Chief Justice of India (both individually as well as institutionally) and the Chief Justice of India is now precluded from taking the opinion of other judges or of any person outside the NJAC. The Chief Justice of India has been reduced to an individual figure from an institutional head.

567. Dr. Ambedkar was not prepared to accept the opinion of the Chief Justice of India (as an individual) as the final word in the appointment of judges. This is because the Chief Justice of India has frailties like all of us. The apprehension of Dr. Ambedkar was allayed by the ***Second Judges case*** and the ***Third Judges case*** which made it mandatory for the Chief Justice of India to express a collective opinion and not an individual opinion. The collective and unanimous opinion (duly reiterated if necessary) would bind the President being the collective and unanimous opinion of persons who were *ex hypothesi* 'well qualified to give proper advice in matters of this sort.' However, the 99th Constitution Amendment Act and the NJAC Act reversed the process well thought out in the ***Second Judges case*** and the ***Third Judges case*** and have taken away the constitutional authority of the Chief Justice of India and placed it on a platter for the NJAC to exploit.

568. Given our constitutional history, the established conventions, the views of various committees over the last seventy years and the views of scores of legal luminaries beginning with Mr. Motilal Setalvad, the throes through which the judiciary has gone through over several decades and the

provisions of our Constitution, I hold that the Article 124A as introduced in the Constitution by the Constitution (Ninety-ninth Amendment) Act, 2014 impinges on the independence of the judiciary and in the matter of appointment of judges (which is a foundational and integral part of the independence of the judiciary) and alters the basic structure of the Constitution. It is accordingly declared unconstitutional. The other provisions of the Constitution (Ninety-ninth Amendment) Act, 2014 cannot stand by themselves and are therefore also declared unconstitutional. Similarly, the National Judicial Appointments Commission Act, 2014 confers arbitrary and unchartered powers on various authorities under the statute and it violates Article 14 of the Constitution and is declared unconstitutional. Even otherwise, the National Judicial Appointments Commission Act, 2014 cannot stand alone in the absence of the Constitution (Ninety-ninth Amendment) Act, 2014.

569. The result of this declaration is that the 'collegium system' postulated by the ***Second Judges case*** and the ***Third Judges case*** gets revived. However, the procedure for appointment of judges as laid down in these decisions read with the (Revised) Memorandum of Procedure definitely needs fine tuning. We had requested learned counsel, on the close of submissions, to give suggestions on the basis that the petitions are dismissed and on the basis that the petitions are allowed. Unfortunately, we received no response, or at best a lukewarm response. Under the circumstances, in my

opinion, we need to have a 'consequence hearing' to assist us in the matter for steps to be taken in the future to streamline the process and procedure of appointment of judges, to make it more responsive to the needs of the people, to make it more transparent and in tune with societal needs, and more particularly, to avoid a fifth judges case! I would, therefore, allow the petitions but list them for a 'consequence hearing' on an appropriate date.

.....……J

New Delhi; **(Madan B. Lokur)**
16th October, 2015

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 13 OF 2015

Supreme Court Advocates-on-Record-Association and another ... Petitioner(s)

Versus

Union of India ... Respondent(s)

WITH

WRIT PETITION (CIVIL) NO. 14 OF 2015

WITH

WRIT PETITION (CIVIL) NO. 18 OF 2015

WITH

WRIT PETITION (CIVIL) NO. 23 OF 2015

WITH

WRIT PETITION (CIVIL) NO. 24 OF 2015

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WRIT PETITION (CIVIL) NO. 70 OF 2015

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WRIT PETITION (CIVIL) NO. 83 OF 2015

WITH

TRANSFER PETITION (CIVIL) NO. 391 OF 2015

WITH

WRIT PETITION (CIVIL) NO. 108 OF 2015

WITH

WRIT PETITION (CIVIL) NO. 124 OF 2015

AND

WRIT PETITION (CIVIL) NO. 209 OF 2015

O R D E R

KURIAN, J.:

I wholly agree with the view taken by my esteemed brother, Chelameswar, J. that there is no situation warranting recusal of Justice Khehar in this case. Now, that we have to pass a detailed and reasoned order as to why a Judge need not recuse from a case, I feel it appropriate also to deal with the

other side of the coin, whether a Judge should state reasons for his recusal in a particular case.

One of the reasons for recusal of a Judge is that litigants/the public might entertain a reasonable apprehension about his impartiality. As Lord Chief Justice Hewart said:

> "It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[705]

And therefore, in order to uphold the credibility of the integrity institution, the Judge recuses from hearing the case.

A Judge of the Supreme Court or the High Court, while assuming Office, takes an oath as prescribed under Schedule III to the Constitution of India, that:

> "… I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."

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705 R v. Sussex Justices, *Ex parte McCarthy,* [1924] 1KB 256, [1923] All ER Rep. 233

Called upon to discharge the duties of the Office without fear or favour, affection or ill-will, it is only desirable, if not proper, that a Judge, for any unavoidable reason like some pecuniary interest, affinity or adversity with the parties in the case, direct or indirect interest in the outcome of the litigation, family directly involved in litigation on the same issue elsewhere, the Judge being aware that he or someone in his immediate family has an interest, financial or otherwise that could have a substantial bearing as a consequence of the decision in the litigation, etc., to recuse himself from the adjudication of a particular matter. No doubt, these examples are not exhaustive.

Guidelines on the ethical conduct of the Judges were formulated in the Chief Justices' Conference held in 1999 known as "Restatement of Judicial Values of Judicial Life". Those principles, as a matter of fact, formed the basis of "The Bangalore Principles of Judicial Conduct, 2002" formulated at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague. It is seen from the Preamble that the Drafting Committee had taken into consideration thirty two such statements all over the world including that of India. On Value 2 "Impartiality", it is resolved as follows:

“Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

The simple question is, whether the adjudication by the Judge concerned, would cause a reasonable doubt in the mind of a reasonably informed litigant and fair-minded public as to his impartiality. Being an institution whose hallmark is transparency, it is only proper that the Judge discharging high and noble duties, at least broadly indicate the reasons for recusing from the case so that the litigants or the well-meaning public may not entertain any misunderstanding that the recusal was for altogether irrelevant reasons like the cases being very old, involving detailed consideration, decision on several questions of law, a situation where the Judge is not happy with the roster, a Judge getting unduly sensitive about the public perception of his image, Judge

wanting not to cause displeasure to anybody, Judge always wanting not to decide any sensitive or controversial issues, etc. Once reasons for recusal are indicated, there will not be any room for attributing any motive for the recusal. To put it differently, it is part of his duty to be accountable to the Constitution by upholding it without fear or favour, affection or ill-will. Therefore, I am of the view that it is the constitutional duty, as reflected in one's oath, to be transparent and accountable, and hence, a Judge is required to indicate reasons for his recusal from a particular case. This would help to curb the tendency for forum shopping.

In **Public Utilities Commission of District of Columbia et al. v. Pollak et al.**[706], the Supreme Court of United States dealt with a question whether in the District of Columbia, the Constitution of the United States precludes a street railway company from receiving and amplifying radio programmes through loudspeakers in its passenger vehicles. Justice Frankfurter was always averse to the practice and he was of the view that it is not proper. His personal philosophy and his stand on the course apparently, were known to the people. Even otherwise, he was convinced of his strong

[706] 343 U.S. 451 (1952)

position on this issue. Therefore, stating so, he recused from participating in the case. To quote his words,

> "The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.
>
> This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it. I am explicit as to the reason for my non-participation in this case because I have for some time been of the view that it is desirable to state why one takes himself out of a case."

According to Justice Mathew in **S. Parthasarathi v. State of A.P.**[707], in case, the right-minded persons entertain a feeling that there is any likelihood of bias on the part of the Judge, he must recuse. Mere possibility of such a feeling is not enough. There must exist circumstances where a reasonable and fair-minded man would think it probably or likely that the Judge would be prejudiced against a litigant. To quote:

> "The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that Justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, H.R. in (Metropolitan Properties Co. (F.G.C.) Ltd. v.

[707] (1974) 3 SCC 459

> Lannon and Others, etc. [(1968) 3 WLR 694 at 707]). We should not, however, be understood to deny that the Court might with greater propriety apply the "reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings."

There may be situations where the mischievous litigants wanting to avoid a Judge may be because he is known to them to be very strong and thus making an attempt for forum shopping by raising baseless submissions on conflict of interest. In the Constitutional Court of South Africa in **The President of the Republic of South Africa etc. v. South African Rugby Football Union etc.**[708], has made two very relevant observations in this regard:

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."
> "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party."

[708] 1999 (4) SA 147.

Ultimately, the question is whether a fair-minded and reasonably informed person, on correct facts, would reasonably entertain a doubt on the impartiality of the Judge. The reasonableness of the apprehension must be assessed in the light of the oath of Office he has taken as a Judge to administer justice without fear or favour, affection or ill-will and his ability to carry out the oath by reason of his training and experience whereby he is in a position to disabuse his mind of any irrelevant personal belief or pre-disposition or unwarranted apprehensions of his image in public or difficulty in deciding a controversial issue particularly when the same is highly sensitive.

These issues have been succinctly discussed by the Constitutional Court in **The President of the Republic of South Africa** (supra), on an application for recusal of four of the Judges in the Constitutional Court. After elaborately considering the factual matrix as well as the legal position, the Court held as follows:-

> "While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply

> because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law". To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself."
>
> (Emphasis supplied)

The above principles are universal in application. Impartiality of a Judge is the *sine qua non* for the integrity institution. Transparency in procedure is one of the major factors constituting the integrity of the office of a Judge in conducting his duties and the functioning of the court. The litigants would always like to know though they may not have a prescribed right to know, as to why a Judge has recused from hearing the case or despite request, has not recused to hear his case. Reasons are required to be indicated broadly. Of course, in case the disclosure of the reasons is likely to affect prejudicially any case or cause or interest of someone else, the Judge is free to state that on account of personal reasons which the Judge does not want

to disclose, he has decided to recuse himself from hearing the case.

.....J.
(KURIAN JOSEPH)

New Delhi;
October 16, 2015.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 13 OF 2015

Supreme Court Advocates-on-Record-
Association and another ...
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WITH
WRIT PETITION (CIVIL) NO. 323 OF 2015
WITH
TRANSFER PETITION (CIVIL) NO. 971 OF 2015
AND
WRIT PETITION (CIVIL) NO. 341 OF 2015

J U D G M E N T

KURIAN, J.:

Entia Non Sunt Multiplicanda Sine Necessitate (Things should not be multiplied without necessity). This is the first thought which came to my mind after reading the judgments authored by my noble brothers Khehar, Chelameswar, Lokur and Goel, JJ., exhaustively dealing with the subject. The entire gamut of the issue has been dealt with from all possible angles after referring extensively to the precedents, academic discourses and judgments of various other countries. Though I cannot, in all humility, claim to match the level of such masterpieces, it is a fact that I too had drafted my judgment. However, in view of the principle enunciated above on unnecessary multiplication, I decided to undo major portion of what I have done, also for the reason that the judgment of this Bench should not be accused of **Bharati** fate (**His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another**[709] has always been criticized on that account).

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709 (1973) 4 SCC 225

Leaving all legal jargons and using a language of the common man, the core issue before us is the validity of the Constitution 99th amendment. It is to be tested on the touchstone of the theory of the basic structure. The amendment has introduced a new constitutional scheme for appointment of Judges to the High Courts and the Supreme Court. During the first phase of the working of the Constitution, the Executive claimed an upper hand in the appointment and the Chief Justice of India or the Chief Justices of the High Courts concerned were only to be 'consulted', the expression often understood in its literal sense. In other words, the decision was taken by the Executive with the participation of the Chief Justice. This process fell for scrutiny in one of the celebrated decisions of this Court in **Samsher Singh v. State of Punjab and another**[710].

In **Samsher Singh** case (supra), a seven-Judge Bench of this Court, in unmistakable terms, held at paragraph 149 as follows:

> **"149.** … The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making

[710] (1974) 2 SCC 831

> consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."
>
> (Emphasis supplied)

This principle, settled by a Bench of seven Judges, should have been taken as binding by the Bench dealing with the First Judges Case which had a coram only of seven. Unfortunately, it held otherwise, though with a majority of four against three. Strangely, the presiding Judge in the First Judges case and author of the majority view, was a member who concurred with the majority in **Samsher Singh** case (supra) and yet there was not even a reference to that judgment in the lead judgment! Had there been a proper advertence to **Samsher Singh** case (supra), probably there would not have been any need for the Second Judges Case.

It appears, the restlessness on the incorrect interpretation of the constitutional structure and position of judiciary in the matter of appointments with the super voice of the Executive, as endorsed in the First Judges Case, called for a serious revisit leading to the Second Judges Case. Paragraph 85 of the Judgment gives adequate reference to the background. To quote:

> **"85.** Regrettably, there are some intractable problems concerned with judicial administration starting from the initial stage of selection of candidates to man the Supreme Court and the High Courts leading to the present malaise. Therefore, it has become inevitable that effective steps have to be taken to improve or retrieve the situation. After taking note of these problems and realising the devastating consequences that may flow, one cannot be a silent spectator or an old inveterate optimist, looking upon the other constitutional functionaries, particularly the executive, in the fond hope of getting invigorative solutions to make the justice delivery system more effective and resilient to meet the contemporary needs of the society, which hopes, as experience shows, have never been successful. Therefore, faced with such a piquant situation, it has become imperative for us to solve these problems within the constitutional fabric by interpreting the various provisions of the Constitution relating to the functioning of the judiciary in the light of the letter and spirit of the Constitution."
>
> (Emphasis supplied)

The nine-Judges Bench in the Second Judges Case overruled the First Judges Case, after a threadbare analysis of the relevant provisions ‘in the light of the letter and spirit of the Constitution’, holding that appointment of Judges to the High Courts and the Supreme Court forms an integral part of the independence of judiciary, that independence of judiciary is part of the basic structure of the Constitution of India, and therefore, the Executive cannot interfere with the primacy of the judiciary in the matter of appointments. Third Judges Case, in 1998, is only an explanatory extension of the working of the principles in the Second Judges Case by institutionalizing the procedure of appointment, introducing the Collegium.

Thus, the structural supremacy of the judiciary in the constitutionally allotted sphere was restored by the Second and Third Judges Cases.

Apparently, on account of certain allegedly undeserving appointments, which in fact affected the image of the judiciary, the politico Executive started a new campaign demanding reconsideration of the procedure of appointment. It was clamoured that the system of Judges appointing Judges is not in the spirit of the Constitution, and hence, the

whole process required a structural alteration, and thus, the Constitution 99th Amendment whereby the selection is left to a third body, the National Judicial Appointments Commission (NJAC). The Parliament also passed the National Judicial Appointments Commission Act, 2014, which is only a creature of Constitution 99th Amendment. The validity of the Act is also under challenge.

'What is the big deal about it?', has been the oft made observation of my esteemed brother Khehar, J., the presiding Judge, in the thirty days of the hearing of the case, which included an unusual two weeks long sitting during the summer vacations with the hearing in three different Courts, viz., Court Nos. 3, 4 and 6. When it is held, and rightly so, that there is no requirement for reconsideration of the Second Judges Case, the fate of the case is sealed; there is no need for any further deal, big or small. Though I generally agree with the analysis and statement of law, in the matter of discussion and summarization of the principles on reconsideration of judgments made by Lokur, J. at paragraph 263, I would like to add one more, as the tenth. Once this Court has addressed an issue on a substantial question of law as to the structure of the Constitution and has laid down

the law, a request for revisit shall not be welcomed unless it is shown that the structural interpretation is palpably erroneous. None before us could blur the graphic picture on the scheme of appointment of Judges and its solid structural base in the Constitution portrayed in the Second Judges Case. This Bench is bound by the ratio that independence of judiciary is part of the basic structure of Constitution and that the appointment of Judges to the High Courts and the Supreme Court is an integral part of the concept of independence of judiciary. And for that simple reason, the Constitution 99th Amendment is bound to be declared unconstitutional and I do so. Thus, I wholly agree with the view taken by Khehar, Lokur and Goel, JJ., that the amendment is unconstitutional and I respectfully disagree with the view taken by Chelameswar, J. in that regard. Since it is being held by the majority that the amendment itself is bad, there is no point in dealing with the validity of the creature of the amendment, viz., the National Judicial Appointments Commission Act, 2014. It does not exist under law. Why then write the horoscope of a stillborn child!

However, I would like to provide one more prod. Professor Philip Bobbit in his famous book ‘Constitutional Fate Theory

of the Constitution', has dealt with a typology of constitutional arguments. To him, there are five archetypes: historical, textual, structural, prudential and doctrinal. To quote from Chapter 1:

> "*Historical argument* is argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution. Such arguments begin with assertions about the controversies, the attitudes, and decisions of the period during which the particular constitutional provision to be construed was proposed and ratified.
>
> The second archetype is *textual argument*, argument that is drawn from a consideration of the present sense of the words of the provision. At times textual argument is confused with historical argument, which requires the consideration of evidence extrinsic to the text. The third type of constitutional argument in *structural argument*. Structural arguments are claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments. The fourth type of constitutional argument is *prudential argument*. Prudential argument is self-conscious to the reviewing institution and need not treat the merits of the particular controversy (which itself may or may not be constitutional), instead advancing particular doctrines according to the practical wisdom of using the courts in a particular way.
>
> Finally, there is *doctrinal argument*, argument that asserts principles derived from precedent or from judicial or academic commentary on precedent."

Professor (Dr.) Upendra Baxi has yet another tool – ‘episodic’, which according to him, is often wrongly used in interpreting the Constitution. To Dr. Baxi, ‘structural’ is the most important argument while interpreting the Constitution. Structural argument is further explained in Chapter 6. To quote a few observations:

> “Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures. They are to be distinguished from textual and historical arguments, which construe a particular constitutional passage and then use that construction in the reasoning of an opinion.”
>
> xxx xxx xxx
>
> “Structural arguments are largely factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts. At the same time, they embody a macroscopic prudentialism drawing not on the peculiar facts of the case but rather arising from general assertions about power and social choice.”
>
> xxx xxx xxx
>
> “Notice that the structural approach, unlike much doctrinalism, is grounded in the actual text of the Constitution. But, unlike textualist arguments, the passages that are significant are not those of express grants of power or particular prohibitions but instead those which, by setting up structures of a certain kind, permit us to draw the

> requirements of the relationships among structures."

Professor Bobbit has also dealt with a sixth approach – ethical, which according to him, is seldom used in constitutional law. In interpreting the Constitution, all the tools are to be appropriately used, and quite often, in combination too. The three constitutional wings, their powers and functions under the Constitution, and their *intra* relationship being the key issues to be analysed in the present case, I am of the view that the 'structural tool' is to be prominently applied for resolving the issues arising in the case. In support, I shall refer to a recent judgment of the U.S. Supreme Court in **State v. Arizona Independent Redistricting Commission**[711], decided on 29.06.2015. It is an interesting case, quite relevant to our discussion. U.S. Constitution Article I, Section 4 ,Clause 1 (Election Clause) reads as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[711] Manu/USSC/0060/2015

Arizona Constitution, Article IV, Part 1, to the extent relevant, reads as follows:

> "Section 1. (1) Senate; house of representatives; reservation of power to people. The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."

Thus, under Section 1, people are involved in direct legislation either by the process known as 'initiative' or 'referendum'. While the initiative allows the electorate to adopt positive legislation, referendum is meant as a negative check. Popularly, the process of initiative is said to correct 'sins of omission' by the Legislature while the referendum corrects 'sins of commission' by the Legislature.

In 2000, Arizona voters adopted Proposition 106, an initiative aimed at the problem of gerrymandering. Proposition 106 amended Arizona's Constitution, removing redistricting authority from the Arizona Legislature and vesting it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). After the 2010 census, as

after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts. The Arizona Legislature challenged the map which the Commission adopted in 2012 for congressional districts arguing that the AIRC and its map violated the "Elections Clause" of the U.S. Constitution.

Justice Ginsburg and four other Justices formed the majority and held that the independent commission is competent to provide for redistricting. To quote the main reasoning:

> “The Framers may not have imagined the modern initiative process in which the people’s legislative powers is coextensive with the state legislature’s authority, but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.”

However, Chief Justice Roberts and three other Justices dissented. Chief Justice Roberts pointed out that the majority position has no basis in the text, structure, or history of the Constitution and it contradicts precedents from both Congress and the Supreme Court. The Constitution contains seventeen provisions referring to the ‘Legislature’ of a State, many of which cannot possibly be read to mean ‘the people’. To quote further:

"The majority largely ignores this evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy. Nowhere does the majority explain how a constitutional provision that vests redistricting authority in "the Legislature" permits a State to wholly exclude "the Legislature" from redistricting. Arizona's Commission might be a "noble endeavor" although it does not seem so "independent" in practice but the "fact that a given law or procedure is efficient, convenient, and useful ... will not save it if it is contrary to the Constitution" *INS v. Chadha*, 462 U.S. 919, 944 (1983)."

xxx xxx xxx

"The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, "the Legislature" is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be exclusive in congressional districting, but neither may it be excluded."

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"The majority today shows greater concern about redistricting practices than about the meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *ante*, at 1. But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law's virtues as a policy innovation cannot redeem its inconsistency with the Constitution."

(Emphasis supplied)

While wholly agreeing with the historic, textual, prudential and doctrinal approaches made by Khehar and Lokur, JJ., my additional stress is on the structural part. The minority in **Arizona** case (supra), to me, is the correct approach to be made in this case.

Separation of powers or say distribution of powers, as brother Lokur, J. terms it, is the tectonic structure of the Constitution of India. The various checks and balances are provided only for maintaining a proper equilibrium amongst the structures and that is the supreme beauty of our Constitution. Under our constitutional scheme, one branch does not interfere impermissibly with the constitutionally assigned powers and functions of another branch. The permissible areas of interference are the checks and balances. But there are certain exclusive areas for each, branch which Khehar, J. has stated as ‘core functions’, and which I would describe as powers central. There shall be no interference on powers central of each branch. What the Constitution is, is only for the court to define; whereas what the constitutional aspirations are for the other branches to detail and demonstrate. As held in **Samsher Singh** case (supra) and the Second and Third Judges Cases,

selection of Judges for appointment in High Courts and the Supreme Court belongs to the powers central of the Judiciary and the permissible checks and balances are provided to other branches lie in the sphere of appointment. If the alignment of tectonic plates on distribution of powers is disturbed, it will quake the Constitution. Once the constitutional structure is shaken, democracy collapses. That is our own painful history of the Emergency. It is the Parliament, in post-Emergency, which corrected the constitutional perversions and restored the supremacy of rule of law which is the cornerstone of our Constitution. As guardian of the Constitution, this Court should vigilantly protect the pristine purity and integrity of the basic structure of the Constitution. Direct participation of the Executive or other non-judicial elements would ultimately lead to structured bargaining in appointments, if not, anything worse. Any attempt by diluting the basic structure to create a committed judiciary, however remote be the possibility, is to be nipped in the bud. According to Justice Roberts, court has no power to gerrymander the Constitution. Contextually, I would say, the Parliament has no power to gerrymander the Constitution. The Constitution 99th amendment impairs the

structural distribution of powers, and hence, it is impermissible.

One word on the consequence. Though elaborate arguments have been addressed that even if the constitutional amendment is struck down, the Collegium does not resurrect, according to me, does not appeal even to common sense. The 99th Amendment sought to 'substitute' a few provisions in the Constitution and 'insert' a few new provisions. Once the process of substitution and insertion by way of a constitutional amendment is itself held to be bad and impermissible, the pre-amended provisions automatically resurface and revive. That alone can be the reasonably inferential conclusion. Legal parlance and common parlance may be different but there cannot be any legal sense of an issue which does not appeal to common sense.

All told, all was and is not well. To that extent, I agree with Chelameswar, J. that the present Collegium system lacks transparency, accountability and objectivity. The trust deficit has affected the credibility of the Collegium system, as sometimes observed by the civic society. Quite often, very serious allegations and many a time not unfounded too, have

been raised that its approach has been highly subjective. Deserving persons have been ignored wholly for subjective reasons, social and other national realities were overlooked, certain appointments were purposely delayed so as either to benefit vested choices or to deny such benefits to the less patronised, selection of patronised or favoured persons were made in blatant violation of the guidelines resulting in unmerited, if not, bad appointments, the dictatorial attitude of the Collegium seriously affecting the self-respect and dignity, if not, independence of Judges, the court, particularly the Supreme Court, often being styled as the Court of the Collegium, the looking forward syndrome affecting impartial assessment, etc., have been some of the other allegations in the air for quite some time. These allegations certainly call for a deep introspection as to whether the institutional trusteeship has kept up the expectations of the framers of the Constitution. Though one would not like to go into a detailed analysis of the reasons, I feel that it is not the trusteeship that failed, but the frailties of the trustees and the collaborators which failed the system. To me, it is a curable situation yet.

There is no healthy system in practice. No doubt, the fault is not wholly of the Collegium. The active silence of the Executive in not preventing such unworthy appointments was actually one of the major problems. The Second and Third Judges Case had provided effective tools in the hands of the Executive to prevent such aberrations. Whether 'Joint venture', as observed by Chelameswar, J., or not, the Executive seldom effectively used those tools.

Therefore, the Collegium system needs to be improved requiring a 'glasnost' and a 'perestroika', and hence the case needs to be heard further in this regard.

.....J.
(KURIAN JOSEPH)

New Delhi;
October 16, 2015.

REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.13 OF 2015

SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION AND ANR. ... PETITIONERS

VERSUS

UNION OF INDIA ... RESPONDENT

WITH

WRIT PETITION (CIVIL) NOS.23 OF 2015, 70 OF 2015, 83 OF 2015, T.P. (C) NO. 391 OF 2015, W.P. (C) NOS. 108 OF 2015, 124 OF 2015, 14 OF 2015, 18 OF 2015, 24 OF 2015, 209 OF 2015, 309 OF 2015, 310 OF 2015 AND 323 OF 2015

J U D G M E N T

ADARSH KUMAR GOEL, J.

Introduction

1. Articles 124, 127, 128, 217, 222, 224 and 231 of the Constitution of India ('the Constitution') deal with the appointment of the judges of the Supreme Court and the High Courts ('the Constitutional courts'), and other allied matters.

The Constitution (Ninety-Ninth Amendment) Act, 2014 ('the Amendment Act') *inter alia* seeks to amend these constitutional provisions. The National Judicial Appointments Commission Act, 2014 ('the NJAC Act'), enacted simultaneously, purports to regulate the procedure of the National Judicial Appointments Commission (NJAC). The present batch of petitions challenge the constitutional validity of the Amendment Act and the NJAC Act. . The Supreme Court Advocates-on-Record Association has filed Writ Petition (Civil) No.13 of 2015, which has been treated as the lead petition.

2. I have perused the erudite opinions of my esteemed brothers. While I respectfully agree with the conclusions arrived at by Khehar J., Lokur J. and Kurian Joseph J., and respectfully disagree with the view of Chelameswar J. I prefer to record my own reasons.

Pre-Amendment Scheme of Appointment and Transfer of Judges

3. The scheme of appointment and transfer of Judges in force prior to the amendment is set out in two memoranda dated 30th June, 1999 issued by the Government of India – first for appointment of Chief Justice of India (CJI) and judges of the Supreme Court and second for appointment and transfer of Chief Justices and the judges of the High Courts.

3.1 Broadly the procedure laid down in the first memorandum is that appointment to the office of the CJI should be of the senior most judge of the Supreme Court considered fit to hold the office. For this purpose, recommendation is sought from the outgoing CJI and if there is doubt about the fitness of the senior most judge, consultation is made with the other judges under Article 124(2). Thereafter, the Law Minister puts up the matter to the Prime Minister (PM) who advises the President. After approval of the President, the appointment is notified. For appointment as judges of the Supreme Court, the CJI initiates the proposal and forwards his recommendation to the Union Minister of Law who puts up the matter to the PM, who in turn advises the President. Opinion of the CJI is formed in consultation with four senior most judges and if successor CJI is not in the said four senior most judges, he is also made part of the collegium. CJI also ascertains the views of the senior most judge in the Supreme Court who hails from the High Court from where a person recommended comes. Opinions in respect of the recommendation are in writing and are transmitted to the Government of India for record. If the views of non-judges are solicited, a memorandum thereof and its substance is conveyed to the Government of India. Once appointment is approved by the President of India, certificate of physical

fitness is obtained and after the warrant of appointment is signed by the President, the appointment is announced and a notification issued in the Gazette of India.

3.2 The procedure laid down in the second memorandum deals with the appointments to the High Courts and transfers. The Chief Justices of High Courts are appointed from outside. *Inter se* seniority in a particular High Court is considered for appointment as Chief Justice from that High Court. Initiation of proposal for appointment of Chief Justice of a High Court is by the CJI. The CJI consults two senior most Judges of the Supreme Court and also ascertains the views of his senior most colleague in the Supreme Court who is conversant with the affairs of the High Court in which the recommendee has been functioning and whose opinion is likely to be significant in adjudging the suitability of the candidate. The views of the Judges are sent along with the proposal of the Union Minister of Law who obtains the views of the concerned State Government and then submits the proposal to the PM who advises the President. As soon as appointment is approved by the President, notification is issued in the Gazette of India. As regards the appointment of a Judge of the High Court, the Chief Justice of the High Court communicates to the Chief Minister his views, after consulting two of his senior most colleagues regarding suitability of the person to be selected.

All consultations must be in writing and these opinions are sent to the Chief Minister, along with the recommendation. If the Chief Minister desires to recommend a name, he has to forward the same to the Chief Justice for his consideration. A copy of the recommendation is also sent to the CJI and the Union Law Minister. The Chief Minister advises the Governor who forwards his recommendation to the Law Minister. The Law Minister considers the recommendation in the light of such other reports (such as I.B. report) as may be available to the Government and then forwards the material to the CJI. CJI consults two senior most Judges and also takes into account the views of the Chief Justice and Judges of the High Court (consulted by the Chief Justice) and those Judges of the Supreme Court who are conversant with the affairs of the candidate. Thereafter the CJI sends the recommendation to the Union Law Minister along with the correspondence with his colleagues. If the Law Minister considers it expedient to refer back the name for opinion of the State Constitutional Authorities, opinion of the CJI must be obtained. The Law Minister then puts up the recommendation to the PM who advises the President. The correspondence between the Chief Justice, the Chief Minister and Governor *inter se* is in writing. As soon as the appointment is approved by the President, physical fitness is ascertained and as soon as warrant of

appointment is signed by the President, notification is issued in the Gazette of India.

3.3 Proposal for transfer is initiated by the CJI. Consent of the Judge concerned is not necessary. The CJI consults four senior most Judges of the Supreme Court and takes into account the views of the Chief Justice of the High Court from which the Judge is to be transferred and Chief Justice of the High Court to which the transfer is to be effected. CJI also takes into account the views of one or more Supreme Court Judges who are in a position to offer his/their views. The views are expressed in writing, and are considered by the CJI and four senior most Judges. The personal facts relating to the Judge and his response to the proposal are invariably taken into account. The proposal is then referred to the Government. The Law Minister submits the recommendation to the PM who advises the President. After the President approves the transfer, a notification is issued in the Official Gazette.

3.4 The above memoranda were issued by the Government of India in the light of unamended Constitutional provisions and the judgment of this Court dated 28th October, 1998 in ***Special Reference No.1 of 1998***[712] ***(Third Judges' case)*** which in substance reiterates the earlier Nine Judge Bench

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(1998) 7 SCC 739

judgment in ***SCAORA vs. Union of India***[713] ***(Second Judges' case).***

3.5 Reference may also be made to the unamended constitutional provisions. Article 124 (2) provides that a Judge of the Supreme Court shall be appointed by the President after consultation with such Judges of the Supreme Court and the High Courts as are deemed necessary. However, the CJI is always to be consulted. Article 217 provides that a Judge of the High Court shall be appointed by the President after consultation with CJI, Governor of the State and in case of a Judge other than the Chief Justice, the Chief Justice of the High Court. The question arose before this Court on several occasions as to the value of the opinion of the CJI in the process of 'consultation'. This Court held that under the scheme of the Constitution a proposal for appointment to the Supreme Court must emanate from the CJI and for appointment to the High Court it should emanate from the Chief Justice of the High Court and the last word on appointment must rest with the CJI[714]. This Court noted that by convention proposals for appointments were always initiated by the judiciary and appointments were made with the concurrence of the CJI. This view was reiterated in ***Third***

[713] (1993) 4 SCC 441

[714] Paras 210, 214, Pandian, J., Paras 361 to 376, Kuldip Singh, J., Para 486, Verma, J., Para 505, Punchhi, J. in Second Judges' case

Judges' case on the basis of which the above memoranda were issued by the Government of India.

Scheme under the Amendment

4. Reference may now be made to the impugned Amendment. It amends Article 124 and provides that such appointments and transfers will now be on the recommendation of the NJAC (Section 2). Requirement of mandatory consultation with the CJI and consultation with such Judges as may be considered necessary has been deleted. Convention of initiation of proposal by Chief Justice for the High Courts and CJI for the Supreme Court and other scheme as reflected in the memoranda earlier mentioned and as laid down in decisions of this Court has been replaced. The amendment inserts a new Article 124A, under which the NJAC is to be constituted. It will comprise the CJI, two senior most judges of Supreme Court next to the CJI, Union Law Minister and two eminent persons to be nominated by the Committee comprising of the PM, the CJI and the Leader of the Opposition in the House of the People/Leader of single largest Opposition Party in the House of the People. The nomination of one of these eminent persons is reserved for persons belonging to the Scheduled Castes, the Scheduled Tribes, OBC, minorities or women. Under the new scheme, for any proposal five out of

six members must concur. If any two members disagree, no proposal can be made.

5. The Amendment Act also provides for the Parliament to enact law to regulate the procedure for appointment of judges of higher courts and to empower the Commission to lay down, by regulations, the procedure for discharge of its functions, the manner of selection of its members and such other matters, as may be considered necessary (Section 3).

6. The NJAC Act provides for the appointment of the senior most judge of the Supreme Court as CJI, if considered fit to hold the office; and for recommendation for appointment as judge of the Supreme Court (Section 5). The Second proviso to Section 5(2) of the NJAC Act states that the Commission shall not recommend a person if two members of the Commission do not agree. Apart from its other functions, the Commission would also recommend appointments of Chief Justice and judges of High Courts (Section 6(1), (3)). Alternatively, the Commission can seek a nomination from the Chief Justice of the High Court for recommending appointment as judge of the High Court(Section 6(2)). For appointment of judges of High Courts, however, the Commission must seek prior consultation with the Chief Justice of the concerned High Court, who in turn has to consult two senior most judges of the said High Court

and such other judges and eminent advocates as may be specified. (Section 6(4)). The Commission is also to seek views of the Governor and Chief Minister of the concerned State. The power of appointment of officers and employees of the Commission is with the Central Government. The Convener of the Commission is the Secretary, Government of India, in the Department of Justice. Central Government is authorised to make rules for carrying out the provisions of the Act(section 11). The Commission is authorised to make regulations consistent with the Act and the Rules. The Rules and the Regulations framed under the Act are required to be placed before the Parliament, which may modify such rules or regulations(sections 12, 13).

7. The statement of objects and reasons of the amendment mentions that this Court had interpreted the word "consultation" as "concurrence" in Articles 124(2) and 217 (2) of the Constitution (S.2). It further states that after review of the constitutional provisions, pronouncements of this Court and consultation with eminent jurists, it was felt that a broad based National Judicial Appointments Commission should be established for making recommendation for appointment of judges of the Supreme Court and the High Courts. The Commission will provide meaningful role to the judiciary, the

executive and eminent persons to present their view points and make the participants accountable while also introducing transparency in the selection process (S.3).

7.1 Though by notification dated 13th April, 2015, the Amendment and the Act have been brought into force, the Commission has not been constituted so far, as two eminent persons have not been so far appointed.

7.2 Key Constitutional unamended provisions and the provisions of the Amendment and the Act are as follows:-

Unamended Provisions	**Provisions of the Amendment**
Article 124 xxxx xxxx xxxx *(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal* ***after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary*** *for the purpose and shall hold office until he attains the age of sixty-five years.* ***Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:*** ***Article 217. Appointment and conditions of the office of a Judge of a High Court -*** *Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal* ***after consultation with the Chief***	*"**124A.** (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:––* *(a) the Chief Justice of India, Chairperson, ex officio;* *(b two other senior Judges of the Supreme Court next to the Chief Justice of India ––Members, ex officio;* *(c) the Union Minister in charge of Law and Justice––Member, ex officio;* *(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People –– Members:* *Provided that one of the eminent person shall be nominated from*

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:*	*amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:* *Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.* *(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.* ***124B.****It shall be the duty of the National Judicial Appointments Commission to—* *(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;* *(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and* *(c) ensure that the person recommended is of ability and integrity.* ***124C.*** *Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.”.*

7.3 The relevant constitutional and statutory provisions are set out separately in an Appendix to this opinion.

Rival Contentions

8. The Amendment Act is challenged as *ultra vires*, *inter alia* for being beyond the competence of the Parliament as it alters and destroys the basic structure of the Constitution, as embodied in the independence of judiciary in the context of appointment of judges of the higher judiciary. The petitioners submit that the power of the Parliament to amend the Constitution under Article 368 is limited and does not extend to altering or destroying the basic structure or basic features of the Constitution. The independence of the judiciary is a constitutional concept, regarded as a basic feature of the Constitution, and includes insulating the judiciary from executive or legislative control, primacy of higher judiciary in the matter of appointment of judges to the High Courts and the Supreme Court, non-amendability of conditions of service of judges of the Supreme Court and the High Court to their disadvantage. The Amendment takes away the primacy of the collective opinion of the CJI and the senior most Supreme Court judges by stalling an appointment unanimously proposed by them if the same is not concurred by two non-judge Commission members [second proviso to Section 5(2) and Section 6(6)]. This endows unchecked veto power to non-judges in appointing judges to higher courts,

compromising the judiciary's independence. The Amendment also dilutes the judiciary's constitutionally-conferred power by granting unbridled power on the Parliament to control, by ordinary law, the manner of selection of a person for appointment to higher judiciary, which also damages the independence of judiciary. This power enables the Parliament to substitute judiciary's primacy with that of the executive. If allowed to stand, the provision could easily be further amended thereby denying any effective role for the senior most judges of the higher judiciary in appointment of judges of the Supreme Court and the High Courts. Thus, the Amendment does not envisage predominant voice for the judges and makes the executive element in appointment of judges dominant which alters and damages the basic structure of the Constitution. It is also contended that the NJAC Act was void as it was passed by the Parliament before the Amendment Act became operative.

9. Thus, the contentions on behalf of the petitioners are:-

(i) Constitution is supreme and powers of all organs are defined and controlled thereunder;

(ii) Amending power of Parliament is limited by the concept of basic structure as judicially interpreted;

(iii) Final interpreter of the Constitution and the scope of powers thereunder is this Court;

(iv) Independence of judiciary and separation of powers are part of basic structure;

(v) Primacy of judiciary in appointment of judges is crucial part of independence of judiciary and separation of powers and thus part of basic structure;

(vi) Role of executive and legislature in appointment of judges being kept at minimum was also part of basic structure;

(vii) The composition of the Commission in the impugned Amendment severally damages the basic structure of the Constitution by destroying primacy of judiciary in appointment of judges and giving controlling role to the executive and legislature in such appointments;

(viii) The impugned amendment enables stalling of appointment of judges proposed by the judiciary unless candidates suggested by the executive are appointed thereby compromising independence of judiciary;

(ix) The impugned amendment expands the power of amendment by delegating crucial issues of appointment of judges to Parliament which is against the basic structure of the Constitution;

(x) The composition of the Commission will shake confidence of people in Judiciary if Executive or Legislature have dominant voice; and

(xi) The impugned Act is beyond legislative competence of the Parliament.

10. The Joint Secretary, Department of Justice has filed a counter affidavit on behalf of the Union of India (UOI), defending the Amendment and the Act. UOI's case is that independence of judiciary is only post appointment. Appointment is an executive act and the judiciary's independence has no relevance with the executive act of

appointment. UOI submits that judicial independence is to be coupled with checks and balances and that a contextual reading of Articles 124(2) and 217(1) with the Constituent Assembly Debates (CAD) makes it evident that there is no primacy of the CJI in appointment of judges. Consultation with the CJI was only by way of a check on executive, which had the final say in the matter. Further, provision for consultation with other judges does not justify creation of a collegium. UOI's submission refers to impeachment provisions for removal of judges (Article 124(4); Parliament's power to regulate procedure for presentation of an address and investigation and proof of misbehaviour or incapacity of a judge (Article 124(5)) and to determine salary of judges and provisions pertaining to other aspects of judicial functioning conferring power on Parliament to legislate (Article 125). UOI submits that the decisions of this Court in ***Second Judges' case*** and ***Third Judges' case*** laying down primacy of the judiciary in the context of consultative process under Articles 124(1) and 217(1) have no relevance to test the validity of the impugned Ninety Ninth Amendment by which provisions of Articles 124(2) and 217(1) stand amended. However, it is contended that the view taken in the said judgments that the judiciary has primacy in appointment is erroneous, and needs to be revisited. In any case, the UOI contends that the primacy of

judiciary in the matter of appointment of judges of the higher judiciary has no connection with independence of judiciary and is not the basic feature of the Constitution. In several countries, such as Australia, independence of judiciary exists without primacy of the judiciary in appointments of judges to the higher judiciary. UOI submits that the power conferred on Parliament to enact law to regulate the procedure of the NJAC or to modify the regulations framed by the NJAC is valid. The NJAC is accountable to Parliament in framing regulations. The presence of Law Minister as a member of the NJAC ensures accountability to public. The presence of two eminent persons is a check and balance on the functioning of other members. Diversity of members will ensure greater accountability of each member to the other. This will ensure greater public confidence in the functioning of the judiciary. The NJAC will fall under the purview of Right to Information Act, 2005 which will ensure transparency. Even if the Amendment was struck down, original provisions could not be revived as doctrine of revival does not apply to Constitutional Amendments. The issue was raised in ***Property Owners' Association vs. State of Maharashtra***[715] with respect to Article 31C of the Constitution which is pending before a nine-judge Bench. It is also submitted that the writ petition is pre-mature as the new

[715] (1996) 4 SCC 49

system has not been given a chance to operate and no rights have been affected.

11. The contentions on behalf of the respondents can be summed up as follows:-

(a) Power of appointment of judges rests with the executive and role of judiciary is confined to consultation which may or may not be accepted by the executive;

(b) Primacy of judiciary in appointments was recognised by erroneous interpretation of unamended provisions of the Constitution and by way of amendment such interpretation has been corrected and thus there is no violation of basic structure. Alternatively larger Bench be constituted to correct the earlier interpretation;

(c) Primacy of judiciary in appointments was not inalienable and in changed situation, in the light of experiences gained, the primacy could be done away with or modified;

(d) Wisdom of constituent body in making a choice was not open to judicial review;

(e) Taking the Constitution as a whole, value of independence of judiciary could be balanced with other constitutional values of democracy, accountability and checks and balances;

(f) Power of amendment was plenary and could not be questioned unless it results in destruction of a pillar of Constitution;

(g) Even with power being with executive or power of veto being with executive, independence of judiciary could survive so long as there was protection of tenure and service conditions of judges;

(h) Accountability and transparency in functioning of every constitutional organ was part of democracy in which case

exclusive power of appointment of judges with the judiciary was undemocratic;

(i) The impugned amendment retains primacy by having three out of six members, out of which two could stop an undesirable appointment. The executive did not have predominant role as two eminent persons were appointed by a committee having the Prime Minister, the CJI and the Leader of Opposition thereby role of Prime Minister being limited. Law Minister and eminent persons as members ensured giving of relevant feedback and ensuring accountability and transparency.;

(j) The impugned amendment in conferring power on Parliament and the Central Government in procedural matters did not violate independence of judiciary; and

(k) The impugned Act was within legislative competence of Parliament.

12. Shri Fali S. Nariman, learned senior counsel led the arguments on behalf of the petitioners in the lead petition followed by S/Shri Ram Jethmalani, Anil B. Divan, K.N. Bhat, Arvind Datar, Dr. Rajeev Dhawan, learned senior counsel and other counsel appearing either in person or as intervenor or otherwise. They have been opposed by learned Attorney General Shri Mukul Rohtagi, learned Solicitor General Shri Ranjit Kumar and S/Shri K. Parasaran, Soli J. Sorabjee, K.K. Venugopal, Harish N. Salve, T.R. Andhyarujina, Dushyant Dave learned senior counsel and other learned counsel for various States and intervenors or otherwise. I record my gratitude to learned counsel for their painstaking assistance to the Court

with their exceptional ability and skill for deciding important issues arising for consideration. Their contentions will be referred to at appropriate stage to the extent necessary.

13. While generally learned counsel on either side have taken identical stand, Shri Venugopal, appearing for the State of M.P., which is otherwise supporting the amendment, in his alternative submission, filed on 14th July, 2015 by way of additional propositions, *inter alia* submitted as follows:

> ***"3*** *Looking at the scheme of the 99th Amendment and the National Judicial Commission Appointments Act, 2014 (NJAC Act), the scheme evolved provides for the constitution of a 6 member Commission and under Article 124-C, for the procedure to be provided under a law made by the Parliament. The NJAC Act has certain salient features that includes under the second proviso to Section 5(2), a provision in the nature of a* ***'veto'****, as no appointment can be made if two members of the Commission do not agree to that appointment. This provision is challenged by the Petitioners as the 99th Amendment Act does not make any such provision and to provide for a 'veto', as it were, by two out of six members, is stated to be ultra vires the Amendment Act or, in any event, not a matter of procedure.*
>
> *4 This submission appears to be correct for the following reasons:*
>
> a. *The principle of 'primacy' of the judiciary, which is a part of judicial independence, must necessarily be read into the NJAC Act as well. Any Act providing for procedure would be ultra vires the Constitutional provision if it does not satisfy the requirement of primacy. The 'veto' provision, therefore, is clearly antithetical to the concept of*

'primacy' and must be struck down as being ultra vires the amendment.

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6. Irrespective of the nine Judges' Bench judgment, certain concepts in law exist in the matter of the functioning of the judiciary in a democracy. The existence of an independent judiciary is a sine qua non for democracy to flourish. Here, we are concerned with the issue of appointment of judges to the higher judiciary. Whether, the power is executive or not, it cannot be gainsaid that it impinges on the independence of the judiciary in case the executive were to exclusively have the power to appoint the judges. Such a system of appointment could result in brining into existence judges who are subservient to the will of the Government, which would be a major litigant in the Courts. Independence therefore, would stand affected.

7. If the 'veto' is invalid, then the common law principle of majority would apply. The Chief Justice of India and the two other judges have expertise in the matter of selection of judges to the higher judiciary and also have full knowledge of the functioning of the potential candidates. However, the unanimous view of the three judges would not carry the day if opposed by the other three members. In every other case, where all six are in agreement on a candidate, no problem in making the right decision would arise. The real question, therefore, is what would be the position if a deadlock arises when the unanimous decision of the three judges is opposed by the other three members. Needless to state, that if the three judges are not ad idem on a candidate, no 'issue of primacy' would arise and the majority would prevail.

8. It is true that the nine judges case can no more hold the field for the purpose of nullifying the 99th amendment, which, obviously, is inconsistent with the Collegium system evolved by the nine judges judgment. But that does not mean that the principles enunciated by the said

judgment could not be relied upon as being a juristic principle that would be applicable in such cases. In other words, these principles can be said to be relevant for all time to come because of the following reasons :

a. *The power of appointment can be used to affect or subvert the independence of the appointees when functioning as members of the superior judiciary.*

b. *A system of appointment where the executive voice predominates would affect such independence.*

c. *If however, the voice of the Chief Justice of India, representing the judiciary prevails, even in a system where the executive or anyone else has a minor part to play, this will nevertheless not affect the independence and on the other hand would sub-serve independence. In other words, primacy in the matter of appointment has to be with the judiciary.*

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11. These are general principles enunciated by the Supreme Court based on the concept of independence of the judiciary. That concept is all pervasive and whenever that situation arises, the Court would, in the same manner as it did in the ***Second Judges' case*** *, interpret the present Article 124-A. This would mean that the principle of independence underlying the appointment of judges of the higher judiciary would require that the views of the three judges of the Commission, speaking with a single voice would have primacy. This would be the result not because the judgment in the* ***Second Judges' case*** *would bind the Court but because the concept of judicial independence applicable in the case of appointment of judges to the higher judiciary would be applicable wherever and whenever a situation arose where no explicit provision in the Constitution gave primacy to the judicial wing. In such cases, the validity of the*

constitutional provision would be upheld and legitimized exactly on the same basis as the concept was evolved in the ***Second Judges' case.*** *As a result, the 99th amendment to the Constitution, would always be deemed to have been a valid exercise of Constituent power. In the absence of the existence of a 'veto', if the three Judges speak with a single voice, their decision would prevail. The President would then have to issue the warrant of appointment.*

xxxxx xxxxx xxxxx

16. Apart from the above, petitioners have also contended that the term 'eminent person' is too broad and that the appointment of eminent persons who have nothing to do with the law and who are not aware of the working of the judicial system would result in a violation of the principle of judicial independence. 'The rule of purposive interpretation' can be applied to this provision. By application of this rule, the Court can interpret eminent persons to mean only 'persons trained in law' or 'eminent jurists' (see in this regard, P. Vaikunta Shenoy v. P. Hari Sharma (2007) 14 SCC 297 @ Paras 11-13 and VC Shukla v. State (Delhi Amn.) (1980 Supp. SCC 249 @ para 28)"

The Issue

14. There being no dispute that a Constitutional Amendment can be valid only if it is consistent with the basic structure of the Constitution, the core issue for consideration is whether the impugned amendment alters or damages the said basic structure and is void on that ground. According to the petitioners the primacy of judiciary in appointment of judges and absence of interference by the Executive therein is by itself a part of basic feature of the Constitution being integral

part of independence of judiciary and separation of judiciary from the Executive. According to the respondents primacy of judiciary in appointment of judges is not part of independence of judiciary. Even when appointments are made by Executive, independence of judiciary is not affected. Alternatively in the amended scheme, primacy of judiciary is retained and independence of judiciary is strengthened. The amendment promotes transparency and accountability and is a part of needed reform without affecting the basic structure of the Constitution. To determine the question one has to look at the concept of basic feature which controls the amending power of the Parliament. This understanding will lead to the decision whether primacy of judiciary and absence of Executive interference in appointment of judges is part of such basic structure.

Discussion

A. Concept of Basic Features – As Limitation on Power of the Parliament to amend the Constitution

15. Article 368 of the Constitution provides for power to amend the Constitution and procedure therefor. In ***Kesavananda Bharti vs. State of Kerala***[716] ***(Kesavananda Bharti case),*** the scope of amending power was gone into by

[716] 1973 (4) SCC 225

a bench of 13-Judges. In the concluding para signed by 9-Judges it was held that "*Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution*". The conclusion was based on interpretation of the word 'amendment'. It was observed that the word was capable of wide as well as narrow meaning and while wide meaning was to be preferred but consistent with the intention of Constitution makers and the context. It could not be given too wide meaning so as to permit damage to the constitutional values which depict the identity of the Constitution.[717]

15.1 The basic structure or framework was not exhaustively defined but some of the features of the Constitution were held to be the illustrations of the basic structure by the majority of seven Judges – Sikri CJ, Shelat, Grover, Hegde, Mukherjea, Reddy and Khanna, JJ. Illustrations by them include Supremacy of the Constitution, democratic form of Government, secular character of the Constitution, separation of powers between the Judiciary, the Executive and the Legislature, federal character of the Constitution, dignity of the individual secured by basic rights in accordance with Parts III and IV, unity and integrity of the nation.[718]

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[717] (Para 284, Sikri, CJ.) ; (Para 583, Shelat & Grover, JJ.); (Para 651 Hegde & Mukherjea, JJ.); (Para 1162, Reddy, J.) and (Para 1426, Khanna, J.)

[718] Paras 292, 582, 666, 1159, 1426

15.2 It was held that the power of the Parliament to amend the Constitution was limited by the requirement that basic foundation and structure of the Constitution remains the same. Power of amendment was envisaged to meet the challenge of the problems which may arise in the course of socio economic progress of the country but it was never contemplated that in exercise of the power of amendment certain inalienable features of the Constitution will be changed. The court referred to various decisions in different jurisdictions dealing with the scope of amendment of the Constitution. Sikri, CJ. observed that having regard to importance of freedom of the individual and the importance of economic, social and political justice, mentioned in the preamble the word “amendment” could not be read in its widest sense. The Fundamental Rights could not be amended out of existence. Fundamental features of secularism, democracy and freedom of individual should always subsist. The expression “amendment” had a limited meaning. Otherwise a political party with two-third majority could so amend the Constitution as to debar any other party from functioning, establish totalitarianism and enslave the people and thereafter make the Constitution unamendable. Thus, the appeal to democratic principles to justify absolute amending power, if accepted, could damage the very democratic principles. Thus, the amendment meant addition

or change within the broad contours of the preamble of the Constitution. The Parliament could adjust the Fundamental Rights to secure the objectives of the Directive Principles while maintaining freedom and dignity of every citizen. The dignity and freedom of the individual was held to be of supreme importance. The basic features were held to be discernible not only from the preamble but the whole scheme of the Constitution. Shelat & Grover, JJ. observed that the Constitution makers did not desire that the citizens will not enjoy the basic freedoms, equality, freedom of religion etc. so that dignity of an individual is maintained. The economic and social changes were to be made without taking away dignity of the individual. The vital provisions of Part III or Part IV could not be cut out or denuded of their identity. Hegde and Mukherjea, JJ. observed that the power of amendment was conferred on the Parliament. People as such were not associated with the amendment. The Constitution was given by the people to themselves. The voice of the members of the Constituent Assembly was of the voice of the people. Two-third members of the two Houses of Parliament did not necessarily represent even the majority of the people. Thus, the two-third members of the two Houses of Parliament could not speak on behalf of the entire people of the country[719].

[719] Paras 652 and 653

Even best of the Government was not averse to have more and more powers to carry out their plans and programmes which they believe to be in public interest, but freedom once lost could hardly be regained. Every encroachment of freedom sets a pattern for further encroachment. The development was envisaged without destruction of individual freedoms. Reddy, J. observed if any of the essential features was altered, the Constitutional structure could not maintain its identity. There could be no justice, liberty or equality without democracy. There could be no democracy without justice, equality and liberty. The structure of the Constitution was an organic instrument. The core commitment to social revolution lies in Parts III and IV. They are the conscience of the Constitution. They had roots deep in the struggle for independence. They were included with the hope that one day victory of people would bloom in India. They connect India's future, present and past. The demand for Fundamental Rights had its inspiration in Magna Carta, the English Bill of Rights, the French Revolution, the American Bill of Rights incorporated in the US Constitution. Referring to the statement of Dr. Ambedkar, that Article 32 was the soul of the Constitution and the very heart of it, it was observed that such an article could not be abrogated by an amendment. Khanna, J. observed that as a result of amendment, the old Constitution could not be

done away with. Basic structure of framework must be retained. It was not permissible to touch the foundation or to alter the basic institutional pattern. What can be amended is the existing Constitution and what must emerge as a result of amendment is not a new and different Constitution but the existing Constitution. What was contemplated by amendment was varying of the Constitution here and there and not elimination of its basic structure resulting in losing its identity.

15.3 One of the questions considered was validity of Section 3 of the Twenty-Fifth Amendment Act, 1971 adding Article 31-C as follows:-

> *"416.* Section 3 of the twenty-fifth amendment, reads thus:
>
> > *3. After Article 31B of the Constitution, the following article shall be inserted, namely:*
> > *31. C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:*
>
> *"Provided that where such law is made by the legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."*

The highlighted part was held by majority to be unconstitutional, for granting immunity from challenge thereby affecting the basic feature of judicial review[720].

15.4 The scope of amending power was again considered by this Court in the course of challenge to Thirty-Ninth Amendment which debarred any challenge to the election of PM and Speaker of the Lok Sabha in ***Indira Nehru Gandhi vs. Raj Narain[721].*** Chandrachud, J. (later the Chief Justice) observed that it is not that only certain named features of the Constitution are part of its basic structure. The features named by individual judges in ***Kesavananda Bharti case*** were merely illustrations and were not intended to be exhaustive. Having regard to its place in the scheme of the Constitution, its object and purpose and the consequences of

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[720] Para 1535 A. (Khanna, J.) In my opinion, the second part of Article 31-C is liable to be quashed on the following grounds:

(1) It gives a carte blanche to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the Legislature, including a State Legislature, to amend the Constitution.

(2) The Legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368.

The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of the remaining part. I would, therefore, strike down the following words in Article 31-C:

"and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."

[721] (1975) Supp. SCC 1

its denial on the integrity of the Constitution, a feature of the Constitution could be held to be a basic feature[722]. He added that undoubted unamendable basic features are :-

> *"(i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (iv) the Nation shall be governed by a Government of laws not of men".*

39th Amendment debarring challenge to election *inter alia* of PM was struck down as being against the basic features of the Constitution.[723] Article 329A, Clause (4) (added by way of Amendment) provided that election law will not apply to a person holding office of PM and Speaker and election of such persons shall not be deemed to be void under any such law. It was held that the democracy was the part of the basic structure which contemplated free and fair election. Without there being machinery for resolving an election dispute, the elections could not be free and fair which in turn will damage the basic feature of democracy. In absence of any law to deal with validity of election of PM, the basic feature of rule of law

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[722] Para 663 - For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance. But it is needless for the purpose of these appeals to ransack every nook and cranny of the Constitution to discover the bricks of the basic structure. Those that are enumerated in the majority judgments are massive enough to cover the requirements of Shri Shanti Bhushan's challenge.

[723] Khanna and Mathew, JJ held that free and fair election was essential for democracy and was part of basic structure. Chandrachud, J. held that right of equality was part of basic structure which was violated. Ray, CJ held that rule of law was basic structure of the Constitution which was violated.

will be violated. Referring to the writing of Madison in "*The Federalist",* it was observed that all powers of the Government could not be vested in one Department. No Constitution could survive without adherence to checks and balances. "*Just as courts ought not to enter into problems entwined in the "political thicket", Parliament must also respect the preserve of the courts*[724]*."*

15.5. Validity of Forty-Second Amendment was considered by this Court in ***Minerva Mills Ltd. vs. Union of India***[725]***.*** The court considered the validity of Sections 4 and 55 of the 42nd Amendment Act. By Section 4, Article 31C was sought to be amended to provide that a law giving effect to Part IV of the Constitution could not be deemed to be void for being inconsistent with Articles 14, 19 and 31 and could not be challenged on the ground that the said law was not for giving effect to the said Part IV. By Section 55, it was provided that no amendment of the Constitution could be challenged on any ground and that there will be no limitation on the constituent power of Parliament to amend the Constitution. This Court observed that the Constitution had conferred limited amending power on the Parliament which itself was a basic feature of the Constitution. The Parliament could not expand its amending power so as to destroy the said basic feature of the

[724] Para 688
[725] (1980) 3 SCC 625

Constitution. The limited power could not be converted into unlimited one. Clauses 4 and 5 of Article 368 added by Forty-Second Amendment were struck down as violative of basic structure of the Constitution. It was observed that the balance between Part III and Part IV of the Constitution was basic feature of the Constitution[726]. Limited amending power of Parliament was also part of basic structure.[727] It was also held that judicial review to determine whether a law was to give effect to Part IV could not be excluded as judicial review was part of the basic structure.[728] It was also observed that though there is no rigid separation of powers in three departments of the State – the Executive, the Legislature and the Judiciary, there is broad demarcation. Fine balance between the three organs could not be upset as it will destroy the fundamental premise of a democratic government. The judiciary is entrusted with the duty to keep the Executive and the Legislature within the limits of power conferred on them which is also a basic feature of the Constitution.[729]

15.6. In ***L. Chandra Kumar vs. Union of India[730],*** part of Article 323 – A(2)(d) and 323 – B (3)(d) to the extent it excluded the jurisdiction of High Courts in respect of specified

[726] Para 56
[727] Paras 17 and 88
[728] Paras 12, 88
[729] Paras 21, 86 and 87
[730] (1997) 3 SCC 261

matters for which jurisdiction was conferred on Tribunals was struck down as violative of basic structure. Power of judicial review conferred on this Court and the High Courts was held to be integral to constitutional scheme in view of earlier decisions and conferment of power of judicial review on another judicial body could not justify exclusion of jurisdiction of the High Courts.[731]

15.7. In ***I.R. Coelho vs. State of Tamil Nadu[732],*** bench of nine Judges, considered the scope of judicial review of inclusion of a law in Ninth Schedule by a constitutional amendment thereby giving immunity from challenge in view of Article 31B of the Constitution. It was held that every such amendment shall have to be tested on the touchstone of essential features of the Constitution which included those reflected in Articles 14, 19 and 21 and principles underlying them. Such amendments are not immune from the attack on the ground they destroy or damage the basic structure. The Court will apply the *'rights test'* and the *'essence of the rights'* test taking synoptic view of Articles in Part III of the Constitution. It was further observed that the Court has to be guided by the *'impact test'* in determining whether a basic feature was violated. The Court will first determine if there is violation of rights in Part III by impugned Amendment, its

[731] Judicial review by constitutional courts was held to be part of basic structure. (Paras 77, 78)
[732] (2007) 2 SCC 1

impact on the basic structure of the Constitution and the consequence of invalidation of such Amendment[733].

15.8 In ***M. Nagaraj vs. Union of India[734]*** , Eighty-Fifth and allied amendments to the Constitution were called in question on the ground of violation of right of equality as a basic feature of the Constitution. While considering the challenge, it was observed that the Constitution sets out principles for an expanding future. This called for a purposive approach to the interpretation. It was observed that a constitutional provision must not be construed in a narrow sense but in a wide and liberal sense so as to take into account changing conditions and emerging problems and challenges. The content of the rights is to be defined by the Courts. Some of the concepts like federalism, secularism, reasonableness and socialism reasonableness are beyond the words of a particular provision. They give coherence to the Constitution and make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules. To qualify as essential feature, a principle has to be established as part of constitutional law and as such binding on the legislature. Only then, it could be examined whether it was a part of basic feature. Theory of basic feature was based on

[733] Fundamental Rights under Articles 14, 15, 19 and 21 were held to be part of basic structure. (Paras 109 and 147)
[734] (2006) 8 SCC 212

concept of constitutional identity. The personality of the Constitution must remain unchanged. The word 'amendment' postulated that the Constitution survived without loss of identity despite the change. [735]

Conclusion:

15.9 It can safely be held that a constitutional amendment has to pass the test of basic structure. Whether or not the basic structure was violated has to be finally determined by this Court from case to case.

B. Whether Primacy of Judiciary in Appointment of Judges is Part of Basic Structure

16. Whether a feature of the Constitution is basic feature or part of basic structure is to be determined having regard to its place in the scheme of the Constitution and consequence of its denial on the working of the Constitution.

16.1 The judiciary has been assigned the role of determining powers of every Constitutional organ as also the rights of individuals. The disputes may arise between the Government of India and the States, between a citizen and the State or between a citizen and a citizen. Disputes relating to the powers of Union Legislature and the State Legislature or the exercise of the executive power may involve issues of constitutionality or legality. It may involve allegations of

[735] Identity test discussed in M. Nagaraj case (supra) (Para 28)

malafides even against highest constitutional dignitaries. This requires an impartial and independent judiciary. The judiciary is required to be separate from the executive control. Judiciary has to inspire confidence of the people for its impartiality and competence. It has not been disputed by learned Attorney General that independence of judiciary is part of the basic structure. It is also undisputed that judicial review is part of basic structure. The decisions of this Court expressly lay down that independence of judiciary and judicial review are part of basic structure. Broad separation of powers between the three departments of the State is a part of doctrine of checks and balances. It is also a part of democracy. Independence of judiciary is integral to the entire scheme of the Constitution without which neither primacy of the Constitution nor Federal character, Social Democracy nor rights of equality and liberty can be effective.

16.2 The judiciary has apolitical commitment in its functioning. Once independence of judiciary is acknowledged as a basic feature of the Constitution, question is whether power of appointing Judges can be delinked from the concept of independence of judiciary or is integral part of it. Can the independence of judiciary be maintained even if the

appointment of Judges is controlled directly or indirectly by the executive?

16.3 To what extent primacy of judiciary in appointment of judges is part of unamendable basic feature of the Constitution. Since the issue has been gone into in earlier binding precedents, reference to such decisions is apt. As already mentioned, it remains undisputed that power of judicial review, independence of judiciary, broad separation of powers in three departments of the State, federalism and democracy are the basic features of the Constitution. Stand of the respondents is that power of appointment of judges does not have impact on such basic features as independence of judges is envisaged post appointment. By an amendment, process of appointment of judges can be altered to reduce the role of judiciary and to increase the role of Executive and Legislature. Alternatively, it is submitted that no substantial change has taken place in the said roles.

16.4 In ***Second Judge's case***, a Bench of 9-Judges of this Court examined the question of interpretation of unamended constitutional scheme dealing with the appointment of judges of the Constitution case. The issue was referred to the Bench of 9-Judges on account of doubts having arisen as to the correctness of the view expressed in ***S.P. Gupta vs.***

Union of India[736] (First Judges' case), laying down that primacy in the matter of appointment of judges rested with the Central Government[737]. The basis of the said decision was that the word 'consultation' used in Articles 124, 217 etc. implied that the views of the consultee need not be treated as binding as the ultimate power of appointment rested with the Central Government. It was held that the views of the CJI or other Judges who were consulted may be entitled to great weight but the final view in case of difference of opinion could be taken by the Central Government. The word 'consultation' could not be read as 'concurrence'.

16.5 The view taken was doubted in ***Subhash Sharma vs. Union of India[738]***. The question whether opinion of CJI with regard to appointment of Judges was entitled to primacy was referred for consideration of a larger bench, as already mentioned. This Court observed that Constitutional phraseology was required to be read and expounded in the context of Constitutional philosophy of separation of powers and the cherished values of judicial independence. The role of the CJI was required to be recognised as of crucial importance for which the view taken in ***First Judges' case*** required

[736] 1981 Supp. SCC 87, Para 30 (Primacy in appointment of judges is held to be of Central Government by holding that obligation of the President (the Central Government) was only to consult the judiciary which could not be treated as binding)
[737] Para 25, Pandian J. (Second Judges Case) : Reasons which led to reconsideration of First Judges' case
[738] 1991 Supp (1) SCC 574 – Paras 31-34, 42-46

reconsideration by a larger Bench. It was noted that there was an anxiety on the part of the Government of the day to assert choice in selection of Judges and if the power to recommend appointment of Judges was vested in the State Government or the Central Government, the picture was likely to be blurred and process of selection may turn out to be difficult. It was also observed that the judiciary had apolitical commitment and the assurance of non-political complexion of judiciary should not be divorced from the process of appointment. The phrase "consultation" had to be understood consistent with and to promote the constitutional spirit. The constitutional values could not be whittled down by calling the appointment of judges as an executive act. The appointment was rather the result of collective constitutional process. It could not be said that power to appoint solely vested with the executive or that the executive was free to take such decision as it deems fit after consultation with the judiciary. The word "consultation" was used in recognition of the status of high constitutional dignitary and could not be interpreted literally. Moreover, the appointment not recommended by Chief Justice of the State and the CJI would be inappropriate and arbitrary exercise of power. The CJI should have preponderant role. Primacy of CJI will improve the quality of selection. The view of the Chief Justices of States and CJI should be decisive unless the

executive had material indicating that the appointee will be undesirable. The view of the majority in ***First Judges' case*** did not recognise the said pivotal position of the institution of the CJI and correctness of the said opinion required reconsideration. It was noted that the Union Government had often stated before Parliament and outside that as a matter of policy it had not made any appointment without the name being given by the CJI and the executive must be held to the standard by which it professed its actions to be judged. Upon reference to larger Bench, the view taken in ***First Judges case*** was overruled in ***Second Judges' case*** which was reiterated in the ***Third Judges case.*** It held that the term "consultation" in Article 124 should not be literally construed. It was to be construed in the constitutional background of its purpose and to maintain and uphold independence of judiciary. So interpreted, it was held that in the event of conflicting opinions of the constitutional functionaries, the opinion of the judiciary as symbolized by the view of the CJI and formed in the manner indicated, would have primacy.

16.6 Pandian, J. held that the requirement of consultation was not relatable to any other service and only applied to appointment of judges in contrast to other high ranking offices. The consultation with the CJI was condition precedent for appointment and advice given by the judiciary in the process

had sanctity. The executive power of appointment comes into play by virtue of Articles 74 and 163 though it was not specifically provided for in Articles 124 and 217. The State was major litigant. The superior courts were faced with controversies with political flavour and in such a situation if the executive had absolute say in appointment of judges, the independence of judiciary will be damaged. The Law Commission Reports and opinion of jurists suggested radical change in appointment of judges by curbing the executive power[739].

16.7 Kuldip Singh, J. observed that the concept of judicial independence did not only mean the security of tenure to individual judges. There has to be independence of judiciary as an institution so that it could effectively act as an impartial umpire between the Governments and the individuals or between the Governments *inter se.* It would be illogical to say that the judiciary could be independent when power of appointment vested in the Executive. The framers of the Constitution never intended to give this power to the Executive which was the largest litigant before the courts[740]. There was established constitutional convention recognising the primal and binding opinion of CJI in the matter of appointment of judges. All appointments since the commencement of the

[739] Paras 195 and 207
[740] Paras 334, 335

Constitution were made with the concurrence of the CJI. The 14th Report of the Law Commission and discussion in the Parliament on 23rd and 24th November, 1959 were referred to[741]. With regard to the statement of Dr. Ambedkar on 24th May, 1949 before the Constituent Assembly that the CJI could not be given a veto on appointment of judges, it was observed that primacy of the CJI acting in representative as against individual capacity would not be against the objective of the said statement[742].

16.8 Verma, J. observed that the scheme of the Constitution of separation of powers, with the Directive Principles of separation of judiciary from Executive, and role of the judiciary to secure rule of law required that appointment of judges in superior judiciary could not be left to the discretion of the Executive. Independence of judges was required even at the time of their appointment instead of confining it to the provisions for security of tenure and conditions of service. It was necessary to prevent influence of political consideration on account of appointments by the Executive. In choice of a candidate, opinion of CJI should have greatest weight. The role of the Executive in the participatory consultative process was intended to be by way of a check on the exercise of power by

[741] Para 357
[742] Para 392

the CJI. The Executive element was to be the minimum to eliminate political influence[743].

16.9 Accordingly, conclusions were recorded in para 486 to the effect that initiation of proposal for appointment and transfer could be initiated by the judiciary and in case of conflicting opinions, the opinion of the CJI had the primacy. In exceptional cases the appointment could be declined by disclosing the reasons but if the reasons were not accepted by the CJI acting in representative capacity, the appointment was required to be made as a healthy convention. The CJI was to be appointed by seniority. The senior most judge, considered fit to hold the office, was to be the CJI.

16.10 Conclusions in ***Third Judges' case*** in para 44 reiterated this view with only slight modification. On that basis, memoranda of procedure mentioned in earlier part of this opinion were issued. The National Commission to Review the Working of the Constitution (NCRWC) headed by Justice M.N. Venkatachaliah, in its report dated 31st March, 2002, observed that appointment of judges was part of independence of judiciary. It was observed that the Executive taking over the power of appointment and playing a dominant role will be violative, of basic structure of the Constitution, of independence of judiciary[744].

[743] Paras 421, 422, 447 and 450
[744] Paras 9.6 and 9.7

16.11 Contention of the petitioners is that the said decisions conclusively recognise primacy of judiciary in appointment of judges inferred from the scheme of the Constitution and such primacy was part of basic structure.

16.12 It is submitted that if the Executive has primacy, the power of appointment of Judges can be used to affect or subvert the independence of the appointees as members of the Constitutional Courts. This would be against the intention of the Constitution makers. The unamended provision could not be replaced by the new mechanism unless the new mechanism ensured that a role of the Judiciary was not decreased and the role of the Executive was not increased and the change made had no adverse impact on the functioning of the Constitution. If this contention is upheld, the impugned amendment will have to be struck down unless it could be held that the amended provisions also retained the said primacy. If primacy of judiciary is held not to be a part of basic structure of the Constitution or it is held that the same is still retained, the amendment will have to be upheld.

C. Plea of the Respondents for re-visiting earlier binding precedents

17. The correctness of the view taken in the above decisions was sought to be challenged by learned counsel for the respondents. The ground on which reconsideration of the

earlier view is sought is that the interpretation in ***Second and Third Judges cases*** is patently erroneous. Members of the Constituent Assembly never intended that the CJI should have last word on the subject of appointment of Judges. The text which was finally approved and which became part of the Constitution did not provide for concurrence of the CJI as has been laid down by this Court. It is also submitted that the interpretation taken by this Court may have been justified on account of the abuse of powers by the Executive specially during emergency (as noticed in ***Union of India vs. Sankalchand Himatlal Sheth***[745]) and in the Law Commission Reports (particularly 14th and 121st Reports), the same situation no longer continues. More over there is global trend for Judicial Appointment Commissions. Even without primacy of the judiciary in appointment of judges, the judiciary could function independently. Judicial Appointment Commission was suggested even earlier. The eminent jurists had criticized the existing mechanism for appointment of Judges and particularly the working of the collegium system.

17.1 Referring to the scheme of Chapter IV of the Constitution, learned Attorney General submitted that Executive and the Legislature had the role in the working of the judiciary. Salary and Conditions of Service of Judges are fixed by the

[745] 1977 (4) SCC 193 (referred to in Paras 125 to 130 Second Judges' case)

Parliament. The Rules for functioning of the Supreme Court are framed with the approval of the President and are subject to the law made by the Parliament. Parliament could confer supplementary powers on the Supreme Court. Conditions of service of officers and servants of the Supreme Court are subject to law made by the Parliament. The rules framed by the CJI require approval of the President. There was inter play of Executive and Legislature in the functioning of the judiciary. Independence of judges was in respect of their security of tenure and service conditions. Manner of appointment did not affect independence of judiciary. Executive appointing Comptroller General of India or Election Commission did not affect their independence. Power of appointment of judges is the Executive power to be exercised by the President with the advice of the Council of Ministers after consultation with the judiciary. The doctrine of separation of powers or separation of judiciary from Executive does not require that the Executive could have no role in appointment of judges. Primacy of judiciary in appointment of judges ignores the principles of checks and balances. The interpretation placed in the earlier decisions ignores the principles of transparency and accountability. Even without there being manifest error in earlier decisions, having regard to the sensitive nature of the

issue and also the fact that an amendment has now been brought about, the earlier decisions need to be revisited.

17.2 The stand of learned Attorney General and other learned counsel appearing for the respondents was contested by learned counsel for the petitioners. It was submitted that all issues sought to be raised by the respondents were duly considered by the Bench of nine-judges. The Central Government sought opinion of this Court under Article 143. A statement was made by the then learned Attorney General that the ***Second Judges' case*** was not sought to be reconsidered. The view of the nine-Judge Bench was based on earlier binding decisions in ***Shamsher Singh vs. State of Punjab***[746] and ***Sankalchand case*** (supra) laying down that the last word on such matters was of the CJI. The expert studies and the Constituent Assembly Debates ruled out pre-dominant role for the Executive or Legislature in appointment of judges. The constitutional scheme did not permit interference of the Executive in appointment of judges. The Executive could give feed back and carry out the Executive functions by making appointments but the proposal had to be initiated and finalised by the judiciary. Frequent reconsideration of opinions by larger Benches of this Court was

[746] 1974 (2) SCC 831

not desirable in absence of any doubt about the correctness of the earlier view.

17.3 Parameters for determining as to when earlier binding decisions ought to be reopened have been repeatedly laid down by this Court. The settled principle is that court should not, except when it is demonstrated beyond all reasonable doubts that its previous ruling given after due deliberation and full hearing was erroneous, revisit earlier decisions so that the law remains certain.[747] In exceptional circumstances or under new set of conditions in the light of new ideas, earlier view, if considered mistaken, can be reversed. While march of law continues and new systems can be developed whenever needed, it can be done only if earlier systems are considered unworkable[748].

17.4 No such situation has arisen. On settled principles, no case for revisiting earlier decisions by larger Benches is made out. As regards the contention that there was patent error in the earlier decisions, the ***Second Judges' case*** shows that the Constituent Assembly Debates are exhaustively quoted and considered. Neither the debates nor the text adopted by the Constitution show that the power of appointment of Judges was intended to be conferred on the Executive or the

[747] Gannon Dunkerly vs. State of Rajasthan, 1993 (1) SCC 364, paras 28 to 31
[748] 2nd Judges' case, Paras 19 to 22

Legislature. The word 'consultation' as interpreted and understood meant that the final word on the subject of appointment of Judges was with the CJI. The practice and convention ever since the commencement of the Constitution showed that proposal for appointment was always initiated by the Judiciary and the last word on the subject belonged to the CJI. This scheme was consistent with the intention of the Constitution makers. All the points now sought to be raised by learned Attorney General have been exhaustively considered in the ***Second Judges case***. The contention that earlier situation of Executive interference has now changed also does not justify reconsideration of the earlier view. If the situation has changed, there can be no reason for change of the system which is functioning as per the intention of the Constitution makers when such change will be contrary to basic structure which is not constitutionally permissible. The objection as to deficiencies in the working of the collegium system will be subject matter of discussion in the later part of this judgment. Individual failings may never be ruled out in functioning of any system. The Judicial Appointment Commissions earlier considered were not on the same pattern. Initially proposal to set up Judicial Commission was made prior to ***Second Judges case,*** with the object of doing away with the primacy of the Executive as laid down in ***First Judges case***. In

Sixty-Seventh Amendment Bill, in the Statement of Objects and Reasons, it is mentioned that the object of setting up of Commission was to 'obviate the criticism of arbitrariness on the part of the Executive'[749]. Ninety-Eighth Amendment Bill, 2003 was introduced with a different composition on recommendation of National Commission to review the working of the Constitution. One-Twentieth Amendment Bill, 2013 did not provide for any composition and left the composition to be provided for by the Parliament. Validity of such proposed Commissions was never tested as such Commissions never came into existence.

17.5 The Judicial Commissions in other countries and provisions of Constitutions of other countries conferring power on the Executive to appoint Judges may also not call for reconsideration of the ***Second Judges' case*** as many of such and similar provisions were duly considered in the ***Second Judges' case*** to which reference will be made. No case is thus made out for revisiting the earlier decisions in ***Second and Third Judges' cases.***

D. Consequential consideration of issue of primacy of judiciary in appointment of judges as part of basic structure.

18. The earlier decisions in ***Second and Third Judges' case*** have to be taken as binding precedents. Once it is so, it

[749] The Bill was introduced in the light of 121st Report of the Law Commission.

has to be held that primacy of the judiciary in appointment of judges is part of the basic structure. Appointment of judges is part of independence of judiciary. It is also essential to uphold balance of powers between Legislature, Executive and Judiciary which by itself is key to the functioning of the entire Constitution. The judiciary is entrusted the power to control the power of the Executive and the Legislature whenever it is alleged that the said organs have exceeded their constitutionally assigned authority. This is the essence of the democracy. Learned counsel for the petitioners highlighted that at times exercise of powers of Judicial Review by the Constitutional Courts may not be to the liking of the Executive or the Legislature. Particular instances have been given of decisions of this Court in ***2G Spectrum case***[750] and ***Coal Scam case***[751] where actions of the Executive were found to be violative of constitutional obligations causing huge loss to public exchequer. It was submitted that arbitrary distribution of State largess by way of giving scarce resources or contracts or jobs or positions of importance akin to 'spoil system' have been held by this Court to be in violation of the Constitution. Policies of the State for arbitrary acquisition of land or in violation of environmental laws have been struck down by this Court. Dissolution of State Assemblies and dismissal of State

[750] Centre for Public Interest Litigation vs. UOI (2012) 3 SCC 1
[751] Manohar Lal Sharma vs. UOI (2014) 2 SCC 532

Governments have also been struck down by this Court[752]. This Court also had to deal with the issues arising out of decisions of Speakers in recognizing or otherwise the defections in Central or State Legislatures[753]. There are enumerable instances when the Courts have to deal with validity of Legislative or Executive decisions of far reaching nature. It is the faith of the people in the impartiality and competence of judiciary which sustains democracy. If appointment of judges, which is integral to functioning of judiciary is influenced or controlled by the Executive, it will certainly affect impartiality of judges and their functioning. Faith of people in impartiality and effectiveness of judiciary in protecting their constitutional rights will be eroded.

18.1 Submissions of learned Attorney General are that even if appointment of judges is held to be part of independence of judiciary, choice of a particular model is not part of basic structure. The role of the Executive cannot be denied altogether nor there can be any objection to members of civil society being included in the process of appointment. The primacy of judiciary in appointment of judges is not an absolutist ideal. Power of appointment has to be seen in the light of need for checks and balances. Independence of

[752] S.R. Bommai vs. UOI (1994) 3 SCC 1; Rameshwar Prasad vs. UOI (2006) 2 SCC 1; M.C. Mehta vs. Kamal Nath (1997) 1 SCC 388

[753] Kihoto Hollohan vs. Zachillhu (1992) Supp. (2) 651

judiciary is not a uni- dimensional test. There could be inter mingling of other wings in the process of appointment of judges. After repeal of Articles 124 and 217, basis of ***Second Judges' case*** did not survive. Primacy of judiciary in appointment of judges is only in the context of stopping wrong appointment or preventing pre-dominance of the Executive. Even if primacy of judiciary was recognized at a given point of time, the same could apply only till the Constitution is amended. Two eminent persons could be laymen to give societal view point. The Law Minister was made a member of the Commission for accountability and transparency. As laid down in ***I.R. Coelho case***, inspite of separation of powers, different branches of the Government could have overlapping functions[754]. In ***Sahara India Real Estate Corpn. Ltd. vs. SEBI[755]***, it was observed that under the Constitution there are different values which must be balanced. Thus, independence of judiciary, checks and balances, democracy and separation of powers are to be considered as a whole. He referred to the background of supersession of judges in the year 1973 and 1977 and selective transfer of judges during emergency as noted in 121st Report of the Law Commission[756]. The report records that in 1976, sixteen judges were transferred from the

[754] Para 64
[755] (2012) 10 SC 603
[756] Paras 1.21 to 1.23, 7.1 and 7.2

respective High Courts in which they were functioning to other High Courts. This was perceived to be an act of interference with the judiciary. Circular of the then Law Minister providing for transfer and short term appointment of judges considered in ***First Judges' case*** was taken in the said report as the executive interference. The report also mentioned the concern arising out of supersession in appointment of CJI, non confirmation of additional judges, transfer of judges giving rise to apprehension of erosion of independence of judiciary at the hands of the Executive. It was concluded that the model then prevalent (with the primacy of the Executive) had failed to deliver the goods. This led to introduction of 67th Amendment Bill, 1990.

18.2 The contentions of learned Attorney General cannot be accepted. The matter having been gone into in great details in above binding precedents which do not require reconsideration, I do not consider it necessary to repeat in detail the discussion which has been recorded in the said decisions.

18.3 In ***Second Judges' case,*** following findings have been recorded :

> *(i) The word 'consultation' used in Articles 124, 217 and 222 of the Constitution meant that the opinion of consultee was*

normally to be accepted thereby according primacy to the judiciary;

The Executive being major litigant and role of judiciary being to impartially decide disputes between citizen and the State, the Executive could not have decisive say in appointing judges;

Doctrine of separation of powers under the Constitution required primacy of judiciary in appointing judges;

Since traits of candidates could be better assessed by the Chief Justice, the view of the Chief Justice as to suitability and merit of the candidate had higher weight;

The Chief Justice of India was not to make a recommendation individually but as representing the judiciary in the manner laid down, that is, after consulting the collegium; and

Primacy of judiciary in appointment of judges is part of independence of judiciary and separation of powers under the Constitution.

18.4 Referring to the constitutional scheme, its background and interpretation, irrespective of the literal meaning of the language employed in Articles 214 and 217 of the Constitution, it was observed that initiation of proposal must always emanate from the Chief Justice of the High Court/CJI (in representative capacity as laid down) and last word on any objection thereto should be normally of the CJI.[757]

[757] Reasons for holding the primacy in appointment of judges to be with the judiciary have been summarized by Pandian, J. in Para 195 (Second Judges' case)

18.5 Reference was made to the interpretation of the word 'consultation' in the context of appointment of judges in earlier judgments in ***Chandra Moulishwar Prasad vs. Patna High Court***[758], ***Shamsher Singh*** and ***Sankalchand cases.*** It was held that "in practice, the last word in such sensitive subject must belong to CJI, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order."

18.6 Reference was also made to the statement of Dr. Ambedkar that it was dangerous to give power to appoint judges to the Executive or with concurrence of the Legislature.[759] Further statement that it was dangerous to give veto power to CJI was explained to mean that the CJI must act not in individual capacity but after consulting senior judges.[760]

18.7 Needless to say that the Constitution of India is unique. While reference to other Constitutions can be made for certain purposes[761], the basic features of Indian Constitution (which may be distinctly different from other Constitutions) have to be retained and cannot be given a go bye. In the above judgment, in the context of working of Indian Constitution, it was held that the role of Executive and Legislature in appointment of judges could not be

[758] 1969 (3) SCC 56
[759] Para 25(5), Pandian, J.
[760] Para 392, Verma, J. (Second Judges' case)
[761] Such as power of Judicial Review, content of right to life etc.

predominant. Even in the Constituent Assembly, models of other countries were not found to be suitable to be followed in India[762]. As already mentioned the Government of India appointed First Law Commission headed by Shri M.C. Stealvad to review the system of judicial administration and all its aspects. The Commission expressly mentioned that the Executive interference in appointment of Judges has not been congenial to independence of judiciary. The Commission noted that the Chief Ministers were having direct or indirect hand in appointment of Judges which results in appointments being made not on merit but on considerations of community, caste, political affiliations. The Chief Minister holding a political office is dependent on the goodwill of his party followers. The recommendation of the CJI is more likely to be on merit. An opinion noted in the report mentions that if the Executive continued to have powerful role, the independence of judiciary will disappear and the Courts will be filled with Judges who owe from appointments to politicians[763]. It was recommended that the hands of CJI should be strengthened and instead of requiring consultation it should require recommendation by the CJI[764]. There should be requirement of concurrence of the CJI[765]. The Report was discussed in the Parliament and the

[762] Paras 184 & 192, Second Judges' case (In para 192 reference is made to famous statement of Dr. Ambedkar about unsuitability of UK and US models in this regard)
[763] Para 14
[764] Para 19
[765] Para 20

then Home Minister declared that the Executive was only an order issuing authority and appointments were virtually being made by the CJI. This statement was reiterated by the then Law Minister[766]. Again in 121st Report, it was observed that appointment of Judges with Executive influence was not conducive to healthy growth of judicial review. Trends all over the world indicate that power of the Executive in appointment of Judges was required to be diluted[767]. The ***Second Judges' case*** took care of the ground realities in the light of constitutional convention. It held that the CJI was better equipped to select the best and for appointments being free from Executive domination to inspire public confidence in impartiality and consistent with the principle of separation of Judiciary from Executive and also consistent with the spirit of Constitution makers. The principle of primacy was recognised and appointment of Judges was held to be integral to the independence of judiciary[768]. To check arbitrary exercise of power by any individual, it was made mandatory that the Chief Justices consult senior Judges. Thus, primacy of judiciary was recognized in initiating proposal as well as in taking final decision[769]. However, participation of the Executive in giving inputs by suggesting names before the proposal was initiated

[766] Paras 362-371 (Second Judges' case)
[767] Paras 7.5 – 7.11 (121st Law Commission Report)
[768] Paras 333-335, Kuldip Singh, J., Paras 47, 49,63, Pandian, J.
[769] Para 486

or giving feedback even after the proposal was initiated was permissible. It was noted that right from beginning of the Constitution, all the proposals for appointments were always initiated by the Chief Justices[770]. View in ***First Judges' case*** that primacy in appointment of Judges was of the Central Government was held to be erroneous by larger Bench *inter alia* for following reasons :

(i) The judiciary has apolitical commitment and if power of appointment of judges is given to the Executive, this will affect independence of judiciary[771];

(ii) Rule of law requires that justice is impartial and people have confidence in judiciary being separate and independent of the Executive so that it can discharge its functions of keeping vigilant watch for protection of rights even against the Executive[772];

(iii) Judiciary has key role in working of the democracy and for upholding the rule of law[773];

(iv) The constitutional scheme provides for mandatory consultation with the CJI since the CJI was better equipped to assess the merit of the candidate which consultation was not provided for in respect of other high constitutional appointments[774].

(v) The appointment of judges was inextricably linked with the independence of judiciary and even in the matter of appointment of district judges, the conclusive say was of the High Courts and not of the Government[775].

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[770] Para 505, Punchhi, J.; 210, 214, Pandian, J.; Paras 361 to 376, Kuldip Singh, J.
[771] Paras 84 and 197, Pandian, J; Paras 428 and 439, Verma, J; Para 334, Kuldip Singh, J
[772] Paras 56, 72 to 74 and 207, Pandian, J.
[773] Paras 55 to 57, Pandian, J.
[774] Para 195 Pandian, J and Para 450, Verma, J.;

(vi) Even in countries where power of appointment of judges was with the Executive, there is demand/proposal for minimizing the role of the Executive[776].

(vii) The effort of the Executive to have say in appointment of judges was found by expert studies to be not congenial to the independence of judiciary[777]. Reference was made to the 14th Report of the Law Commission that if the Executive had powerful voice in appointment of judges, the independence of judiciary will disappear and the courts will be filled with judges who owe their appointments to the politicians. Reference was also made to 121st Report of the Law Commission to the effect that even in UK there was thinking to create a check on the power of the Executive to select and appoint judges.

(viii) Consultation with the CJI was not envisaged by the Constitution makers to be of formal nature but implied that great weight was to be given so that the last word belonged to the CJI[778].

(ix) Article 50 and the background of its enactment spells out the mandate for appointment of judges being taken away from the Executive and its transference to the judiciary.[779]

18.8 In the above background, the forceful contention of learned Attorney General that the scheme of the Constitution did not envisage primacy of judiciary but only mandatory consultation with the CJI and optional consideration with such

[775] Paras 447 to 463, Verma, J.; Paras 195 to 197, Pandian, J.; Paras 335 and 380, Kuldip Singh, J. (Para 215, Pandian, J. – Appointments and control of district judges is with the High Courts)
[776] Para 25(6), Pandian, J.
[777] 14th Report of the Law Commission is referred to in paras 64 and 65 by Pandian, J.; 121st Report of Law Commission is referred to in Paras 184 to 191 and 204, Pandian, J.
[778] Paras 383 to 387, Kuldip Singh, J. (However, CJI was not to be the persona designata but as spokesman of the judiciary in the manner laid down in the judgment.)
[779] Second Judges' case (Paras 74 to 81)

other judges as may be considered necessary cannot be accepted, even if it is so suggested by the literal meaning of the words used in the text of the provision. It may be mentioned that the word 'consultation', on account of the scheme of the Constitution, was held to carry special meaning, on a purposive interpretation. The interpretation was not based solely on the word 'consultation' but on scheme of independence of judiciary. The contention that independence of judiciary was not affected even when the Executive made the appointment is contrary to the expert studies and well considered decisions of this Court. The acknowledged scheme of the Constitution and its working is not to allow domination of the Executive in appointment of Judges. Such domination affects independence of judiciary, public faith in its impartiality (when the Government is major litigant), brings in extraneous considerations, compromises merit, weakens the principles of checks and balances and separation of judiciary from the Executive. Thus, by substitution of the words, the Parliament could not interfere with the primacy of judiciary in appointment of judges and thereby interfere with the basic feature of the Constitution. It may be mentioned that use of similar expression in Article 74 of the Constitution in the context of Executive power of the President to act on "aid and advice" of Council of Ministers was held to mean that the

President was only a formal head.[780] It cannot be suggested that by amendment of the expression used, constitutional scheme of the President being formal head can be changed as such amendment will be repugnant to the basic structure of the Constitution. Likewise, even by amendment primacy of judiciary in appointment of judges cannot be excluded. Such primacy existed not merely by word 'consultation' but by virtue of role of judiciary in working of the Constitution, by CJI being better suited to assess merit of the candidate and on account of Executive being major litigant. There is no change in these factors even after amendment. It is not thus a question of change of model or of available choice with the Parliament. Plea of presumption of constitutionality can be of no avail where an established basic feature of the Constitution is sought to be damaged. Similarly, the plea that Parliament is best equipped to assess the needs of the people is not enough reason to extend the power of Parliament to amend the basic feature of the Constitution. The change of time does not justify greater role for the Executive in appointment of judges. The plea of overlapping role of different Departments of the Government is against the basic structure as far as appointment of judges is concerned.

[780] Paras 48 and 57, Shamsher Singh case

18.9 While it is true that the Legislature can even retrospectively clarify its intention and thereby bring about a change in law[781], in the present context meaning of the unamended provision was not based merely on the words used but also the entire scheme of the Constitution particularly the independence of judiciary. It has been held that in the context of the Indian Constitution, having regard to the consistent past practice and to avoid political interference in appointment of judges, and also on account of the CJI/CJ being better equipped to assess the merit of a candidate, proposal must always be initiated by the CJI/CJ and the CJI must also have final word on the subject. It can hardly be doubted that the Constitution is a dynamic document and has to be interpreted to meet the felt needs of times and cannot bind all future generations. At the same time, it is also now well settled that the amending power is limited to non essential/non basic features and does not extend to altering the basic features and framework of the Constitution. Primacy of judiciary is certainly a part of the basic feature of the Constitution. If primacy of judiciary in the appointment of judges is held to be not a part of basic feature, the Parliament may be free to confer the said power on the Executive or the Legislature or to any other authority which can certainly compromise the independence of judiciary. It will

[781] Shri Prithvi Cotton Mills Ltd. vs. Broach Borough Municipality, 1969 (2) SCC 283

also in turn disturb the doctrine of separation of powers and other basic features like rule of law, democracy and federalism and working of the Constitution as a whole. Independence of judiciary is key element in the entire functioning of the Constitution and such independence is integrally linked with the appointment of judges free from Executive interference. The alternative submission of Shri Venugopal, learned senior counsel appearing for the State of Madhya Pradesh in Paras 4 and 8 (reproduced in para 13 above) also supports the conclusion that appointment of judges is part of independence of judiciary and primacy of judiciary in appointment of judges is required to be retained. The power of appointment of judges cannot be exercised by the Executive as the same will affect independence of judiciary. Even after the original provisions are amended, this principle is still applicable.

18.10 At this stage, it may be mentioned that any perceived shortcoming in the working of existing mechanism of appointment of judges cannot by itself justify alteration or damage of the existing scheme once it is held to be part of basic feature. As Dr. Ambedkar observed[782] :-

> *"The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of*

[782] In speech dated 25.11.1949 on conclusion of proceedings of the Constituent Assembly (Page 975 of the CAD).

*In his speech as President of the Constituent Assembly quoted in Para 429 of the Second Judges' case)

> *those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics."*

To the same effect Dr. Rajendra Prasad* said :-

> *"If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them."*

Even a good system may have shortcomings in its working on account of individual failures. It may be mentioned that criticism of working may be leveled against working of every organ of the Constitution including the Executive and the Legislature and while all efforts must be continuously made to bring about improvement in every sphere, the basic scheme set up by the Constitution cannot be given a go bye on that ground. It is not necessary to comment upon how good or bad any constitutional authorities have performed in discharge of their duties or how good or bad the judiciary has performed, as the limited question for consideration of the Court is to identify and retain the basic structure of the Constitution in appointment of judges. The improvement in working of existing system of appointment of judges can be the subject matter of separate consideration which is being proposed but

certainly without giving a go bye to the basic features of the Constitution of independence of judiciary. In ***Manoj Narula vs. Union of India***[783]***,*** question considered was how persons with criminal antecedents could be prevented from being appointed as Ministers. There was also reference to the concern as to how persons with such antecedents could be prevented from being legislators. This Court held that the issue has to be dealt with by those to whom the Constitution has entrusted the responsibility and this Court could only enforce the constitutional scheme.

18.11 At this stage, it may be mentioned that the claim of learned Attorney General that the Parliament represented the will of the people or that the amendment represented the will of the people and interference therewith will be undesirable is contrary to the law laid down in ***Kesavananda Bharti case (supra)***[784]***.*** The will of the people is the Constitution while the Parliament represents the will of the majority at a given point of time which is subordinate to the Constitution, that is, the will of the people. The Constitution was supreme and even Parliament has no unlimited amending power. Learned Attorney General rightly submitted that the last word on the validity of a constitutional amendment is of this Court. Even if the judiciary is not an elected body, it discharges the

[783] 2014 (9) SCC 1
[784] Paras 652 amd 653

constitutional functions as per the will of the people reflected in the Constitution and the task of determining the powers of various constitutional organs is entrusted to the judiciary[785].

Conclusion:

18.12 Accordingly, I hold that primacy of judiciary and limited role of the Executive in appointment of judges is part of the basic structure of the Constitution. The primacy of judiciary is in initiating a proposal and finalising the same. The CJI has the last word in the matter. The Executive is at liberty to give suggestions prior to initiation of proposal and to give feedback on character and antecedents of the candidates proposed and object to the appointment for disclosed reasons as held in ***Second and Third Judges' cases.***

E. Whether the Impugned Amendment alters or damages the basic structure

19. In the above background, the only question which remains to be considered is whether under the impugned amendment the basic feature of primacy of judiciary in appointment of judges has been altered or damaged.

19.1 Learned Attorney General submitted that basic structure comprises many features like several pillars in a foundation, some of which are enumerated in opinions rendered in ***Kesavananda Bharti case.*** In judging the

[785] Paras 328 and 334, Kuldip Singh, J. (Second Judges' case)

validity of a constitutional amendment, test is whether the amendment would lead to collapse of the Constitution. Merely affecting or impinging upon an Article embodying a feature that is part of the basic structure was not sufficient to declare an amendment unconstitutional. Violation of basic structure of the constitution must be such that the structure itself would collapse. He also relied upon the observations in ***Bhim Singh Ji vs. Union of India***[786] particularly the following observations :

> *"Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty. But to permit the Bharati*[8] *ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralysation of parliamentary function. Nor can the constitutional fascination for the basic structure doctrine be made a trojan horse to penetrate the entire legislative camp fighting for a new social order and to overpower the battle for abolition of basic poverty by the 'basic structure' missile."*

and following observations in ***Ashoka Kumar Thakur vs. Union of India***[787]***:-***

> *"There are large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human*

[786] (1981) 1 SCC 166
[787] (2008) 6 SCC 1

> *life. The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs."*

19.2. Applying the above tests it was submitted that the Ninety-Ninth Amendment was consonant with and strengthens the independence of judiciary while upholding the democracy, rule of law and checks and balances. NJAC is in sync with the needs of time and is modelled on checks and balances to ensure a democratic process with plurality of views. NJAC dilutes power of executive in favour of the judiciary. He submitted that identity test was required to be applied which means that after the amendment the amended Constitution loses the identity of the original Constitution. There is no bar to making changes and to adopt the Constitution to the requirements of changing times without touching the foundation or altering the basic constitutional pattern. He further relied upon the observations in the ***Indira Gandhi*** and ***Minerva Mills Ltd. cases (supra).***

19.3 The learned Attorney General further submitted that the object of the amendment is to broad base the collegiate body so as to provide for participatory and collective role to the judiciary, the executive and the civil society. The executive has only one member, the Law Minister. The object of having the Law Minister is to provide information about the

candidates which information the other members may not have. The eminent persons will be independently appointed by a committee comprising of the PM, the CJI and the Leader of Opposition. In this way there is no abrogation of independence of judiciary. Moreover, three of the six members are from the judiciary and thus, the right to reject was available to the judges, while the executive alone cannot exercise the right to reject. Even in ***Second Judges' case*** it is observed that the process of appointment is a participatory process. An area relating to suitability of candidates such as his antecedents and personal character may be better known to consultees other than the CJI. The expression, 'eminent person' is well known and it means distinguished in character or attainments or by success in any walk of life. The expression 'distinguished' is used in Article 124 (3) providing for eligibility criteria for judges of the Supreme Court. Since the high powered committee comprising three high functionaries is to appoint an eminent person, there is sufficient safeguard against any uncanalised power. The principles of constitutional trust apply to the high powered committee which can be trusted to select the most appropriate persons. Such eminent persons shall provide inputs for the qualities which make a person suitable for appointment as a judge. Diversity in composition of the

Commission will mitigate the danger of cloning. In other bodies also there are provisions for non judges. For example, Consumer Protection Act. Reservation in favour of minorities, women, Scheduled Castes, Scheduled Tribes and OBC will have the effect of sensitizing other members for the problems to be faced by these sections. Even in the report of National Commission to Review the Working of the Constitution (NCRWC), also known as Venkatachalliah Commission, a provision for an eminent person was made without prescribing any criteria. The eminent person will be guided by the CJI, who will be the Chairman and best placed to access the legal merit of the candidates. The executive is a key stake holder in justice delivery system for which it is accountable to the Parliament and it cannot be denied role in appointment of judges. Mere possibility of abuse of provision cannot be a ground for holding a provision unreasonable. Reliance has been placed on ***Mafat Lal Industries Ltd. vs. Union of India***[788] which reads as under :-

> *"To the same effect are the observations by Khanna, J. in Kesavananda Bharati v. State of Kerala (SCR at p. 755 : SCC p. 669). The learned Judge said: (SCC p. 821, para 1535)*
>
> *"In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances.*

[788] (1997) 5 SCC 536

> *Opportunity must be allowed for vindicating reasonable belief by experience."*
>
> *To the same effect are the observations in T.N. Education Deptt. Ministerial and General Subordinate Services Assn. v. State of T.N. [(1980) 3 SCC 97] (SCR at p. 1031) (Krishna Iyer, J.). It is equally well-settled that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding the provision procedurally or substantively unreasonable. In Collector of Customs v. Nathella Sampathu Chetty [1962 (3) SCR 786], this Court observed: "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." It was said in State of Rajasthan v. Union of India [(1977) 3 SCC 592] (SCR at p. 77), "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief". (Also see Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [(1954) SCR 1005] (SCR at p. 1030)."*

Transparency and accountability in the matter of appointment are essential for public confidence in the judiciary. In this connection reference has been made to ***Inderpreet Singh Kahlon vs. State of Punjab***[789] which reads as under :-

> *"This unfortunate episode teaches us an important lesson that before appointing the constitutional authorities, there should be a thorough and meticulous inquiry and scrutiny regarding their antecedents. Integrity and merit have to be properly considered and evaluated in the appointments to such high positions. It is an urgent need of the hour that in such appointments absolute transparency is required to be maintained and demonstrated. The impact of the deeds and misdeeds of the constitutional authorities (who are highly placed), affect a very large number of people for a very long time, therefore, it is absolutely imperative that only*

[789] (2006) 11 SCC 356

people of high integrity, merit, rectitude and honesty are appointed to these constitutional positions."

19.4 These submissions cannot be accepted. It is obvious that pre-dominant role of the judiciary, as it exists in light of original Constitutional scheme in taking a final decision on the issue of appointment of judges of the Supreme Court and appointment and transfer of judges of the High Courts, has been given a go bye. Under the unamended scheme of appointment of judges, which is a basic feature of the Constitution, the President is to make appointment, after consultation with the CJI representing the judiciary. Disregarding the views of the CJI is permissible in exceptional situations for recorded reasons having bearing on character and antecedents of a candidate and if such reasons are found to be acceptable to the CJI. Under the amended scheme, no such final view can be taken by the CJI. Without giving any reason, the Minister or the nominated members can reject the unanimous view of the judges. Chief Justice of the High Court is not a member of the Commission and has no Constitutional role in appointment/transfer of the judges of the High Courts. Mere fact that without the judges, the Minister and the nominated members cannot make an appointment is not at par with the situation where a decision itself is taken by the CJI

representing the judiciary. The Constitutional power of the Chief Justice of the High Court to initiate proposal for appointment as judge of the High Court has been done away with, at least as far as the Constitutional provisions are concerned.

19.5 The contention that the amendment strengthens the independence of judiciary or the democracy or brings about transparency or accountability is not shown to be based on any logic beyond the words. Even if in appointing two eminent members CJI is also a member of the Committee, the fact remains that the PM and the Leader of the Opposition have significant role in appointing such members, who will have power not only equal to the CJI and two senior most judges of the Supreme Court in making appointment of judges of the Supreme Court and appointment/transfer of judges of the High Courts but also right to reject the unanimous proposal of the CJI and the two senior most judges. Such composition of the Commission cannot be held to be conducive to the independence of judiciary. Appointment of judges of the Supreme Court and appointment/transfer of judges of the High Courts, can certainly be influenced to a great extent by the Law Minister and two nominated members, thereby affecting the independence of judiciary.

19.6 Contention of learned Attorney General that there is a presumption that the Law Minister and the nominated members will conduct themselves independently and will make value addition in selecting the judges in a better way cannot be accepted. The views of the Constitution makers and eminent expert committees clearly show that role of the Executive in appointment of judges has to be minimum and by and large limited to check the character and antecedents of the candidates and not to finally assess the merit and suitability of such candidates. In this view of the matter, even if the contention that no guideline was required for criteria for appointment of eminent persons when the Committee will be comprised of high dignitaries is accepted the fact remains that such persons will play not merely supporting but pre-dominant role in appointing Supreme Court and High Court judges which will not be congenial to the independence of judiciary. There is no justification for reservation for one of the nominated members being from specified categories. Such provision is against the scheme of the Constitution and contrary to the object of selecting judges purely by merit. The nature of appointment does not justify any affirmative action for advancement of any socially and educationally backward classes or for the Scheduled Castes or Scheduled Tribes or women. The appointment of judges has to be on evaluation of

merits and suitability of the candidates. Religion, caste or sex of the evaluator has no relevance. The plea that the Law Minister and the nominated members will provide feed back also does not provide any justification for their being members of the Commission and thereby participating in evaluation and suitability of a candidate for appointment as judge of the Supreme Court or High Courts and having power to overrule unanimous view of judges. The appointment of a judge of the Supreme Court is normally made out of Chief Justices of High Courts or senior judges or eminent lawyers or eminent jurists whose merit is better known to senior judges. Their evaluation has to be impartial and free from any political or other considerations. Persons making selection are required to be best placed to assess their merit and suitability. Pre-dominant and decisive role of the judiciary is a requirement not only of independence of judiciary and separation of powers but also for inspiring confidence of the people at large necessary for strength of the Democracy. The citizens having a grievance of violation of their fundamental and legal rights against the Executive or the Legislature expect that their grievance is considered by persons whose appointments are not influenced by the Executive or the Legislature. If an appointment is perceived as being influenced by political consideration or any other extraneous influence, faith in impartiality, which is hall

mark of independence of judiciary, will be eroded. The scheme in other countries cannot be mechanically followed when it is in conflict with the basic scheme of the Indian Constitution.

19.7 In this regard, it may be recalled that the word amendment literally means betterment or improvement and sponsor of amendment may always claim improvement. Such claim has to be tested by applying the 'identity test' and the 'impact test'. The said tests have already been mentioned in the earlier part of its opinion. The amendment should not affect the identity of an essential feature of the Constitution. The impact of the amendment on the working of the scheme of the Constitution has to be taken into account[790]. This brings to some extent subjective element which is unavoidable even while testing any legislation which is alleged to be violative of fundamental rights and justified on the concept of 'reasonable restrictions'[791]. In this regard, effect of Executive interference which has been documented by expert studies cannot be held to be irrelevant or ignored on the ground that this is a subject of wisdom of Parliament. As already mentioned, the working of the Judiciary has affected the Executive and Legislature on several occasions, including (by way of illustration) ***Privy***

[790] Kesavananda Bharati case – Para 531; Maneka Gandhi vs. UOI (1978) 1 SCC 248 – Para 19; I.R. Coelho case – Para 149

[791] V.G. Row vs. State of Madras (1952) SCR 597

Purses case[792], Bank Nationalisation Case[793], Freedom of Press case[794], Kesavananda Bharati case (supra), Indira Gandhi case (supra), Minerva Mills case (supra), L. Chandrakumar case (supra), M. Nagaraj case (supra), I.R. Coelho case (supra), S.R. Bommai case[795].

19.8 The new structure provides for decisive voice with the Commission which apart from judges comprises of Law Minister and two eminent persons to be nominated by a specified committee. Before examining the said structure, it may be noted that it is not merely the text of the amendment but also its impact and potential which has to be kept in mind on 'identity' of the original scheme and the 'width' of the power under the new scheme[796]. In a similar context when an alternative judicial forum was sought to be created to deal with the company matters in place of High Courts, this Court held that the concept of rule of law required that the new mechanism should, as nearly as possible, have same standards[797]. Same view was taken in the context of setting up of National Tax Tribunals to substitute the jurisdiction of the High Courts in tax matters[798]. The new scheme may iron out

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[792] Madhav Rao Jivaji Rao Scindia vs. UOI [1971 (1) SCC 85],
[793] Rustom Cavasjee Cooper vs. Union of India [1970 (1) SCC 248]
[794] Bennett Coleman & Co. Ltd. vs. Union of India [1972 (2) SCC 788]
[795] S.R. Bommai vs. UOI [(1994) 3 SCC 1]
[796] Kesavananda Bharati case – Para 531; Maneka Gandhi vs. UOI (1978) 1 SCC 248 – Para 19; I.R. Coelho case – Para 149
[797] Union of India vs. Madras Bar Asson. (2010) 11 SCC 1 – Para 108
[798] Madras Bar Asson. vs. UOI (2014) 10 SCC 1 – Pars 136 and 137

the creases but the mechanism should be comparable to the substituted scheme.

19.9 As already mentioned under the unamended scheme, as authoritatively interpreted by this Court, power of initiating a proposal was always with the judiciary. At the time of making of the Constitution, the draft of the Constitution was circulated to the Federal Court and High Courts to elicit views of the judges. In the memorandum representing the views of the judges, it was mentioned that the existing convention was that appointment of judges was made after referring the matter to the Chief Justice and obtaining his concurrence[799].

19.10 In CAD, various models were considered but the system applicable in other countries providing for final say of the Executive or concurrence of Legislature (as in UK and USA) were found to be unsuitable. It was stated by Dr. Ambedkar that the power could not be left to be exercised on the advice of the Executive or be made subject to concurrence of the Legislature. It was further stated that the Chief Justice could also not be given a veto upon the appointment of judges[800]. The Law Commission in its 14th Report criticised the interference by the Executive in appointment of judges. The matter came up for discussion before the Parliament and the Home Minister and the Law Minister made a statement that all

[799] Second Judges' case – Paras 360 and 361
[800] Statement of Dr. Ambedkar referred in Para 192 in Second Judges' case

appointments were made on the recommendation of the CJI as the CJI was familiar with the merits of the candidates. Out of 211, 210 appointments were made with the consent and concurrence of the CJI[801]. It was noted that the procedure for appointment of judges applicable prior to ***Second Judge's case*** was that a proposal for appointment was initiated by the CJI in case of the Supreme Court and by Chief Justice of the High Court in case of the High Court Judges[802]. This mechanism was held to be a part of the convention[803].

19.11 In ***Shamsher Singh case (supra)*** this Court observed that in practice the last word in matters of judiciary must belong to the CJI. The same view was expressed in ***Sankalchand case (supra)*** in the context of transfer of judges[804]. In 80th Report of the Law Commission headed by Justice H.R. Khanna, J. (1979), a Commission was proposed with a pre-dominant voice of judiciary to deal with the appointment and transfer of judges. The Report was significant in the background of supersession of judges in appointment of the CJI and selective transfer of judges which were perceived to be interference with the independence of judiciary. However, contrary to the said recommendations, a circular was issued by the Law Minister in 1981

[801] Debates reproduced in Paras 362 – 368 in Second Judges' case
[802] Para 98 Second Judges' case
[803] Para 370, Kuldip Singh, J. and Para 505, Punchhi, J. in Second Judges' case
[804] Paras 39, 41 Chandrachud, J.; 50-52 Bhagwati, J.; 103, 115 Krishna Iyer, J.,

proposing transfer of judges and making appointment of judges for short period which itself was perceived to be interference with the independence of judiciary and was challenged in ***First Judges' case***. As already mentioned, the majority held that primacy in such matters rested with the Central Government[805]. The said view was subject matter of severe criticism. Eminent constitutional expert Seervai commented that the Executive was not qualified to assess the merits or demerits of a candidate. Initiation of a proposal by the Executive was against the intention of the framers of the Constitution. Political, Executive or Legislative pressure should not enter into the appointment of a judge[806]. The Law Commission headed by Justice D.A. Desai in its 121st Report also criticised the system where the Executive had overriding powers in the matter of appointment of judges. He stated that power to appoint and transfer judges of superior courts by the Executive affects independence of judiciary and is not conducive to its healthy growth. He recommended a Judicial Commission to check the arbitrariness on the part of the Executive in such appointments and transfers[807].

19.12 The interpretation in the ***Second Judge's case*** was in the above historical background. In the context of

[805] Para 30 – First Judges' case
[806] Seervai, 4th Edition, Constitutional Law of India – Paras 25.350, 25.353 and 25.354
[807] Para 7.5 and 7.8 – 121st Report of the Law Commission

working of the Indian Constitution, the dominant role of the Executive in appointment of judges adversely affected the independence of judiciary. The judiciary is assigned important role for upholding the rule of law and democracy. Its independence and its power of judicial review are part of basic structure. Primacy of judiciary in appointment of judges is part of basic structure. In this background question is whether the new scheme retains the said primacy of judiciary in appointment of judges.

19.13 Under the new scheme, the Law Minister has been given role equal to the CJI. Right from the commencement of the Constitution, this role of the Law Minister was never envisaged while initiating the process and finalizing it. Law Minister, in participatory scheme, could at best suggest a name or give his comments on the names proposed but the proposal could and was always initiated by the CJI. At the stage of initiation, if equal authority is conferred, this will erode the primacy of judiciary as declared by this Court authoritatively. Any deviation in the past was always adversely commented upon and held to be undesirable amounting to interference with the independence of judiciary[808]. Other two persons to be nominated by a Committee which also has predominant political voice to be placed at par with the CJI in

[808] Para 505, Punchhi, J.; Paras 210,214, Pandian, J.; Paras 361 to 376, Kuldip Singh, J. in Second Judges' case

initiating and finalizing a proposal destroys the original scheme beyond its identity. Any suggestion before initiation of a name or feedback even after initiation may be useful and may not affect independence of judiciary but equal participation by the Law Minister and two outsiders in final decision for initiation or appointment can be detrimental to the independence of judiciary. It cannot be wished away by presuming that the Law Minister and the two distributors will not be influenced by any extraneous consideration. Such a presumption will be contrary to the acknowledged factual experience. It will also be against the concept of separation of judiciary from the Executive. More over this will be contrary to the basic intention of the Constitution makers. The amendment is not an insignificant amendment and is not within the basic framework of the working of the Constitution. The very premise and object of the amendment as reflected in the Statement of Objects and Reasons and the stand of the Union of India in its pleadings and during the course of arguments is that the primacy of judiciary was evolved by erroneous interpretation which is sought to be corrected. It is stated that the primacy of judiciary was undemocratic and denied the Executive a meaningful role. These reasons are untenable for reasons already discussed. As regards the plea of transparency and accountability, the same has to be achieved without compromising independence

of judiciary. If on the perceived plea of transparency and accountability, the independence of judiciary is sought to be adversely affected by the Amendment, this will cause severe damage to the functioning of the Constitution. The primacy of judiciary, as already noticed, is integral to the independence of judiciary, separation of powers, federalism and democracy, rule of law and supremacy of the Constitution. The amendment does away with the primacy of even unanimous opinion of the judicial members as such opinion is not enough to finalise an appointment. While Shri Venugopal has rightly stated in his alternative submission that primacy of judiciary is part of judicial independence and if Executive has pre-dominant voice, it could subvert independence of judiciary, his submission that the situation could be retrieved by giving the suggested interpretation cannot be accepted. Such interpretation is not warranted by the text of the amendment or by the principles of interpretation. It is difficult to hold that primacy of judiciary is still retained as a wrong proposal can still be stalled by any two members, including two judges. The primacy of judiciary as always understood in binding judicial precedents comprises of initiation of name and taking a final call[809]. These two core features constitute identity of the primacy of judiciary. Subject to these two features, any

[809] Paras 471, 478, 486(2), 486 (3), 486(4 and 5) , Verma, J.

amendment could have been made and if these two features are compromised, the basic identity of the Constitution can be held to have been altered or damaged.

19.14 There can be no doubt about the propositions forcefully canvassed by the respondents that the legislative wisdom of the choice of the Parliament was not open to question and that possibility of abuse of power could not affect the existence and exercise of power but these submissions cannot ignore the limitation of basic features. Examining whether basic feature was sought to be altered, is different from questioning the wisdom of the Parliament. It is testing the power of Parliament conferred by the Constitution. Similarly determining whether the new mechanism complied with the framework of the Constitution is different from the issue of possibility of abuse. In the present case, question is of independence of judiciary which implies having judges not influenced by any political consideration as per the intention of framers of the Constitution. Even assuming the best of intention, can the power of judicial review by the constitutional courts be subjected to scrutiny by any 'eminent persons' on the ground that working of the judiciary was perceived to be unsatisfactory. Obviously it will be clear interference with independence of judiciary[810]. Same way, constitutionally

[810] By way of illustration : P. Sambamurthy vs. State of A.P. [(1994) 3 SCC 1]; Amrik Singh Lyallpuri vs. UOI (2011) 6 SCC 535; Union of India vs. Madras Bar Asson. (2010) 11 SCC 1; Madras Bar Asson. vs.

conferred judicial primacy in appointment of judges cannot be whittled down or sought to be controlled by those who are not given or allowed to take over such functions. Even granting the best of intentions, the Parliament could not act beyond the authority conferred on it by the Constitution. Thus, taking away primacy of judiciary or conferring such primacy on a body which is not at par with the said concept is certainly not a choice available with the Parliament. As already mentioned, the concept of primacy of judiciary comprises of initiating the proposal and taking a final decision in case any adverse feed back is received after the proposal is initiated. This concept of primacy is compromised if the judiciary is unable to initiate a proposal in the first instance or if such proposal can be effectively rejected. The impact thereof being that the appointment of judges could be made under the influence of the Executive represented by the Law Minister or the non-judge members in whose appointment the pre-dominant voice is not of the judiciary. The impact of such appointments will be that the judges appointed will owe their appointments to the Executive which may be destructive of the public confidence and impartiality of judiciary and adversely affect the role of the judiciary as an important impartial constitutional organ. As already noted, the role of the judiciary

is to define and regulate working of other constitutional authorities within the scope of roles assigned to them[811].

19.15 If the amendment had merely provided for advisory or recommendatory role to the Law Minister or the non-judicial members with the professed object of transparency and accountability, the situation may have been different. It may not have, in that case, interfered with the primacy of the judiciary in appointment of judges which is the mandate of the Constitution. Such power cannot be justified under the doctrine of wisdom of Parliament nor on the principles of trust once such power is in violation of principle of primacy of judiciary in appointment of judges. No individual instance either of working of the Executive or Legislature or the existing system of appointment of judges need be discussed as the issue involved here is of interpretation of the Constitution and not of success or failure of any individual or persons. As already mentioned, the shortcomings in working of every institution may need to be removed by constant efforts constitutionally permissible but cannot justify the altering of the framework of the Constitution or the same being damaged.

20. Reference may now be made to the submission of learned counsel for the respondents that in many countries without primacy of judiciary in appointment of judges,

[811] Special Reference No.1 (1965) 1 SCC 413 at 446

independent judiciary is functioning and thus unfettered judicial primacy was inconsistent with the international trend. Particular mention has been made of 15 countries, namely, Kenya, Pakistan, South Africa, UK, Israel, France, Italy, Nigeria, Sri Lanka, Australia, Canada, New Zealand, Bangladesh, Germany and United States.

20.1 The submission of learned Attorney General in relation to judicial appointments in the said 15 countries is as follows :

> *"a. 9 countries conduct appointment of judges through either judicial appointment commissions (Kenya, Pakistan, South Africa and UK), committees (Israel) or councils (France, Italy, Nigeria and Sir Lanka); 4 countries appoint judges through a direct order of the Governor General (Australia, Canada, New Zealand) or the President (Bangladesh), where applicable; 1 (Germany) follows a multi-stage process of nomination by the Minister of Justice, confirmation by Parliamentary Committees and final appointment by the President; and 1 (United States) follows a process of nomination by the President (executive) and confirmation by the Senate (legislature).*
>
> *b. In all 15 countries, the executive is the final or determinative appointing authority. Out of the 9 countries with commissions, in 2 countries (South Africa and Sri Lanka) the executive has absolute majority in comparison with members of other groups (judiciary, legislature and independent persons). In 4 countries (France, Israel, Kenya and UK) there is a balanced representation of various stakeholders, including the executive. Out of 3 countries where the number of judges are in a majority (Italy, Nigeria and Pakistan), in 2 countries (Nigeria and Pakistan) the decision of the commission is subject to the vote of a parliamentary committee/Senate, while in 1 (Italy), the President of the Republic is the final appointing authority and the chairman of the*

judicial appointment body. In 5 of the countries without commissions (Canada, Australia, New Zealand, Bangladesh and United States of America), the decision is taken by the Executive without any formal process of consultation with the judiciary, while in 1 (Germany), the appointment process is conducted by the Parliament, and later confirmed by the President.

c. In 8 countries (France, Israel, Italy, Kenya, Nigeria, Pakistan, South Africa and UK) with bodies for judicial appointments, independent members have a mandated role in the selection process through representation on the said bodies. In 4 countries where independent members do not play a formal role in the appointment process (Canada, USA, Australia and New Zealand), the appointing authority (body or person) consults independent members at various stages of the appointment process for their feedback on the selection or recommendation of a prospective candidate. In 3 countries (Bangladesh, Germany and Sri Lanka) no documented process of consultation with independent members is provided for."

20.2 Learned counsel for the respondents also referred to criticism of the collegium system by some jurists including the eminent jurist Shri Nariman, appearing in the present case for the petitioners.

20.3 On the other hand, Shri Nariman opposed the above submissions and referred to decisions of this Court particularly ***Kesavananda Bharti case, Indira Gandhi case*** and ***Minerva Mills case,*** where the Constitution amendments were struck down. He also referred to expert studies including reports of the 14th and 121st Law Commissions and the National Commission to Review the Working of the Constitution

(NCRWC), headed by Justice M.N. Venkatachaliah (retired CJI), wherein it was observed that independence of judiciary was basic feature of the Constitution and composition of a National Commission was required to be consistent with the concept of independence of judiciary. Method of appointment of judges could not be altered in such a way as may impinge upon the independence of judiciary. Composition of a Judicial Commission has to uphold the primacy of judiciary.[812]

20.4 Shri Nariman also submitted that the impugned amendment was introduced in response to decisions of this Court affecting certain legislators. He submitted that independent functioning of the judiciary often comes in conflict with the Executive and the Legislature but mandate of the Constitution of upholding the independence of judiciary was necessary to inspire faith of citizens in impartial justice and to uphold the constitutional values like the Rule of law and the Democracy, by upholding protection of fundamental rights even against the State. He particularly made reference to the history of proposed Forty-Fifth Amendment vide Bill 88 of 1978 to provide in Article 368 that an Amendment compromising the independence of judiciary could be made by approval by majority at a referendum. The same was brought about by the Janta Government led by leaders who were arrested during

[812] (Paras 9.6 and 9.7 of the Report dated 26.9.2001 as included in Vol. II of the Report of the NCRWC, 2002)

emergency. It was not approved for want of majority in Rajya Sabha. He also referred to decisions of this Court ***Lily Thomas vs. Union of India***[813] and ***Chief Election Commissioner vs. Jan Chaukidar***[814] holding that a member of a Legislature will stand qualified on conviction and that a person confined in jail could not contest an election and efforts to undo such decisions. He also referred to the treatise, ***Constitutional Law of India by Seervai, 4th Edition***, to the effect that the decision of ***First Judges' case*** put the judicial independence at the mercy of the Executive[815].

20.5 He also gave a personal note, in response to reliance on behalf of the respondents on his own biography "Before Memory Fades" as follows:-

> *"I have been, and I continue to be, a supporter of the "Judicial-Appointment-Commission-system" and so are my clients whom I represent (this is so stated in the Writ Petition at page 26 to 31, and 44 to 45). BUT I am definitely opposed to a pretence of a Judicial Appointments Commission - which in reality is not judicial, only partly or quasi judicial. The "Judicial Appointments Commission system" (so called) as embodied in the 99th Constitutional Amendment, 2014 and along with the NJAC Act, 2014, is opposed BECAUSE is not in accordance with and does not conform to the Beijing Principles on Independence of the Judiciary (by which we in India are governed). The principles were formulated after long deliberation by Heads of the Judiciary in the LAWASIA region (including India's Chief Justice) - who are all signatories to the Beijing Principle. Principles No.15 reads as follows:-*

[813] 2013 (7) SCC 653
[814] 2013 (7) SCC 507
[815] Paras 25.350 to 25.354

> *"15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained."*

Note *- NOT OUTSIDERS, not representatives of the EXECUTIVE: because this is not helpful in the interests of maintaining the INDEPENDENCE OF THE JUDICIARY.* ***Text of Beijing Principles are annexed as Exhibit-II.***

The then Law Minister had stated in Parliament, when these measures were first introduced, that he had consulted named persons including myself - and as to what I said is accurately recorded in the Minutes of the Meeting prepared by the office of the Law Minister. This is what the minutes record:

> *- Constitutional Expert and Senior Advocate, Shri Fali Nariman stated that it is important to remember the independence of the judiciary and the separation of powers. The basic structure doctrine as laid down by the Supreme Court in the Keshavananda Bharti case could not be violated and any proposal for appointment of judges must be in conformity with the basic structure. He felt that the Government should consider following the model of the Appointments Commission as suggested by the Justice Venkatchaliah Commission that gave dominance to the judiciary in the appointment process. He stated that composition of the Commission is the basic issue, and a Commission with non-Judge domination would not be viable in India.*
>
> *....."*

21. As already mentioned, the Constitution of India has its own background and personality[816]. Models of other

[816] R.C. Poudyal vs. UOI (1994) Supp. 1 SCC 324, para 53

countries could not be blindly followed so as to damage the identity and personality of the Indian Constitution. The Judicial Commissions referred to by learned Attorney General do not show the trend of reducing the pre-existing role of judiciary. In fact, the trend is for reducing the pre-existing role of the Executive. In the impugned amendment it is the reverse. Thus, the contention of working of other Constitutions or setting up of judicial Commissions with varying compositions in other countries does not justify the impugned amendment which is contrary to the basic structure of the Indian Constitution.

22. There is also no merit in the contention that in the present case mere alteration in a constitutional provision does not amount to damage of a basic feature. It is not a case of simple amendment to iron out creases. Its impact clearly affects the independence of judiciary. As already mentioned, appointment of judges has always been considered in the scheme of the working of the Indian Constitution to be integral to the independence of judiciary. It is for this reason that primacy in appointment of judges has always been intended to be of the judiciary. Pre-dominant role of the Executive is not permissible. Such primacy comprises of initiating the proposal by the judiciary and final word being normally with the CJI (in representative capacity).

This scheme is beyond the power of amendment available to the Parliament.

22.1 In the new scheme, the Chief Justices of the High Courts have not been provided any constitutional say. The Chief Justice of the High Court is in a better position to initially assess the merit of a candidate for appointment as judge of the High Court. The constitutional amendment does not provide for any role to the Chief Minister of the State. This may affect the quality of the candidate selected and thereby the independence of judiciary. The statutory provision in the NJAC Act will be gone into separately.

22.2 The contention of learned Attorney General that the amendment was justified to uphold the principles of checks and balances and transparency which were equally important constitutional values cannot be accepted. Even assuming that there is a scope for improvement in the working of the collegium system, it cannot be held that under the existing system there is no transparency or checks and balances. The procedure laid down in memoranda issued by the Central Government has been noted in the earlier part of this opinion. All proceedings in initiating a proposal are in writing and are forwarded to the constitutional functionaries. The Chief Minister, the Governor, the Law Minister, the PM and the President have opportunity to give their views in the matter of

appointment of Chief Justices and Judges of High Courts apart from judges and non-judges involved in the process. The Law Minister, the PM and the President also have opportunity to give their comment on appointment of CJI and the Judges of the Supreme Court. There is also an opportunity to suggest names before initiation of proposal. There is no bar to an expert feedback from the civil society through the constitutional functionaries involved. Thus, there is transparency as well as checks and balances. These considerations do not justify interference with the final initiation of proposal by the judiciary or in taking a final view in the matter by the judiciary, consistent with the mandate of the Constitution.

22.3 Learned Attorney General sought to compare the existing provision for veto by two members of collegium in appointment of Supreme Court Judges as per ***Third Judges' case*** to justify veto under Section 6 (6). As already mentioned, the role of the Law Minister and the non-judge members cannot be placed at par with the Chief Justice and Judges of the Supreme Court. They cannot be compared for obvious reasons. The veto power with the Law Minister or with a non-judge members, as against a Supreme Court Judge who is the member of the collegium, may involve interference with the independence of judiciary. Similarly, requirement of

special majority in any other ordinary situation was not comparable with the scheme of appointment of judges which is *sui generis*. Similarly, the plea of giving vital inputs does not justify participation of the non-judge members with the Chief Justice and the Judges in discharging their functions of initiating a proposal or taking a final view. Though, formal act of appointment of judges may be an executive function, there is a unique judicial element in the process of appointment of judges of constitutional courts. The criticism against perceived short comings in the working of the collegium also does not justify the impugned provisions. As already observed, there may be criticism even against discharging of judicial functions by the aggrieved parties or otherwise. But that does not justify interference with the judicial decisions[817]. Needless to say that criticism can be against the working of any system but the systems can be changed only as per the Constitution. Efforts to improve all systems have to be continuously made.

[817] P. Sambamurthy vs. State of A.P. (1987) 1 SCC 362 – Paras 3 and 4, striking down Article 371D(5), Amrik Singh Lyallpuri vs. UOI (2011) 6 SCC 535 – Para 15 – 17, striking down Section 347D of the Delhi Municipal Corporation Act, 1957 (66 of 1957)

Conclusion:-

22.4 I would conclude that the new scheme damages the basic feature of the Constitution under which primacy in appointment of judges has to be with the judiciary. Under the new scheme such primacy has been given a go-bye. Thus the impugned amendment cannot be sustained.

F. Validity of the NJAC Act

23. In view of my conclusion about the amendment being beyond the competence of the Parliament, I do not consider it necessary to discuss the validity of the NJAC Act in great detail as the said Act cannot survive once the amendment is struck down. However, consistent with my earlier view that primacy of judiciary in appointment of judges cannot be compromised and on that ground not only Section 2 of the Amendment dispensing with the mandatory consultation with the judiciary as contemplated under the unamended provisions, Section 3 conferring power on the NJAC (under Article 124B) and providing for composition of the Commission under Article 124A giving a role to the Law Minister and two eminent persons equal to the CJI in recommending appointments as CJI, Judges of Supreme Court, Chief Justices and other Judges of the High Courts and recommending transfer of Chief Justices and Judges of the

High Courts are unconstitutional but also Article 124C giving power to the Parliament to regulate the procedure and to lay down the manner of selection was also unconstitutional, the impugned Act has to be struck down. It goes far beyond the procedural aspects. In Section 5 (2) 'suitability criteria' is left to be worked out by regulations. Second proviso to Section 5 (2) and Section 6 (6) give veto to two members of the Commission which is not contemplated by the Amendment. Section 5 (3) and Section 6 (8) provide for conditions for selection to be laid down by regulations which are not mere procedural matters. Section 6 authorises the recommendations for appointment as judges of the High Courts without the proposal being first initiated by the Chief Justice of the High Court. Section 6 (1) provides for recommendation for appointment of Chief Justice of a High Court on the basis of *inter se* seniority of High Court Judges. This may affect giving representation to as many High Courts as viable as, in *inter se* seniority, many judges of only one High Court may be senior most. Section 6 (2) provides for seeking nomination from Chief Justices of High Courts, but Section 6 (3) empowers the Commission itself to make recommendation for appointment as Judge of the High Court and seek comments from Chief Justice after short listing the candidates by itself. Section 8 enables the Central

Government to appoint officers and employees of the Commission and to lay down their conditions of service. The Secretary of the Government is the Convenor of the Commission. Section 13 requires all regulations to be approved by the Parliament. These provisions in the Act impinge upon the independence of judiciary. Even if the doctrine of basic structure is not applied in judging the validity of a parliamentary statute, independence of judiciary and rule of law are parts of Articles 14, 19 and 21 of the Constitution and absence of independence of judiciary affects the said Fundamental Rights. The NJAC Act is thus liable to be struck down.

G. Effect of Amendment being struck down

24. The contention that even if Amendment is held to be void, the pre-existing system cannot be restored has no logic. In exercise of power of judicial review, a provision can be declared void in which case the legal position as it stands without such void provision can be held to prevail. It is not a situation when position has not been made clear while deciding an issue. Power of this Court to declare the effect of its order cannot be doubted nor the decisions relied upon by the respondents show otherwise. I hold that on amendment being struck down, the pre-existing system stands revived.

H. Review of Working of the Existing System

25. Since the system existing prior to amendment will stand revived on the amendment being struck down and grievances have been expressed about its functioning, I am of the view that such grievances ought to be considered. It is made clear that grievances have not been expressed by the petitioners about the existence of the pre-existing system of appointment but about its functioning in practice. It has been argued that this Court can go into this aspect without re-visiting the earlier decisions of the larger Benches. I am of the view that such grievances ought to be gone into for which the matter needs to be listed for hearing.

Conclusion

26. The impugned Amendment and the Act are struck down as unconstitutional. Pre-existing scheme of appointment of judges stands revived. The matter be listed for consideration of the surviving issue of grievances as to working of pre-existing system.

.....J.
[ADARSH KUMAR GOEL]

NEW DELHI
OCTOBER 16, 2015

APPENDIX

(I) Key Provisions of the Unamended Constitution

*"**124. Establishment and constitution of Supreme Court -** (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.*

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4).

xxxxxxx

***217. Appointment and conditions of the office of a Judge of a High Court-** 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:*
xxxxxx

***222. Transfer of a Judge from one High Court to another-** The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.*

xxxxx"

(II) The 99th Amendment Act

"THE CONSTITUTION (NINETY-NINTH AMENDMENT) ACT, 2014

[31st December, 2014]

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Sixty-fifth Year of the Republic of India as follows:—

1. *(1) This Act may be called the Constitution (Ninety-ninth Amendment) Act, 2014.*

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. *In article 124 of the Constitution, in clause (2),––*

(a for the words "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose", the words, figures and letter "on the recommendation of the National Judicial Appointments Commission referred to in article 124A" shall be substituted;

(b) the first proviso shall be omitted;

(c) in the second proviso, for the words "Provided further that", the words "Provided that" shall be substituted.

3. *After article 124 of the Constitution, the following articles shall be inserted, namely:—*

*"**124A.** (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:––*

(a) the Chief Justice of India, Chairperson, ex officio;

(b two other senior Judges of the Supreme Court next to the Chief Justice of India ––Members, ex officio;

(c) the Union Minister in charge of Law and Justice––Member, ex officio;

(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the

Leader of single largest Opposition Party in the House of the People –– Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

124B. *It shall be the duty of the National Judicial Appointments Commission to—*

(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;

(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

(c) ensure that the person recommended is of ability and integrity.

124C. *Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.".*

4. *In article 127 of the Constitution, in clause (1), for the words "the Chief Justice of India may, with the previous consent of the President", the words "the National Judicial Appointments Commission on a reference made to it by the Chief Justice of India, may with the previous consent of the President" shall be substituted.*

5. *In article 128 of the Constitution, for the words "the Chief Justice of India", the words "the National Judicial Appointments Commission" shall be substituted.*

6. *In article 217 of the Constitution, in clause (1), for the portion beginning with the words "after consultation", and ending with the words "the High Court", the words, figures and letter "on the recommendation of the National Judicial Appointments Commission referred to in article 124A" shall be substituted.*

7. *In article 222 of the Constitution, in clause (1), for the words "after consultation with the Chief Justice of India", the words, figures and letter "on the recommendation of the National Judicial Appointments Commission referred to in article 124A" shall be substituted.*

8. *In article 224 of the Constitution,––*

(a) in clause (1), for the words "the President may appoint", the words "the President may, in consultation with the National Judicial Appointments Commission, appoint" shall be substituted;

(b) in clause (2), for the words "the President may appoint", the words "the President may, in consultation with the National Judicial Appointments Commission, appoint" shall be substituted.

9. *In article 224A of the Constitution, for the words ''the Chief Justice of a High Court for any State may at any time, with the previous consent of the President'', the words ''the National Judicial Appointments Commission on a reference made to it by the Chief Justice of a High Court for any State, may with the previous consent of the President'' shall be substituted.*

10. *In article 231 of the Constitution, in clause (2), sub-clause (a) shall be omitted."*

(II) The NJAC Act

"THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014 NO. 40 OF 2014

[31st December, 2014]

An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Sixty-fifth Year of the Republic of India as follows:—

1. *(1) This Act may be called the National Judicial Appointments Commission Act, 2014.*

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. *In this Act, unless the context otherwise requires,––*

(a) "Chairperson" means the Chairperson of the Commission;

(b) "Commission" means the National Judicial Appointments Commission referred to in article 124A of the Constitution;

(c) "High Court" means the High Court in respect of which recommendation for appointment of a Judge is proposed to be made by the Commission;

(d) "Member" means a Member of the Commission and includes its Chairperson;

(e) "prescribed" means prescribed by the rules made under this Act;

(f) "regulations" means the regulations made by the Commission under this Act.

3. *The Headquarters of the Commission shall be at Delhi.*

4. *(1) The Central Government shall, within a period of thirty days from the date of coming into force of this Act, intimate the vacancies existing in the posts of Judges in the Supreme Court and in a High Court to the Commission for making its recommendations to fill up such vacancies.*

(2) The Central Government shall, six months prior to the date of occurrence of any vacancy by reason of completion of the term of a Judge of the Supreme Court or of a High Court, make a reference to the Commission for making its recommendation to fill up such vacancy.

(3) The Central Government shall, within a period of thirty days from the date of occurrence of any

vacancy by reason of death or resignation of a Judge of the Supreme Court or of a High Court, make a reference to the Commission for making its recommendations to fill up such vacancy.

5. *(1) The Commission shall recommend for appointment the senior-most Judge of the Supreme Court as the Chief Justice of India if he is considered fit to hold the office: Provided that a member of the Commission whose name is being considered for recommendation shall not participate in the meeting.*

(2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such under clause (3) of article 124 of the Constitution:

Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered:

Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.

(3) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary.

6. *(1) The Commission shall recommend for appointment a Judge of a High Court to be the Chief Justice of a High Court on the basis of inter se seniority of High Court Judges and ability, merit and any other criteria of suitability as may be specified by regulations.*

(2) The Commission shall seek nomination from the Chief Justice of the concerned High Court for the purpose of recommending for appointment a person to be a Judge of that High Court.

(3) The Commission shall also on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, nominate name for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such under clause (2) of article 217 of the

Constitution and forward such names to the Chief Justice of the concerned High Court for its views.

(4) Before making any nomination under sub-section (2) or giving its views under sub-section (3), the Chief Justice of the concerned High Court shall consult two senior-most Judges of that High Court and such other Judges and eminent advocates of that High Court as may be specified by regulations.

(5) After receiving views and nomination under sub-sections (2) and (3), the Commission may recommend for appointment the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by regulations.

(6) The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation.

(7) The Commission shall elicit in writing the views of the Governor and the Chief Minister of the State concerned before making such recommendation in such manner as may be specified by regulations.

(8) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Chief Justice of a High Court and a Judge of a High Court as it may consider necessary.

7. *The President shall, on the recommendations made by the Commission, appoint the Chief Justice of India or a Judge of the Supreme Court or, as the case may be, the Chief Justice of a High Court or the Judge of a High Court:*

Provided that the President may, if considers necessary, require the Commission to reconsider, either generally or otherwise, the recommendation made by it:

Provided further that if the Commission makes a recommendation after reconsideration in accordance with the provisions contained in sections 5 or 6, the President shall make the appointment accordingly.

8. *(1) The Central Government may, in consultation with the Commission, appoint such number of officers and other employees for the discharge of functions of the Commission under this Act.*

(2) The terms and other conditions of service of officers and other employees of the Commission appointed under sub-section (1) shall be such as may be prescribed.

(3) The Convenor of the Commission shall be the Secretary to the Government of India in the Department of Justice.

9. *The Commission shall recommend for transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court, and for this purpose, specify, by regulations, the procedure for such transfer.*

10. *(1) The Commission shall have the power to specify, by regulations, the procedure for the discharge of its functions.*

(2) The Commission shall meet at such time and place as the Chairperson may direct and observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meeting), as it may specify by regulations.

11. *(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.*

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:––

(a) the fees and allowances payable to the eminent persons nominated under sub-clause (d) of clause (1) of article 124A of the Constitution;

(b) the terms and other conditions of service of officers and other employees of the Commission under sub-section (2) of section 8;

(c) any other matter which is to be, or may be, prescribed, in respect of which provision is to be made by the rules.

12. *(1) The Commission may, by notification in the Official Gazette, make regulations consistent with this Act, and the rules made thereunder, to carry out the provisions of this Act.*

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(a) the criteria of suitability with respect to appointment of a Judge of the Supreme Court under sub-section (2) of section 5;

(b) other procedure and conditions for selection and appointment of a Judge of the Supreme Court under sub-section (3) of section 5;

(c) the criteria of suitability with respect to appointment of a Judge of the High Court under sub-section (3) of section 6;

(d) other Judges and eminent advocates who may be consulted by the Chief Justice under sub-section (4) of section 6;

(e) the manner of eliciting views of the Governor and the Chief Minister under sub-section (7) of section 6;

(f) other procedure and conditions for selection and appointment of a Judge of the High Court under sub-section (8) of section 6;

(g) the procedure for transfer of Chief Justices and other Judges from one High Court to any other High Court under section 9;

(h) the procedure to be followed by the Commission in the discharge of its functions under sub-section (1) of section 10;

(i) the rules of procedure in regard to the transaction of business at the meetings of Commission, including the quorum at its meeting, under sub-section (2) of section 10;

(j) any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be made by regulations.

13. *Every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be*

without prejudice to the validity of anything previously done under that rule or regulation.

14. *(1)If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, after consultation with the Commission, by an order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:*

Provided that no such order shall be made after the expiry of a period of five years from the date of commencement of this Act.

(2)Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament."

(III) The Statement of Objects and Reasons of the Amendment Act

"Statement of Objects and Reasons

The Judges of the Supreme Court are appointed under clause (2) of article 124 and the Judges of the High Courts are appointed under clause (1) of article 217 of the Constitution, by the President. The Ad-hoc Judges and retired Judges for the Supreme Court are appointed under clause (1) of article 127 and article 128 of the Constitution respectively. The appointment of Additional Judges and Acting Judges for the High Court is made under article 224 and the appointment of retired Judges for sittings of the High Courts is made under article 224A of the Constitution. The transfer of Judges from one High Court to another High Court is made by the President after consultation with the Chief Justice of India under clause (1) of article 222 of the Constitution.

2. The Supreme Court in the matter of Supreme Court Advocates-on-Record Association Vs. Union of India in the year 1993, and in its Advisory Opinion in the year 1998 in the Third Judges case, had interpreted clause (2) of article 124 and clause (1) of article 217 of the Constitution with respect to the meaning of "consultation" as "concurrence". Consequently, a Memorandum of Procedure for appointment of Judges to the Supreme Court and High Courts was formulated, and is being followed for appointment.

3. After review of the relevant constitutional provisions, the pronouncements of the Supreme Court and consultations with eminent Jurists, it is felt that a broad based National Judicial Appointments Commission should be established for making recommendations for appointment of Judges of the Supreme Court and High Courts. The said Commission would provide a meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable, while also introducing transparency in the selection process.

4. The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is an enabling constitutional amendment for amending relevant provisions of the Constitution and for setting up a National Judicial Appointments Commission. The proposed Bill seeks to insert new articles 124A, 124B and 124C after article 124 of the Constitution. The said Bill also provides for the composition and the functions of the proposed National Judicial Appointments Commission. Further, it provides that Parliament may, by law, regulate the procedure for appointment of Judges and empower the National Judicial Appointments Commission to lay down procedure by regulation for the discharge of its functions, manner of selection of persons for appointment and such other matters as may be considered necessary.

5. The proposed Bill seeks to broad base the method of appointment of Judges in the Supreme Court and High Courts, enables participation of judiciary, executive and eminent persons and ensures greater transparency, accountability and objectivity in the appointment of the Judges in the Supreme Court and High Court.

6. The Bill seeks to achieve the above objectives."

ITEM NO.1A COURT NO.4 SECTION X,PIL,XVIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s). 13/2015

SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION AND ANOTHER **Petitioner(s)**

VERSUS

UNION OF INDIA **Respondent(s)**

WITH
W.P.(C) No. 23/2015
W.P.(C) No. 70/2015
W.P.(C) No. 83/2015
T.P.(C) No. 391/2015
W.P.(C) No. 108/2015
W.P.(C) No. 124/2015
W.P.(C) No. 14/2015
W.P.(C) No. 18/2015
W.P.(C) No. 24/2015
W.P.(C) No. 209/2015
W.P.(C) No.309/2015
W.P.(C) No. 310/2015
W.P.(C) No.323/2015
T.P.(C) No.971/2015
W.P.(C) No.341/2015

[HEARD BY HON'BLE JAGDISH SINGH KHEHAR, HON'BLE J. CHELAMESWAR, HON'BLE MADAN B. LOKUR, HON'BLE KURIAN JOSEPH AND HON'BLE ADARSH KUMAR GOEL, JJ.]

Date :16/10/2015 These petitions were called on for judgment today.

For Petitioner(s) In WP 13/2015 **Mr. Fali S. Nariman, Sr. Adv.**
Mr. Subhash C. Kasyap, Adv.
Mr. Pranav Vyas, Adv.
for Mr. Surya Kant, Adv

For Petitioner(s) In WP 23/2015 **Prof. Bhim Singh, Sr. Adv.**

For Petitioner(s) In WP 70/2015 **Mr. Santosh Paul, Adv.**
Mr. Joseph Aristotle S.,Adv.
Mr. Arvind Gupta, Adv.
Mr. M.B. Elakkumanan, Adv.
Mr. Malay Swapnil, Adv.
Ms. Priya Aristotle, Adv.

	Ms. Savita Singh, Adv.
For Petitioner(s) In WP 83/2015	**Mr. Prashant Bhushan,Adv.**
For Petitioner(s) In WP 108/2015	**Mr. Anil. B. Divan, Sr. Adv.** **Mr. R.K.P. Shankar Das, Sr. Adv.** **Mr. K.N. Bhat, Sr. Adv.** **Mr. Prashant Kumar, Adv.** **Mr. Syed Rehan, Adv.** **Mr. Ranvir Singh, Adv.** **Ms. Anindita Pujari,AOR** **Mr. Jitendra Mahapatra, Adv.**
For Petitioner(s) in WP 124/2015	**Mr. Mathews J. Nedumpara, in person** **Mr. A.C.Philip, Adv.** **Mr. Rabin Majumder,AOR**
For Petitioner(s) in WP 14/2015	**Mr. Manohar Lal Sharma, in person** **Ms. Suman, Adv.**
For Petitioner(s) in WP 18/2015	**Mr. R.K. Kapoor, in person**
For Petitioner(s) in WP 24/2015	**Mr. Bishwajit Bhattacharyya, in person**
For Petitioner(s) in WP 209/2015	**Mr. Rajiv Daiya, in person**
For Petitioner(s) in WP(C) 309/2015	**Mr. P.M. Duraiswamy, in person** **Mr. V.N. Subramaniam, Adv.**
For Petitioner(s) in WP 310/2015	**Mr. Subhasish Bhowmick, AOR**
For Petitioner(s) In WP 323/2015	**Mr. S.K.Sinha, Adv.** **Mr. Joydeep Mukherjee, Adv.** **for Mr. Rabin Majumder,AOR**
For Petitioner(s) In WP 341/2015	**Mr. Sriram Parakkat, Adv.** **Mr. Vishnu Shankar Jain, Adv.** **for Mr. Ankur S. Kulkarni, AOR**
For Petitioner(s) in TP(C) No.971/2015	**Ms. Prachi Bajpai, Adv.**
For Respondent(s) India	**Mr. Ranjit Kumar, Solicitor General of**

(UOI)	Mr. P.S. Narasimha, ASG
and for	Mr. Guru Krishna Kumar, Sr. Adv.
petitioner(s)	Ms. V. Mohana, Sr. Adv.
In TP 391/2015	Mr. D.L. Chidananda, Adv.
	Ms. Madhvi Divan, Adv.
	Mr. Abhinav Mukherji, Adv.
	Ms. Binu Tamta, Adv.
	Dr. Arghya Sengupta, Adv.
	Ms. Ranjeeta Rohatgi, Adv.
	Ms. Devanshi Singh, Adv.
	Ms. Diksha Rai, Adv.
	Mr. Ninad Laud, Adv.
	Mr. Ajay Sharma, Adv.
	Ms. Ritwika Sharma, Adv.
	Mr. Samit Khosla, Adv.
	Mr. Nikhil Rohatgi, Adv.
	Mr. R.K. Sharma, Adv.
	Mr. Gurmehar s. Sistani, Adv.
	for Mr. B.V. Balaram Das, AOR
	Mr. Gautam Narayan, Adv.
for SCBA	Mr. Dushyant Dave, Sr. Adv.
	Ms. Aishwarya Bhati, Adv.
	Mr. Devashish Bharuka,AOR
	Capt. K.S. Bhati, Adv.
	Mr. A.K. Tiwari, Adv.
	Mr. T. Gopal, Adv.
	Mr. Dilip Nayak, Adv.
for State of	Mr. Shiv Mangal Sharma, AAG
Rajasthan	Mr. S.S. Shamshery, AAG
	Mr. Sandeep Singh, Adv.
	Mr. Amit Sharma, Adv.
	for Ms. Ruchi Kohli, AOR
IA 10/2015	Mr. Ashish Dixit, in person
	Mr. Gautam Takuldar, AOR
for State of MP	Mr. Ankur Talwar, Adv.
	Mr. Rohit Bhat, Adv.
	Ms. Prerna Priyadarshini, Adv.
	Ms. Suhasini Sen, Adv.
	Mr. Ankit Kr., Adv.
	for Mr. Mishra Saurabh, Adv.
for State of	Mr. T.R. Andhyarujina, Sr. Adv.
Maharashtra	Mr. Mahaling Pandarge, Adv.
	Mr. Nishant Kanteshwarkar, AOR
	Mr. Arpit Rai, Adv.

Mr. Anip Sachthey, Adv.
Mr. Saakaar Sardana, Adv.

Ms. K. Enatoli Sema, Adv.
Mr. Edward Belho, Adv.
Mr. Amit Kumar Singh, Adv.

Mr. Vir Bahadur Singh, AG
Mr. Gaurav Bhatia, AAG
Mr. Abhisth Kumar, AOR.
Mr. Abhishek Kumar Singh, Adv.
Mr. Vijay Pratap Yadav Adv.
Mr. Som Raj Choudhury, Adv.

Ms. Anitha Shenoy, Adv.
Mr. V.N. Raghupathy, Adv.

Mr. Tapesh Kumar Singh, Adv.
Mr. Mohd. Waquas, Adv.
Mr. Kumar Anurag Singh, Adv.

Ms. Rachana Srivastava, Adv.

Mr. Ravindra Shrivastava, Sr. Adv.
Mr. C.D. Singh, AAG
Ms. Shashi Juneja, Adv.
Mr. A.P. Mayee, Adv.
Mr. Apoorv Kurup, Adv.
Mr. V.C. Shukla, Adv.
Mr. Pulkit, Adv.

Mr. Ramesh Babu M.R., Adv.
Ms. Swati Setia, Adv.

Mr. Sapam Biswajit Meitei, Adv.
Mr. Z.H. Isaac Haiding, Adv.
Mr. Ashok Kumar Singh, Adv.

Mr. Tushar Mehta, ASG
Ms. Hemantika Wahi,Adv.

Mr. Sanchar Anand, AAG
Mr. Ajay Bansal, AAG
Mr. Jagjit Singh Chhabra, Adv.
Mr. Kuldip Singh, AOR
Mr. Ajay Yadava, Adv.
Mr. Anil Nishani, Adv.
Mr. Jaswant P, Adv.

Mr. Sibo Sankar Mishra, Adv.

Mr. Suryanarayana Singh, AAG
Ms. Pragati Neekhra,AOR

Mr. Indra Pratap Singh, Adv.
Mr. Prakash Kumar Singh,AOR

Mr. Arun Monga, Adv.
Ms. Kudrat Sandho, Adv.
for Mr. Tushar Bakshi, AOR

Mr. M.Yogesh Kanna, Adv.
Mr. Jayant Patel, Adv.

Dr. Rajeev Dhawan, Sr. Adv.

Mr. Krishna Sarma, Adv.
Mr. Avijit Roy, Adv.
Mr. Navnit Kumar, Adv.
Ms. Barnali Das, Adv.
Ms. Deepika, Adv.
for M/s Corporate Law Group

Mr. Guntur Prabhakar, Adv.
Ms. Prerna Singh, Adv.

Mr. Anil Grover, AAG
Mr. Ajay Bansal, AAG
Mr. Gaurav Yadava, Adv.
Ms. Nupur Singhal, Adv.
Mr. Sanjay Visen, Adv.

Mr. Anil Kumar Chopra, Adv.
Mr. Ashok Kumar Thakur, Adv.
Mr. Imran Khan Burni, Adv.

Hon'ble Mr. Justice Jagdish Singh Khehar, Hon'ble J. Chelameswar, Hon'ble Madan B. Lokur, Hon'ble Kurian Joseph and Hon'ble Adarsh Kumar Goel, JJ. Pronounced the separate judgments, the prayer for reference to a larger Bench, and for reconsideration of the Second and Third Judges cases [(1993) 4 SCC 441, and (1998) 7 SCC 739, respectively] is rejected; the Constitution (Ninety-ninth Amendment) Act, 2014 is declared unconstitutional and void; the National

Judicial Appointments Commission Act, 2014, is declared unconstitutional and void; the system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Courts; and transfer of Chief Justices and Judges of High Courts from one High Court, to another, as existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014 (called the "collegium system"), is declared to be operative; and to consider introduction of appropriate measures, if any, for an improved working of the "collegium system", list on 3.11.2015.

(Renuka Sadana)
Court Master

(Parveen Kr. Chawla)
AR-cum-PS