Supreme Court of India Supreme Court ... vs Union Of India on 6 October, 1993 Author: J Verma Bench: Pandian, S.R. (J), Ahmadi, A.M. (J) (J), Verma, Jagdish Saran Punchhi, M.M., Yogeshwar Dayal Ray, G.N. (J), Anand, A.S. (J) (J) CASE NO.: Writ Petition (civil) 1303 of 1987

PETITIONER: Supreme Court Advocates-on-Record Association and another

RESPONDENT: Union of India

DATE OF JUDGMENT: 06/10/1993

BENCH: S. Ratnavel Pandian & A.M. Ahmadi & Kuldip Singh & J.S. Verma & M.M. Punchhi & Yogeshwar Dayal & G.N. Ray & Dr. A.S. Anand & S.P. Bharucha

JUDGMENT: JUDGMENT ORDER With S.P. Gupta Vs. Respondent:Union of India J.S. Verma, J. (for himself and on behalf of Yogeshwar Dayal, G.N. Ray, Dr. A.S. Anand & S.P. Bharucha, JJ.) : 1. By and Order dated October 26,1990 passed in Subhash Sharma and Ors. and Anr. Union of India (1990) 2 S.C.R. 433 and the matters connected therewith, the papers of Writ petition No. 1303 of 1987 - Supreme Court Advocates-on-Record Association and Anr. v. Union Of India were directed to be placed before the learned Chief Justice of India for constituting a Bench of nine Judges to examine the two question referred therein, namely, the position of the Chief Justice of India with reference to primacy, and justiciability of fixation of Judge strength. That Order was made since the referring Bench was of the opinion, that the correctness of the majority view in S.P. Gupta and Ors. etc. etc. v. Union of India and Ors. etc. etc. (1982) 2 SCR 365 : (AIR 1982 SC 149), required reconsideration by a larger Bench. This is how these questions arise for decision by this Bench. 2. The context in which the aforesaid two questions have been referred for decision by this Bench requires that they be considered in all the facts as were argued before us by all, to give a comprehensive answers to the problem. It is, therefore, appropriate to reformulate the two questions as under: (1) Primacy of the opinion of the Chief Justice of India in regard to the appointments of Judges to the Supreme Court and the High Court, and in regard to the transfers of High Court Judges/Chief Justices; and (2) Justiciability of these matters, including the matter of fixation of the Judge-strength in the High Courts. 3. Able assistance was afforded to us by several eminent counsel who appeared to canvass the different viewpoints in order to focus attention on every aspect of these questions. Sarvashri F.S. Nariman, Kapil Sibal, Ram Jethmalani, P.P. Rao and Shanti Bhushan argued for reconsideration of the majority opinion in S.P. Gupta, contending that the role of the Chief Justice of India in the matter of appointments to the Supreme Court and the High Courts and transfers of the High Court Judges and Chief Justices has primacy, with the executive having the role of merely making the appointments and transfers in accordance with the opinion of the Chief Justice of India. This, in substance, was the common theme of their address. However, there were minor variations between them relating to the extent of exclusion of the executive's

role. One point of view canvassed was that the primacy of the Chief Justice of India is in all matters; another point of view was that in an exceptional case the executive may not make an appointment recommended by the Chief Justice of India if, for strong reasons disclosed to the Chief Justice of India, that appointment was considered to be unsuitable. It was also contended by them that the matter of fixation of the Judge-strength under Article 216 is justiciable, there being some difference between them about the extent to which it is justiciable. Shri S.P. Gupta, petitioner-in-person in Writ Petition No. 156 of 1993, also argued that the majority opinion in S.P. Gupta v. Union of India (1982) 2 SCR 365 : (AIR 1982 SC 149) , is incorrect. 4. Shri K. Parasaran by and large argued in favour of affirmance of the majority opinion in S.P. Gupta, contending that there is no occasion to take a different view, more so when, in spite of that decision, in the actual working, the Government of India gives the greatest weight to the opinion of the Chief Justice of India; and, except on rare occasions, appointments have been made only in accordance with the opinion of the Chief Justice of India. Shri Parasaran submitted that the Constituent Assembly Debates show that the plea for primacy of Chief Justice of India, or the requirement of his concurrence in making the appointment, was considered and expressly discarded while drafting the Constitution. He also submitted that the several provisions in the Constitution relating to the oath of office; fixity of tenure; restriction against alteration of conditions of service to the detriment of the judges after their appointment; salaries and pensions being charged on the Consolidated Fund; restriction on discussion of their conduct in the legislature; power to punish for contempt; and open hearing in courts are sufficient safeguards for the independence of the judiciary and therefore, no further exclusion of the executive's role in the process of appointment of Judges is contemplated. 5. The learned Attorney General, in substance, canvassed for acceptance of the opinion of Pathak, J. (as he then was) in S.P. Gupta as the correct view, providing a middle course. The learned Advocate General of Karnataka agrued for reconsideration of the majority opinion in S.P. Gupta. He contended that the role of the executive is merely to suggest the names of those it considers suitable, to the Chief Justice, but initiation of the proposal must be by the Chief Justice and the opinions of the Chief Justice of India and Chief Justice of the High Court are entitled to much greater weight. The learned Advocate General submitted, that any person disapproved of by the Chief Justice of India cannot be appointed a Judge; and the President is not bound to appoint every one who may be recommended. He also submitted that the opinion of the judiciary binds the executive even in the matter of fixation of Judge-strength under Article 216, as a matter of policy. On the other hand the learned Advocate General of Sikkim contended that the primacy is in the executive, and the majority opinion in S.P. Gupta is correct. To the same effect was the submission of the learned Advocate General of Madhya Pradesh. 6. Shri R.K. Garg submitted that the opinion of Pathak, J. (as the then was) in S.P. Gupta is preferable, that there is primacy of the role of the Chief Justice of India in the process of appointment, which is an inter-grated process. The submissions of some others who addressed us fall within the broad

parameters of the rival contentions. 7. It is unnecessary for us the burden this opinion with the full historical background in which these questions arise for decision, since the same is stated at length in S.P. Gupta and, along with the subsequent developments, mentioned in the referring Order. However, for the sake of convenience, a brief resume of the background in which these questions have to be considered, may be given. BACKGROUND 8. 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, provide some insight to the true meaning of the relevant provisions in the Constitution relating to the composition of the judiciary. The construction of those provisions must accord with these fundamental concepts in the constitutional scheme to preserve the vital and promote the growth essential for retaining the Constitution as a vibrant organism. 9. It is useful to refer to certain observations by a Constitution Bench in Sub-committee on Judicial Accountability v. Union of India and Ors. (1991) 4 SCC 699, as under :- ... 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. 10. In S.P. Gupta the concept of independence of the judiciary to be kept in view, while interpreting the relevant provisions of the Constitution, was summerised by Bhagwati, J. (as he then was), thus : Judges should be stern stuff and tough fire, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution. 11. Pathak, J. (as he then was) in S.P. Gupta under the topic 'The Rule of Law and the administration of justice', stated thus : ... While the administration of justice draws its legal sanction from the Constitution, its credibility rests in the faith of the people. Indispensable to that faith is the independence of the judiciary. An Independent and impartial judiciary supplies the reason for the judicial institution, it also gives character and content to the constitutional milieu. ...In fashioning of the provisions relating to the judiciary, the greatest importance was attached to securing the independence of the judges, and throughout the Constituent Assembly debates the most vigorous emphasis was laid on that principle... the framers of the Constitution took great pains to ensure that an even better and more effective

judicial structure was incorporated in the Constitution, one which would meet the highest expectations of judicial independence.... (emphasis supplied) 12. This perception of the concept of independence of the judiciary is in harmony with the 'Basic Principles on the independence of the Judiciary' forming a part of the universal 'Human Rights in the Administration of Justice' envisaged by the Seventh United Nations Congress at Milan and endorsed by the U.N. General Assembly in 1985, which provide inter alia as under : 10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.... xxx xxx xxx 13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience. (emphasis supplied) (Human rights - A Compilation of International Instruments (1988) at p. 267.) 13. Mathew, J. in Smt. Indira Nehru Gandhi v. Shri Raj Narain and Anr. (1975) Supp. SCC 1, after indicating that the rule of law is a part of the basic structure of the Constitution, apart of the basic structure of the Constitution, apart from democracy, as held in Kesavananda Bharati (1973) Supp. Supp. S.C.R. 1, proceeded to succinctly summarise the modern concept of the rule of law, as under : ...'Rule of law' is an expression to give reality to something which is not readily expressible. That is why Sir Ivor Jennings said that it is an unruly horse.... Dicey's formulation of the rule of law, namely. the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, excluding the existence of arbitrariness, of prerogative, even of wide discretionary authority on the part of the government has been discarded in the later editions of his book. That is because it was realized that it is not necessary that where law ends, tyranny should begin. As Culp Davis said, where the law ends, discretion begins and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.... It is impossible to find a government of laws alone and not of men in the sense of eliminating all discretionary powers. All governments are governments of law and of men.... xxx xxx xxx Another definition of rule of law has been given by Friendrich A. Hayek in his books : "Road to Serfdom" and "Constitution of Liberty". It is much the same as that propounded by the Franks Committee in England : The rule of law stands for the view that decisions should be made by the application of known principles or laws. In general such decisions will be predictable, and the citizen will known where he is. On the other hand there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of the decision taken in accordance with the rule of law. xxx xxx xxx If it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then there is no rule of law in any modern State...it is impossible to enunciate the rule of law which has as its basis that no decision can be made unless there is a certain rule to govern the decision. Leaving aside these extravagant versions of rule of law, there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the

ordinary law. But, if rule of law is to be a basic structure of the Constitution, one must find specific provisions in the Constitution embody the constituent elements of the concept. I cannot conceive of rule of law as a twinkling star up above the Constitution. To be a basic structure, it must be a terrestrial concept having its habitat within the four comers of the Constitution. The provisions of the Constitution were enacted with a view to ensure the rule of law. Even if I assume that rule of law is basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14. Maybe, the other articles referred to do the same duty. (emphasis supplied) 14. It is, therefore, realistic that there has to be room for discretionary authority within the operation of the rule of law, even though it has to be reduced to the minimum extent necessary for proper govenance; and within the area of discretionary authority, the existence of proper guidelines or norms of general application excludes any arbitrary exercise of discretionary authority. In such a situation, the exercise of discretionary authority in its application to individuals, according to proper guidelines or norms, further reduces the area of discretion; but to that extent discretionary authority has to be given to make the system workable. A further check in that limited sphere is provided by the conferment of the discretionary authority not to one individual but to a body of men, requiring the final decision to be taken after full interaction and effective consultation between them, to ensure projection of all likely points of view and procuring the element of plurality in the final decision with the benefit of the collective wisdom of all those involved in the process. The conferment of this discretionary authority in the highest functionaries is a further check in the same direction. The constitutional scheme excludes the scope of absolute power in any one individual. Such a construction of the provisions also, therefore, matches the constitutional scheme and the constitutional purpose for which these provision were enacted. 15. It is also useful to refer to certain observations of the referring Bench in Subhash Sharma, the significance of which cannot be doubted. It was observed therein, as under : In India, however, the judicial institutions, by trading, have an avowed apolitical commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of "consultation" has to be understood and expounded consistent with and to promote this constitutional spirit. These implications are, indeed vital.... The appointment is rather the result of collective, constitutional process. It is a participatory constitutional function. It is, perhaps, inappropriate to refer to any 'power' or 'right' to appoint Judges. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories.... What Endmond Bruke said is to be recalled. : All persons possessing a position of power ought to be strongly and awfully impressed with an idea that they act in trust and are to account for their conduct in that trust to the one great Master, Author and Founder of Society. (emphasis supplied) 16. In view of the fact that the constitutional functionaries to whom the task has been

entrusted discharge a 'participatory constitutional function', it is instructive to recall the prophetic warning of Dr. Rajendra Prasad in his speech, President of the Constituent Assembly, while moving for adoption of the Constitution of India. He said : We have prepared a democratic Constitution. But successful working of democratic institutions requires in those who have to work them willingness to respect the viewpoints of others, capacity for compromise and accommodation. Many things which cannot be written in a Constitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions. The way in which we have been able to draw this Constitution without taking recourse to voting and to divisions in lobbies strengthens that hope. Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it.... If the people who are elected are capable and men of character and integrity, they would be able to make the beat 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. There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are bom of these differences. We can only hope that the country will throw up such men in abundance.... In India today I feel that the work that confronts us is even more difficult than the work which we had when we ware engaged in the struggle. We did not have then any conflicting claims to reconcile, no leaves and fishes to distribute, no powers to share. We have all these now, and the temptations are really great. Would to God that we shall have the wisdom and the strength to rise above them, and to serve the country which we have succeeded in liberating. (emphasis supplied) (The Framing of India's Constitution, Vol. IV - B Shiva Rao - pages 957- 58) 17. The need for judicial determination of this controversy has arisen only because the warning of Dr. Rajendra Prasad does not appear to have been duly heeded by the functionaries entrusted with the constitutional obligation of properly composing the higher judiciary, and ensuring its satisfactory functioning, for the administration of justice in the country. The adverse agnesauence of this failure is manifested in many ways. 18. It is well known that the appointment of superior Judges is from amongst persons of mature age with known background and reputation in the legal profession. By that time the personality is fully developed and the propensities and background of the appointee are well known. The collective wisdom of the constitutional functionaries involved in the process of appointing superior Judges is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful persons gain entry. It is not unlikely that the care and attention expected from them in the discharge of this

obligation has not been bestowed in all cases. It is, therefore, time that all the constitutional functionaries involved in the process of appointment of superior Judges 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. This is not difficult to achieve. 19. The question of primacy of the role of the Chief Justice of India in the context of appointment of Judges in the Supreme Court and the High Courts must be considered in this backdrop for the proper picture of the constitutional scheme to emerge from the mixture of various hues, to achieve the constitutional purpose of selecting the best available for composition of the Supreme Court and the High Courts, so essential to ensure the independence of the judiciary, and, thereby, to preserve democracy. A fortiori any construction of the constitutional provisions which conflicts with this constitutional purpose or negates the avowed object has to be eschewed, being opposed to the true meaning and spirit of the Constitution and, therefore, an alien concept. 20. It is with this perception that the nature of primacy, if any of the Chief Justice of India, in the present context, has to be examined in the constitutional scheme. The hue of the word 'consultation', when the consultation is with the Chief Justice of India as the head of the Indian Judiciary, for the purpose of composition of higher judiciary, has to be distinguished from the colour the same word 'consultation' may take in the context of the executive associated in that process to assist in the selection of the best available material. 21. In S.P. Gupta, the majority comprising of Bhagwati, J. (as he then was), Fazal Ali, J., Desai, J. and Venkataramiah, J. (as he then was), took the view, in substance that the opinion of the Chief Justice of India does not have primacy in the matter of appointments of Judges of the Supreme Court and the High Courts; that the primacy is with the Central Government which is to take the decision after consulting all the constitutional functionaries; and the Central Government is not sound to act in accordance with the opinion of all the constitutional functionaries consulted, even if their opinion be identical. It was also held in S.P. Gupta that for initiation of the proposal for appointment of a Judge of the Supreme Court or a High Court, there could not be a blanket embargo on the executive initiating the proposal, even though it would be appropriate that the executive's right to initiate an appointment should be limited to suggesting appropriate names to the Chief Justice of the High Court or the Chief Justice of India. It is this view of the majority in S.P. Gupta and, particularly, the same literal meaning given to the word 'consultation' in Articles 124(2) and 217(1) in relation to all consultees, together with the final authority given to the Central Government in the matter of appointments, which gives rise to the occasion for its reconsideration. 22. It is also of significance, as noticed in Subhash Sharma, that 'the Union Government has quite often, both before the Parliament and outside, stated that it has, as a matter of policy, not made any appointments to the superior judiciary without the name being cleared by the Chief Justice of India.' This assertion of the Government of India was reiterated, on affidavit, at the hearing before us, by stating that, barring a few exceptions, all appointments to the superior judiciary were made only in accordance with the opinion of the Chief

Justice of India, notwithstanding the majority view in S.P. Gupta. The true significance of this stand of the Government of India is, that in the actual working of this process, even the executive attaches primacy to the role of the Chief Justice of India in the matter of appointments to the superior judiciary, not withstanding the decision in S.P. Gupta that the primacy is with the Government of India and not in the Chief Justice of India. 23. The question of primacy of the role of the Chief Justice of India, therefore, arises in this background. 24. The principal provisions of the Constitution, mainly with reference to which the questions referred have to be answered, are the following 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 (now "twenty-five" vide Act 22 of 1986) 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 consuited ; Provided further that - (a) a judge may, by writing under his hand addressed to the President, resign his office; (b) a large may be removed from his office in the manner provided in Clause (4). xxxx xxxx xxxx 216. Constitution of High Courts. - Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. 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 year: 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 tot 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)... (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. 222. Transfer of a Judge from on 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. PRIMACY OF THE CHIEF JUSTICE OF INDIA 25. This question arises for the purposes of appointments of Judges in the Supreme Court in accordance with Article 124(2), and in the High Courts in accordance with Article 217(1); and transfer of a Judge/Chief Justice from on High Court to another in accordance with Article 222 of the Constitution. 26. We begin with a note of caution, thus : O, it is excellent To have a giant's strength; but it is tyrannous To use it like a giant." (Shakespeare in 'Measure of Measure') 27. 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. 28. The primacy of one constitutional functionary qua the other, who together participate in the performance of this function assumes significance only when they cannot reach an agreed conclusion. The debate is academic, when a decision is reached by agreement taking into account the opinion of every one participating together in the process, as primarily intended. The situation of a difference at the end, raising the question of primacy is best avoided by each constitutional functionary remembering that all of them are participants in a joint venture, the aim of which is to find out and select the most suitable candidate for appointment, after assessing the comparative merit of all those available. This exercise must be performed as a pious duty to discharge the constitutional obligation imposed collectively on the highest functionaries drawn from the executive and the judiciary, in view of the great significance and these appointments. The common purpose to be achieved, points in the direction that emphasis has to be on the importance of the purpose and not on the comparative importance of the participants working together to achieve the purpose. Attention has to be focussed on the purpose, to enable better appreciation of the significance of the role of each participant, with the consciousness that each of them has some inherent limitation, and it is only collectively that they constitute the selector. 29. The discharge of the assigned role by each functionary, viewed in the context of the obligation of each to achieve the common constitutional purpose in the joint venture will help to transcend the concept of primacy between them. However, if there be any disagreement even then between them which cannot be ironed out by joint effort, the question of primacy would arise to avoid stalemate. 30. For this reason, it must be seen who is best equipped and likely to be more correct in his view for achieving the purpose and performing the task satisfactorily. In other words, primacy should be in him who qualifies to be treated as the 'expert' in the field. Comparatively greater weight to his opinion may then be attached. 31. The aforementioned perception in all the constitutional functionaries associated in the integrated participatory consultative process to achieve the avowed common purpose should ordinarily prevent the situation when the question of primacy arises; and in the exceptional cases when it

does arise, the functionary having primacy would do well to respect the viewpoint of others and recall that it implies the carrying by him of a greater burden. This will ensure better performance of the role with primacy, in the proper spirit, and will make it easier for the others to accept the primacy. Appointments 32. The appointment of Judges to the Supreme Court and the High Courts is made by the President and is, therefore, ultimately an executive act. Article 74(1) clearly provides, and the proviso inserted therein by the Constitution (Forty-Fourth Amendment) Act, 1978 reinforces, that the President, in exercise of his functions, shall act in accordance with the advice tendered by the Council of Ministers. If Articles 124(2) and 217(1) provided for appointments of Judges by the President without obligatory consultation with the functionaries specified therein, then, by virtue of the full effect of Article 74, there would be no room for any controversy that the appointments were not to be made by the executive in its absolute discretion. A situation of this kind existed under the Government of India Acts in the pre Constitution era, even when, in practice, the Chief Justice of the High Court was usually consulted, since a Judge of the High Court was appointed in the absolute discretion of the Crown. 33. 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. The relevant provision, were : 101. Constitution of high courts. - (1)... (2) Each high court shall consist of a chief justice of as many other judges as His Majesty may think fit to appoint : 102. Tenure of judges of high Courts.- (1) Every judge of a high court shall hold office during His Majesty's pleasure. xxx xxx xxx 34. 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. The relevant parts of these Sections were : 200. Establishment and Constitution of Federal Court. - (1)... (2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty-five years Provided that - (a) a judge may by resignation under his hand addressed to the Governor- General resign his office; (b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, or reference being made to them by His Majesty, report that the judge ought on any such ground to be removed. xxx xxx xxx 220 Constitution of High Courts. (1) .... (2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years : Provided that - (a) a judge may, by resignation under his hand addressed to the Governor resign his office : (b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind of body if the Judicial Committee of the Privy Council on reference being to them by His Majesty, report that the judge ought on

any such ground to be removed. (c) the office of a judge shall be vacated by his being appointed by His Majesty to be a judge of the Federal Court or of another High Court. xxx xxx xxx 35. 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. The consultation, if any with the Chief Justice under the Government of India Acts was merely to enable the executive to take into account that view, if it so desired, but prior consultation with the Chief Justice was no an essential prerequisite. 36. 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 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. 37. This clear departure in the constitutional scheme from the earlier pattern in the Government of India Acts, wherein the appointments were in the absolute discretion of the Crown, is a sure indication that irrespective of the question of primacy of the Chief Justice of India in the matter of appointments, the Constitutional provisions cannot be construed to read therein the absolute discretion of primacy of the Government of India to make appointments of its choice, after completing formally the requirement of consultation, even if the opinion given by the consultees of the judiciary is to the contrary. In our opinion, this departure made in the Constitution of India from the earlier scheme under the Government of India Acts, is itself a strong circumstance to negative the view that in the constitutional scheme primacy is given to the opinion of the Government of India, notwithstanding the mandate of obligatory consultation with the Chief Justice of India all cases, and also with the Chief Justice of the High Court in the case of appointment to a High Court. 38. The consideration must, therefore, be confined to the comparative weight to be attached to the opinion of the Chief Justice of India vis-a-vis the opinion of the other consultees and the Central Government. 39. It follows that the view of Bhagwati, J. (as he then was) in S.P. Gupta which reflects the majority opinion therein, at least to the extent indicated hereafter, conflicts with this constitutional scheme, and, with respect, does not appear to be a

correct construction of the provisions in Article 124(2) and 217(1). Certain portions from the opinion of Bhagwati, J. to this effect are, as under : ... It is clear on a plain reading of these two Articles that the Chief Justice of India, the Chief Justice of the High Court and such other Judges of the High Courts and of the Supreme Court as the Central Government may deem it necessary to consult, are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government.... ... It would therefore be open to the Central Government to override the opinion given by the constitutional functionaries required to be consulted and to arrive at its own decision in. regard to the appointment of the judge in the High Court or the Supreme Court.... 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.... (emphasis supplied) 40. It is obvious, that the provision for consultation with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best epuipped to know and assess the worth of the candidate, and his suitability for appointment as a superior judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. 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. 41. The primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of primacy would arise when the decision is reached in this manner by consensus, without any difference of opinion. However, if conflicting opinions emerge at the end of the process, then only the question of giving primacy to the opinion of any of the consultees arises. For reason indicated earlier, primacy to the executive is negatived by the historical change and the nature of functions required to be performed by each. The primacy must, therefore, lie in the final opinion of the Chief Justice of India, unless

for very goods reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable. 42. This is not surprising if we remember that even in United Kingdom where similar judicial appointments are in the absolute discretion of the executive, these appointments are made by convention 'on the advice of the Prime Minister after consultation with the Lord Chancellor, who himself consults with senior members of the judiciary before making his choice or consulting with the Prime Minister' and the 'Prime Minister would depart from the recommendations of the Lord Chancellor only in the most exceptional case.' (See the Politics of Judiciary - J.A.G. Griffith at p.17, 18). the Lord Chancellor, Lord Machay speaking recently on 'The Role of the Judge in a Democracy' said : One of the most important responsibilities of a Lord Chancellor in our democracy is for judicial appointments. It is my duty to ensure that neither political bias, nor personal favouritism, nor animosity play any part in the appointment of judges and that they are selected regardless of sex, ethnic origin or religion of the basis of their fitness to carry out the solemn responsibility of judicial office. I look for those with integrity, professional ability, experience, standing a sound temperament and good health. To achieve this I consult widely and regularly with the judges, Law Lords and other members of the legal profession. In naturally attach particular importance to the opinion of the Divisions of the High Court. Judges therefore have an important role in judicial appointments, albeit informally rather than proscribed by statute. (emphasis supplied) (Commonwealth Law Bulletin, Vol. 18, Number 4, October 1992, at p.1257) 43. With the express provision in the Indian Constitution for consultation with the Chief Justice of India, the role of the Chief Justice of India cannot be of significance than that of the Lord Chancellor in United Kingdom. 44. The majority view in S.P. Gupta to the effect that an executive should have primacy, since it is accountable to the people while the judiciary has no such accountability, is an easily exploded myth, a bubble which punishes on a mere touch. Accountability of the executive to the people in the matter of appointments of superior Judges has been assumed, and it does not have any real basis. There is no occasion to discuss the merits of any individual appointment in the legislature on account of the restriction imposed by Articles 121 and 211 of the Constitution. Experience has shown that it also does not form a part of the manifesto of any political party, and is not a matter which is, or can be, debated during the election campaign. There is thus no manner in which the assumed accountability of the executive in the matter of appointment of an individual judge can be raised, or has been raised at any time. On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism levelled by the ever vigilant Bar. That controversy is raised primarily in the courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus,

in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India. 45. If that is the position in actual practice of the constitutional professions relating to the appointments of the superior Judges, wherein the executive itself holds out that it gives primacy to the opinion of the Chief Justice of India, and in the matter of accountability also it indicates the primary responsibility of the Chief Justice of India, it stands to reason that the actual practice being in conformity with the constitutional scheme, should also be accorded legal sanction by permissible constitutional interpretation. This reason given by the majority in S.P. Gupta for its view, that the executive has primacy, does not withstand scrutiny, and is also not in accord with the existing practice and the perception even of the executive. 46. However, it need hardly be stressed that the primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion. 47. In view of the provision in Article 74(1), the expression 'President' in Articles 124(2) and 217(1) means the President acting in accordance with the advice of the Council of Ministers with the Prime Minister at the head; and the advice given by the Council of Ministers has to accord with the mandate in the Constitution, or, in other words, with the construction made of Articles 124(2) and 217(1) by this Court, in discharge of its constitutional duty to interpret the Constitution. A fortiori, advice given by the Council of Ministers which binds the President and requires him to act in accordance therewith, had to be the advice given in accordance with the constitutional provisions, as interpreted by this Court. 48. If it were to be held that, notwithstanding the requirement of Articles 124(2) and 217(1) of mandatory consultation with the Chief Justice of India and Chief Justice of the High Court, the Council of Ministers has the unfettered discretion to give contrary advice, ignoring the view of the Chief Justice of India, and the President is bound by Article 74(1) to act in accordance with that advice, then the constitutional purpose of introducing the mandatory requirement of consultation in Articles 124(2) and 217(1) would be frustrated. It is for this reason, that in the matter of appointments of Judges of the superior judiciary, the interaction and harrnonisation of Article 74(1) with Articles 124(2) and 217(1) has to be borne in mind, to serve the constitutional purpose. In short in the matter of appointments of Judges of the superior judiciary, the constitutional requirement is, that the President is to act in accordance with the advice of the Council of Ministers as provided in Article 74(1); and the advice of the Council of Ministers is to be given in accordance with Articles 124(2) and 217(1), as construed by this Court. In this sphere, Article 74(1) is circumscribed by the requirement of Articles 124(2) and 217(1). and all of them have to be read together. 49. The above view also accords with the provisions in the Constitution pertaining to the removal

from office of Judges of the Supreme Court and the High Courts. The removal of a Supreme Court Judge in accordance with Clauses (4) and (5) of Article 124, and of a High Court judge similarly, as provided in Article 218, requires a different scheme to be followed, to which Article 74(1), in terms does not apply. It cannot be suggested that the President, while making an order removing a Judge of the Supreme Court or of a High Court, is to be governed entirely by the advice of the Council of Ministers in accordance with Article 74(1), ignoring the special provisions relating to the removal of a Judge, incorporated in the Constitution. Similarly, in the case of appointments, the special provision prescribing the process for appointment is of significance, and Article 74(1) has to be read along therewith, and not in isolation, to make correct construction. 50. The question of primacy of the role of the Chief Justice of India has to be examined not merely with reference to the fact that an appointment is an executive act, or with reference only to the comparative constitutional status of the different consultees involved in the process, but with reference also to the constitutional purpose sought to be achieved by these provisions, and the manner in which that purpose can be best achieved. 51. Providing for the role of the judiciary as well as the executive in the integrated process of appointment merely indicated that it is a participatory consultative process, and the purpose is best served if at the end of an effective consultative process between all the consultees the decision is reached by consensus, and no question arises of giving primacy to any consultee. Primarily, it is this indication which is given by the constitutional provisions, and the constitutional purpose would be best served if the decision is made by consensus without the need of giving primacy to any one of the consultees on account of any difference remaining between them. The question of primacy of the opinion of any one of the constitutional functionaries qua the others would arise only if the resultant of the consultative process is not one opinion reached by consensus. 52. The constitutional purpose to be served by these provisions is to select the best from amongst those available for appointment as Judges of the superior judiciary, after consultation with those functionaries who are best suited to make the selection. It is obvious that only those persons should be considered fit for appointment as Judges of the superior judiciary who combine the attributes essential for making an able, independent and fearless judge. Several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior Judge. The initial appointment of Judges in the High Courts is made from the Bar and the subordinate judiciary. Appointment to the Supreme Court is mainly from amongst High Court Judges, and on occasion directly from the Bar. The arena of performance of those men are the courts, it is, therefore, obvious that the maximum opportunity for adjudging their ability and traits, is in the courts and, therefore, the Judges are best suited to assess their true worth and fitness for appointment as judges. This is obviously the reason for introducing the requirement of consultation with the Chief Justice of India in the matter of appointment of all Judges, and with the Chief Justice of the High Court in

the case of appointment of a Judge in a High Court. Even the personal traits of the members of the Bar and the Judges are quite often fully known to the Chief Justice of India and the Chief Justice of the High Court who get such information from various sources. There may however, be some personal trait of an individual lawyer or Judge, which may be better known to the executive and may be unknown to the Chief Justice of India and the Chief Justice of the High Court, and which may be relevant for assessing his potentiality to become a good Judge. It is for this reason, that the executive is also one of the consultees in the process of appointment. The object of selecting the best men to constitute the superior judiciary is achieved by requiring consultation with not only the judiciary but also the executive to ensure that every relevant particular about the candidate is known and duly weighed as a result of effective consultation between all the consultee, before the appointment is made. It is the role assigned to the judiciary and the executive in the process of appointment of Judges which is the true index for deciding the question of primacy between them, in case of any difference in their opinion. The answer which best subserves this constitutional purpose would be the correct answer. 53. It has been indicated that the judiciary being best suited and having the best opportunity to assess the true worth of the candidates, the constitutional purpose of selecting the best available men for appointment as superior Judges is best served by ascribing to the judiciary, as a consultee, a more significant role in the process of appointment. The only question is of the extent of such significance and the true meaning of the primacy of the role of the Chief Justice of India in this context. 54. It is of considerable significance that Bhagwati, J. (as he than was), after subscribing to the majority view in S.P. Gupta, speaking for the unanimous view of the Constitution Bench, in Ashok Kumar Yadav and Ors. v. State of Haryana and Ors. (1985) 4 SCC 417: AIR 1987 SC 454, stated thus : We would also to point out that in some of the States, and the State of Haryana is one of them, the practice followed is to invite a retired Judge of the High Court as an expert when selections for recruitment to the Judicial Service of the State are being made and the advice given by such retired High Court Judge who participates in the viva voce test as an expert is sometimes ignored by the Chairman and members of the Public Service Commission. This practice is in our opinion undesirable and does not commend itself to us. When selections for the Judicial Service of the State are being made, it is necessary to exercise the utmost care to see that competent and able persons possessing a high degree of rectitude and integrity are selected, because if we do not have good, competent and honest Judges, the democratic polity of the State itself will be in serious peril. It is therefore essential that when selections to the Judicial Service are being made, a sitting Judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting Judge comes as an expert who, by reason of the fact that he is a sitting High Court Judge, knows the quality and character of the candidates appearing for the interview, the advice given by him should ordinarily be accepted, unless there are strong and cogent reason for not accepting such advice and such strong

and cogent reasons must be recorded in writing by the Chairman and members of the Public Service Commission. We are giving this direction to the Public Service Commission in every State because we are anxious that the finest talent should be. recruited in the Judicial Service and that can be secured only by having a real expert whose advice constitutes a determinative factor in the selection process. (emphasis supplied) 55. We respectfully agree with the above observation made in the context of the subordinate judiciary, and would add that it is even more true in the context of appointments made to the superior judiciary. The majority opinion of Bhagwati, J. in S.P. Gupta must be read along with the above unanimous opinion of the Constitution Bench in Ashok Kumar Yadav. 56. 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 of 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 necessary 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 view of some other Judges who are traditionally associated with this function. 57. 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. 58. 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 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 and 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. 59. The norms developed in actual practice, which have crystallised into conventions in this behalf, as visualised in the speech of the President of the Constituent Assembly, are mentioned later. Transfers 60. Every power vested in a public authority is to subserve a public purpose, and must invariably be exercised to promote interest. This guideline is inherent in every such provision, and so also in Article 222. The provision requiring exercise of this power by the President only after consultation with the Chief Justice of India, and the absence of the requirement of consultation with any other functionary, is clearly indicative of the determinative nature, not mere primacy, of the Chief Justice of India's opinion in this matter. The entire gamut in respect of the transfer of Judges is covered by Union of India v. Sankal Chand Himatlal Sheth and Anr. (1978) 1 SCR 423 : AIR 1977 SC 2328 and S.P. Gupta and Ors. etc. etc. v. Union of India and Ors. etc. etc. (1982) 2 SCR 365 : (AIR 1982 SC 149). It was held by majority in both the decisions that there is no requirement of prior consent of the Judge before his transfer under Article 222. This power has been so exercised since then, and transfer of Chief Justice has been the ordinary rule. It is unnecessary to repeat the same. 61. The initiation of the proposal for the transfer of a Judge/Chief Justice should be by the Chief Justice of india alone. This requirement in the case of a transfer is greater, since consultation with the Chief Justice of India alone is prescribed. However, in the case of Jammu & Kashmir, the special provision relating to that State must be kept in view, while initiating the proposal. 62. The power of transfer can be exercised only in 'public interest' i.e. for promoting better administration of justice throughout the country. After adoption of the transfer policy, and with the clear provision for transfer in Article 222, any transfer in accordance with the recommendation of the Chief Justice of India cannot be treated as punitive or an erosion in the independence of judiciary. Such Judges as may be transferred hereafter will have been, for the most part, initially appointed after the transfer policy was adopted and judicially upheld by this Court. There will be no reason for any of them to even think that his transfer is punitive, when it is made in accordance with the recommendation of the Chief Justice of India. In his case, transfer was an obvious incident of this tenure. This applies equally to all Judges appointed after the adoption of the transfer policy, irrespective of whether they gave an undertaking to go on transfer or not. 63. The Constituent Assembly Debates indicate that the High Court Judges were intended to constitute and All India Cadre. This position cannot now be doubted after adoption of the policy of appointing Chief Justices from outside and the maintenance of an All India seniority based on the date of initial appointment, treating all High Courts as equal. If the transfer of a Judge on appointment as Chief Justice is not punitive, there is no occasion to treat the transfer of any other Judge as punitive. 64. There is nothing in Article 222 to

require the consent of a Judge/Chief Justice for his first or even a subsequent transfer. Since his consent is not read as a requirement for the first transfer, there is no reason to require his consent for any subsequent transfer, according to the same provision. The power under Article 222 is available throughout the tenure of a High Court Judge/Chief Justice, and it is not exhausted after the first transfer is made. The contrary view in S.P. Gupta has no basis in the Constitution. It is reasonable to assume that the Chief Justice of India will recommend a subsequent transfer only in public interest, for promoting better administration of justice throughout the country, or at the request of the concerned Judge. As indicated, at least now, after the lapse of more than a decade since the decision in S.P. Gupta, there is no reason to treat any transfer as punitive; and, therefore, the observation in S.P. Gupta that a punitive transfer is impermissible has to application any more. As indicated by us later, a transfer made in accordance with the recommendation of the Chief Justice of India, is not justiciable. 65. Promotion of public interest by proper functioning of the High Courts and, for that reason, the transfer of any Judge/Chief Justice from one High Court to another must be the lodestar for the performance of this duty enjoined on the Chief Justice of India, as the head of the India judiciary. Suitable norms, including those indicated hereafter, must be followed by the Chief Justice of India, for his guidance, while dealing with individual cases. Meaning of President 66. The expression 'President' in Articles 124(2), 217(1) and 222 means the President acting on the aid and advice of the Council of Ministers in accordance with Article 74(1); and the advice given by the Council of Ministers had to be in accordance with the concept of the primacy of the Chief Justice of India and the other norms indicated herein, to accord with the mandate in the Constitution. A fortiori the advice given by the Council of Ministers according to the Constitution binds the President and, therefore, the advice must accord with the principles indicated herein. NORMS 67. The absence of specific guidelines in the enacted provisions appears to be deliberate, since the power is vested in high constitutional functionaries and it was expected of them to develop requisite norms by convention in actual working as envisaged in the concluding speech of the President of the Constituent Assembly. The hereinafter mentioned emerging from the actual practice and crystallised into conventions - not exhaustive - are expected to be observed by the functionaries to regulate the exercise of their discretionary power in the matters of appointments and transfers. Appointments (1) What is the meaning of the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' ? 68. 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 seniormost 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. 69. 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. 70. The Chief Justice of India, for the formation of his opinion, has to adopt a course which would enable him to discharge duty objectively to select the best available persons as Judges of the Supreme Court and the High Courts. The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, must be in writing to avoid any ambiguity. (2) The Chief Justice of India can recommend the initial appointment of a person to a High Court other than that for which the proposal was initiated, provided that the constitutional requirements are satisfied. (3) Inter se seniority amongst Judges in their High Court and their combined seniority on all India basis is of admitted significance in the matter of future prospects. Inter se seniority amongst Judges in the Supreme Court, based on the date of appointment, is of similar significance. It is, therefore, reasonable that this aspect is kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court. Apart from recognising the legitimate expectation of the High Court Judges to be considered for appointment to the Supreme Court according to their seniority, this would also lend greater credence to the process of appointment and would avoid any distortion in the seniority between the appointees drawn even from the same High Court. The likelihood of the Supreme Court being deprived of the benefit of the services of some who are considered suitable for appointment, but decline a belated offer, would also be prevented. (4) Due consideration of every legitimate expectation in the decision making process is a requirement of the rule of non-arbitrariness and, therefore, this also is a norm to be observed by the Chief Justice of India in recommending appointments to the Supreme Court. Obviously, this factor applies only to those considered suitable and

at least equally meritorious by the Chief Justice of India, for appointment to the Supreme Court. Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority. 71. This legitimate expectation has relevance on the ground of longer experience on the Bench, and is a factor material for determining the suitability of the appointee. Along with other factors, such as, proper representation of all sections of the people from all parts of the country, legitimate expectation of the suitable and equally meritorious Judges to be considered in their turn is a relevant factor for due consideration while making the choice of the most suitable and meritorious amongst them, the outweighing consideration being merit, to select the best available for the apex court. (5) 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. (6) The distinction between making an appointment in conformity with the opinion of the Chief Justice of India, and not making an appointment recommended by the Chief Justice of India to be borne in mind. Even though no appointment can be made unless it is in conformity with the opinion of the Chief Justice of India, yet in an exceptional case, where the facts justify, a recommendee of the Chief Justice of India, if considered unsuitable on the basis of positive material available on record and placed before the Chief Justice of India, may not be appointed except in the situation indicated later. Primacy is in making an appointment; and, when the appointment is not made, the question of primacy does not arise. There may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India, except in the situation indicated hereafter. 72. It is only to this limited extent of non-appointment of a recommendee of the Chief Justice of India, on the basis of positive material indicating his appointment to be otherwise unsuitable, that the Chief Justice of India does not have the primacy to persist for appointment of that recommendee except in the situation indicated later. This will ensure composition of the courts by appointment of only those who are approved of by the Chief Justice of India, which is the real object of the primacy of his opinion and Intended to secure the independence of the judiciary and the appointment of the best men available with undoubted credentials. (7) 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. (8) Some instances when non-appointment is permitted and justified may be given. Suppose the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reasons, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible. Similarly, when the recommendation is for appointment to a High Court, and the opinion of the Chief Justice of the High Court conflicts with that of the Chief Justice of India, the non- appointment, for valid reasons to be recorded and communicated to the Chief Justice of India, would be permissible. If the tenure as a Judge of the candidate is likely to be unduly short, the appointment may not be made. Non-appointment for reasons of doubtful antecedents relating to personal character and conduct, would also be permissible. The condition of health or any such factor relating to the fitness of the candidate for the office may also justify non-appointment. (9) In order to ensure effective consultation between all the constitutional functionaries involved in the process, the reasons for disagreement, if any, must be disclosed to all others, to enable reconsideration on that basis. All consultations with everyone involved, including all the Judges consulted, must be in writing and the Chief Justice of the High Court, in the case of appointment to a High Court, and the Chief Justice of India, in all cases, must transmit with his opinion the opinion of all Judges consulted by him, as a part of the record. 73. Expression of opinion in writing is an in built check on exercise of the power, and ensures due circumspection. Exclusion of justiciability, as indicated hereafter, in this sphere should prevent any inhibition against the expression of a free and frank opinion. The final opinion of the Chief Justice of India, given after such effective consultation between the constitutional functionaries, as primacy in the manner indicated. (10) To achieve this purpose, and to give legitimacy and greater credibility to the process of appointment, the process must be initiated by the Chief Justice of India in the case of the Supreme court, and the Chief Justice of the High Court in the case of the High Courts. This is the general practice prevailing, by convention, followed over the years, and continues to be the general rule even now, after S.P. Gupta. The executive itself has so understood the correct procedure, notwithstanding S.P. Gupta, and there is no reason to depart from it when it is in consonance with the concept of the independencey of the judiciary. (11) The constitutional functionary meant by the expression 'Governor' in Article 217(1), is the Governor acting

on the 'aid and advice' of his Council of Ministers in accordance with Article 163(1) read with Articles 166(3) and 167. (12) Adherence to a time bound schedule would prevent any undue delay and avoid dilatory methods in the appointment process. On initiation of the proposal by the Chief Justice of India or the Chief Justice of the High Court, as the case may be, failure of any other constitutional functionary to express its opinion within the specified period should be construed to mean the deemed agreement of that functionary with the recommendation, and the President is expected to make the appointment in accordance with the final opinion of the Chief Justice of India. In such a situation, after expiry of the specified time within which all the constitutional functionaries are to give their opinion, the Chief Justice of India is expected to request the President to make the appointment without any further delay, the process of consultation being complete. (13) On initiation of the proposal by the Chief Justice of India or the Chief Justice of the High Court, as the case may be copies thereof should be sent simultaneously to all the other constitutional functionaries involved. Within the period of six weeks from receipt of the same, the other functionaries must convey their opinion to the Chief Justice of India. In case any such functionary disagrees, it should convey its disagreement within that period to the others. The others, if they change their earlier opinion, must, within a further period of six weeks, so convey it to the Chief Justice of India. The Chief Justice of India would then form his final opinion and convey it to the President within four weeks, for final action to be taken. It is appropriate that a memorandum of procedure be issued by the Government of India to this effect, after consulting the Chief Justice of India, and with the modifications, if any, suggested by the Chief Justice of India to effectuate the purpose. (14) The process of appointment must be initiated well in time to ensure its completion at least one month prior to the date of an anticipated vacancy; and the appointment should be duly announced soon thereafter, to avoid any speculation or uncertainty. This schedule should be followed strictly and invariably in the appointment of the Chief Justices of the High Courts and the Chief Justice of India, to avoid the institution being rendered needless for any significant period. In the case of appointment of the Chief Justice of a High Court to the Supreme Court, the appointment of the successor Chief Justice in that High court should be made ordinarily within one month of the vacancy. (15) Apart from the two well known departures, appointments to the office of Chief Justice of India have, by convention, been of the seniormost Judge of the Supreme Court considered fit to hold the office; and the proposal is initiated in advance by the outgoing Chief Justice of India. The provision in Article 124(2) enabling consultation with any other Judge is to provide for such consultation, if there be any doubt about the fitness of the seniormost Judge to hold the office, which alone may permit and justify a departure from the long standing convention. For this reason, no other substantive consultative process is involved. There is no reason to depart from the existing convention and, therefore, any further norm for the working of Article 124(2) in the appointment of Chief Justice of India is unnecessary. Transfers (1) In the formation of his opinion, the Chief Justice of India, in the

case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India. The personal factors relating to the concerned Judge, and his response to the proposal, including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice. (2) Care must be taken to ensure that no Chief Justice is transferred without simultaneous appointment of his successor-in-office, and ordinarily the acting arrangement should not exceed one month, the maximum period needed usually for the movement of the Chief Justice to their new positions. This is essential for proper functioning of the High Courts, and to avoid rendering headless any High Court for a significant period which adversely affects the functioning of the judiciary of that State. (3) The continuing practice of having Acting Chief Justice for long periods; transferring permanent Chief Justices and replacing them with out of turn Acting Chief Justices for long periods; appointing more than one Chief Justice from the same High Court resulting in frustration of the legitimate expectation of Judges of some other High Court in their turn, except in an extraordinary situation, must be deprecated and avoided. Application of the policy has been quite often selective and it is essential to make it uniform to prevent any injustice. (4) It may be desirable to transfer in advance the seniormost judge due for appointment as Chief Justice to the High Court where he is likely to be appointed Chief Justice, to enable him to take over as Chief Justice as soon as the vacancy arises and, in the meantime, acquaint himself with the new High Court. This would ensure a smooth transition without any gap in filling the office of Chief Justice. In transfer of puisne Judges, parity in proportion of transferred Judges must be maintained between the High Courts, as far as possible. (5) The recommendations in the Report of the Arrears Committee (1989- 90) mention certain factors to be kept in view while making transfers to avoid any hardship to the transferred Judges. These must be taken into account. JUSTICIABILITY Appointments and Transfers 74. The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decision, which is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated. The reduction of the area of discretion to the minimum, the element of plurality of Judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms

to regulate the area of discretion are sufficient checks against arbitrariness. 75. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge, Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary. 76. This is also in accord with the public interest of excluding these appointments and transferes from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busy-bodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in S.P. Gupta while expanding the concept of locus standi, was adverted to recently by a Constitution Bench in Raj Kanwar, Advocate v. Union of India and Anr. (1992) 4 SCC 605. It is therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that or bias, which in any case is excluded by the element of plurality in the process of decision making. Fixation of Judge Strength 77. Article 216 deals with Constitution of High Courts. It provides that very High Court shall consist of a Chief Justice and 'such other judges as the President may from time to time deem it necessary to appoint.' To enable proper exercise of this function of appointment of 'other Judges', it is necessary to make a periodical review of the Judge strength of every High Court with reference to the felt need for disposal of cases, taking into account the backlog and expected future filing. This is essential to ensure speedy disposal of cases, to 'secure that the operation of the legal system promotes justice' - directive principle 'fundamental in the governance of the country' which, it is the duty of the State to observe in all its action; and to make meaningful the guarantee of fundamental rights in Part III of the Constitution. Accordingly, the failure to perform this obligation, resulting in negation of the rule of law by the law' delay must be justiciable, to compel performance of that duty. 78. Accordingly, it must be held that fixation of Judge strength in a High Court is justiciable; and if it is shown that the existing strength is inadequate to provide speedy justice to the people - speedy trial being a requirement of Article 21 - in spite of the optimum efficiency of the existing strength, a direction can be issued to assess the felt need and fix the strength of Judges commensurate with the need to fulfil the State obligation of providing speedy justice and to thereby 'secure that the operation of the legal system promotes justice' - a solemn resolve declared also in the preamble of the Constitution. In making the review

of the Judge strength in a High Court, the President must attach great weight to the opinion of the Chief Justice of that High Court and the Chief Justice of India, an if the Chief Justice of India so recommends, the exercise must be performed with due despatch. 79. The decision in S.P. Gupta, taking the view that this matter is not justiciable to any extent, does not commend itself to us as a correct exposition of the constitutional obligation in Article 216 of the Constitution, and the constitutional purpose of its enactment. This provision, like all constitutional provisions, is not to be construed in isolation, but as a part of the entire constitutional scheme, conforming to the constitutional purpose and its ethos. So construed, this matter is justiciable to the extent and in the manner indicated. Of course, the area of justiciability does not extend further, to enable the Court to make the review and fix the actual Judge strength itself, instead of requiring the performance of that exercise in accordance with the recommendation of the Chief Justice of India. SUMMARY OF THE CONCLUSIONS 80. A brief general summary of the conclusions stated earlier in detail is given for convenience, as under : (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 primary 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 had 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. 81. This summary has to be read along with the earlier part, wherein the conclusions are elaborately stated with reasons. 82. The above discussion answers the questions referred and disposes of these matters, accordingly. S. Ratnavel Pandian, J. "Solmon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty." 83. In terms of the above Biblical apologue in the old Testament as coined by Francis Bacon in his 'Essay of Judicature', the vital questions which are of great constitutional significance affecting the Indian Judicial system that are posed for deep consideration can be figuratively formulated thus: (1) Whether the present day 'Solomon's throne (symbolizing the majesty of our justice system) is fully supported by the 'Lion's (symbolizing the legislature and executive) on both sides? (2) Weather the 'Lions' are still under the 'throne'? (3) Whether, the 'Lions' are circumspected from checking or opposing any of the points of sovereignty of the judiciary (i.e. judicial sovereignty)? (4) Whether it is for the 'Lions' to pronounce the name of 'Solomon' and his successor to occupy the throne? (5) Whether 'Solomon' has any right of proposing any celebrated structural reform to his 'House' (symbolizing the judicial structure) or is it for the 'Lions' to make such proposal to 'Solomon's House' without reference to Solonon? (6) Is it for the 'Lions' to make any alteration to the structure of the Imperial State of 'Solomon's House' and propose sweeping reforms whether Constitution and composition of a 'Kingdom of Solomon' - even without reference to Solomon or even inexcusably ignoring any suggestion of Solomon? (7) Whether under the present scheme and procedure proscribed and followed, 'Solomon' is made to sit on the chair of handicapped sub-silentio instead of his own 'throne'? 84. The questions that are symbolically referred to above are raised in these two Writ Petitions and they are related to the functioning of the superior judiciary, the primacy objects of which being to facilitate the judiciary (a) to get rid of its suffocation caused by the excessive dominance of the executive in the matter of appointment of Judges to the superior judiciary as well as in the formation of its structural composition; (b) to give primacy - if

not supremacy - to the opinion of the Chief Justice of India (hereinafter referred to as 'CJI') in all the matters thereof and (C) to enjoy normal breathing of the unpolluted air of judicial independence, so that the indispensable independence and integrity of the judiciary are kept up, consistent with the letter and spirit of the Constitution and in tune with the oath or affirmation made and subscribed, bearing 'allegiance to the Constitution of India' and also are saved 'from the hardening of the executive arteries'. 85. The reliefs sought for are to issue a mandamus to the Union of India (hereinafter referred to as the 'UOI') to fill the vacancies of Judges in the Supreme Court and the several High Courts of the country and for some ancillary orders/directions in regard to the main prayer. 86. Pursuant to the direction of a three-Judges Bench comprising Ranganath Misra, CJ, M.N. Venkatachaliah, J (as the learned Chief Justice then was) and M.N. Punchhi, J dated 26th October 1990 made in a public interest litigation under the caption Subhash Sharma and Ors. v. Union of India (1990) Supp. 2 SCR 433, the present cases are placed on the docket of this nine-Judges Bench to explore the following two important topical questions formulated therein which are swirling around the basic issues as it has been felt by that Bench that the correctness of the ratio in S.P. Gupta and Ors. etc. etc. v. Union, of India and Ors. etc. (1982) 2 SCR 365: (AIR 1982 SC 149), on the status of the Chief Justice of India in the matter of appointment of Judges to the higher echelons of judiciary for the efficient functioning of the superior judicial system required re-consideration by a larger Bench. The relevant passage of the above Order reads thus : Returning to the views of the majority, we may set out the views of these learned Judges in the Judgment as to 'consultation' and primacy of the position of the Chief Justice of India which would in our opinion require reconsideration. 87. The questions on the basis of the above Order that arise for consideration are : (1) 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 in regard to the transfer of High Court Judges, is entitled to primacy? and (2) Whether the matters including the matter for fixation of the Judge- strength in the High Courts are justiciable? 88. I had the advantage of perusing the judgment of my learned brother, J.S. Verma, J. Though I am in respectful agreement with most of the conclusions arrived at by him, yet having regard to the important constitutional issues involved in this case, I would like to give may own reasons for those conclusions and also add some of my views on a few other points. 89. Even at this prefatory stage, we with greatest respect to the opinion of the eminent Judges in Gupta's case and also mindful of the historical importance of that decision venture to say that we do not proceed to re-consider the basic issues in Gupta's case with any pre-conceived notion of back- pedaling those views already expressed but for meeting certain challenges. 90. It will be grotesque if any such criticism is ever levelled against the proposed reconsideration of the decision in question or any bad motive attributed thereto. The Concept of reconsideration of legal proposition and judicial review. 91. The immediate but inevitable substantial questions that follow for serious consideration are as to what are the essential conditions and circumstances under which the Courts will be

justified in undertaking the task of reconsidering its earlier view, expressed on the inter-pretation of the Constitution or law, as the case may be and what are the guidelines for such drastic course and what will be the legal effect that may flow from it. 92. Since this Court is the highest Court of this land an its vitality is a national imperative, the primary institutional task of this Court is, first to clearly under stand the true message that the Constitution intends to convey, secondly to ascertain the 'original meaning' of that message in the light of the constitutional provisions and thirdly to pronounce what the law is in harmony with meaningful purpose, original intent and true spirit of the Constitution; because only those pronouncements have to reflect the enduring principle of constitutional law and policy. In the discharge or performance of these national duties, some controversies on the general philosophy of the Constitution, many novel issues and difficult problems are likely to come up for deep consideration and also for reconsideration when new challenges emerge. 93. Besides, in the series of litigations involving constitutional questions, the inevitable result of an avalanche of various judicial pronouncements necessarily involves consideration of the constitutional provisions. 94. To combat and deal with all these controversies, issue and problems which are always open for judicial interpretation, the Courts have to undertake an onerous mission in exploring the 'real intention' and 'original meaning' of the Constitution beyond all obscurities and to expound the principles underlying the philosophy of the Constitution and declare what the Constitution speaks about and mandates. 95. The exploration of the new principles are essential in those areas no before explored; more so when the old principle are found to be to responding to the unresolved and unforeseen modern challenges or to have become inapplicable to the new situations or found to be unsound. At the same time, it is not to be lost sight that in the above institutional task, the Court does not create any new right net known to the court does not create any new right not known to the constitutional text or history but merely discovers and announces only the existing right so far hidden under the surface on a better understanding of the values of the underlining intend and spirit of the Constitution in the light of a new set of conditions. The resultant corrolary would be that the old legal concept and such principles may be swept away by a new concept and under a new set of conditions or a fresh outlook. 96. The proposition that the provisions of the Constitution must be confined only to the interpretation which the framers, with the conditions and outlook of their time would have placed upon them is not acceptable and is liable to be rejected for more than one reason - firstly, some of the current issues could not have been foreseen; secondly, others would not have been discussed and thirdly, still others may be left over as controversial issues, i.e. termed as deferred issues with conflicting intentions. Beyond these reasons, it is not easy or possible to decipher as to what were the factors that influenced the mind of the framers at the time of framing the Constitution when it is juxtaposed to the present time. The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time. 97. So it falls upon the superior Courts in 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 permeate and surround it and by clearly focussing on the reality of the working of the constitutional system and scheme so as to made the justice delivery system more effective and resilient. Although frequent over-ruling of decision will made the law uncertain the 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 its earlier decisions, if so warranted under compelling circumstances and even to over-rule 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. 98. In a recent Judgment in S. Nagaraj and Ors. etc. v. State of Karnataka and Anr. 1993 (5) Judgment Today 27 to which one us (S. Ratnavel Pandian, J) was party, the following observation has been made while emphasising the power of this either recalling or reviewing its own order : Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And Clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review and order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice. 99. In the same case, B.P. Jeevan Reddy, J. in his separate judgment has stated thus : It is the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would

have serious consequences. An act of Court should prejudice non. “Of all these things respecting which learned men dispute”, said Cicero, " there is none more important than clearly to understand that we are born for justice and that right is founded not in opinion but in nature." This very idea was echoed by James Madison (the Federalist No. 51 Page 352). He said : “Justice is the end of Government. It is the end of the Civil Society. It ever has been and ever will be pursued, until it be obtained or until liberty be lost in the pursuit. 100.”I speak but once" in the sense that we declare the law once but never for many moons to come, can never serve as a good policy at all times in the field of construction of law, because a Judge’s opinion as to what the law speaks about, does not always and under all circumstances elicit the approval of his brethren as it may sometimes happen that the earlier Judge might have been mistaken in law or has got lost in the maze of interpretation. Therefore, in exceptional and extraordinary 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 more force to reconsider its earlier ruling or decision and if necessitated even to over-rule 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. 101. Case laws, including many leading decisions of the Constitution Benches wherein the earlier views expressed and the principle enunciated have been reconsidered and over-ruled are not wanting. In this connection, it would be germane to refer to an illuminating decision of the Supreme Court of Canada in Queen v. Beauregard (1987) LRC (Constitution 180) wherein Chief Justice Dickson rejected the “Strict Construction Argument” in interpretation of constitutional provisions (the Canadian constitution, Act 1867, s-100) and observed thus : With respect to the first of these arguments, I do not think Section 100 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 Section 100 much to say that the word ‘pension’ admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of ‘pensions. 102. There is a remarkable development in this area in recent times due to the dynamic judicial activism. Reference may be made to (1) The Bengal Immunity Company Limited v. The State of Bihar and Ors. (1955) 2 SCR 603 : AIR 1955 SC 661, (2) Samsher Singh and Anr. v. State of Punjab (1975) 1 SCR 814 : AIR 1974 SC 2192 (3) Union of India v. Sankal Chand Himatlal Sheth and Anr. (1978) 1 SCR 423 : AIR 1977 SC 2328, (4) Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors. (1991) Supp.

1 SCC 600, (5) Subhash Sharma and Ors. v. Union of India (1990) Supp. 2 SCR 433, (6) Kihoto Hollohan v. Zachillhu and Ors. (1992) Supp. 2 SCC 651, (7) Indra Sawhney and Ors. v. Union of India (1992) Supp. SCC 210 and (8) Union of India v. Tulsi Ram Patel (1985) Supp. 2 SCR 131, at pages 273 and 274. 103. In addition to the above, there are some outstanding decisions of this Court which found certain constitutional amendments being violative of the basic structure of the Constitution and consequently declared those amendments void. Vide His Holiness Kesavananda Bharti Sripadagalavaru v. State of Kerala (1973) Supp. SCR 1 decided by a Bench of 13-Judges which over-ruled the proposition of law propounded in I.C. Golak Nath and Ors. v. State o Punjab and Anr. 1967 SCR 762: AIR 1967 SC 1643. 104. See also (1) Waman Rao and Ors. etc etc. v. Union of India and Ors. (1981) 2 SCR 1 : AIR 1981 SC 271, (2) Minerva Mills Ltd. and Ors. v. Union of India (1981) 1 SCR 206 : AIR 1980 SC 1789, (3) Synthetics & Chemical Ltd. etc v. State of U.P. and Ors. (1989) Supp. 1 SCR 623, (4) Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy and Anr. (1992) 1 SCC 508: 1992 AIR SCW 389, (5) Raghunathrao Ganpatrao v. Union of India AIR 1993 SC 1267 : (1993) 1 JT (SC) 374: 1993 AIR SCW 1044, (6) R.C. Poudyal v. Union of India (1993) 1 Scale 489. In Poudyal's case (supra) the majority view is thus: 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. 105. It is on account of our earnest inquisitiveness for healthy judiciary and love for justice, we shall probe the physiology of the judicial system and strive to answer these two structural questions, posed for examination purely on an objective test with utmost detachment and fairness, and free from every from a interest, loyally, obligation or prior commitment since the decision to be pronounced on the interpretation of the relevant constitutional provisions is intended to ensure a fortress to protect the independence of judiciary. 106. We shall presently narrate the chronology of events and the mass of enthralling historical material including the opinion of some learned outstanding Judges here and elsewhere, eminent jurists and the Law Commissions that necessitated the reconsideration of the decision in S.P. Gupta's case. (1) In the order of reference dated 26.10.1990 made in Writ Petition No. 1303 of 1987 (along with Writ Petition Nos. 13003 of 1985 and 302 of 1987) vide Subhash Sharma's case (supra) it has been pellucidly observed that the correctness of the majority view in Gupta's case require reconsideration by a larger nine-Judges Bench. (2) Be it noted that even the majority in S.P. Gupta's case appears to have been not satisfied with what they perceived to be the constitutional scheme of appointment of Judges, viz., that the ultimate power of selection and appointment of Judges in the Supreme Court and High Courts rest with the Central Government. 107. In fact, Bhagwati, J. (as the learned Chief Justice then was) who delivered the main judgment, while responding to the strident criticism that the process of selection and methodology of appointment of Judges to the

superior judiciary by the Central Government has eroded the independence of judiciary, has himself made some suggestions in the following words : We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad-based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity. 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 high judiciary. 108. The exposition of the above reform suggested an recommended in S.P. Gupta's case indicates that the learned Judges in that case were not happy to hand over the authority exclusively to the executive - namely "the right of choice" in the selection of candidates to the superior judiciary. (3) Y.V. Chandrachud, J who presided over the Indian Judiciary for nearly 8 years as Chief Justice of India while inaugurating a seminar at Patna on February 26,1983 i.e. long after the decision in S.P. Gupta's case was handed down on December 30, 1981 admitted that the present procedure for selection and appointment of Judges to the superior judiciary is "outmoded" and should be "given a decent burial". In his view, the recommendation by the suggested collegium would be far more credible and acceptable than of a single individual in the narrow confines and secrecy of his chamber. Vide R.K. Hegde, the Judiciary Today: A plea for Collegium 38. (4) The Law Commission chaired by Justice D.A. Desai in its 121st Report on "A new forum for Judicial appointments" while recommending the establishment of a National Judicial Commission to serve as a consultative body in the matter of appointment of Judges to the Supreme Court and High Courts, has made its conclusion in Chapter IX under the caption "Corollary" as follows : If the structure recommended herein is acceptable, it would necessitate amendment to the Constitution. The power to appoint a Judge of the Supreme Court and a Judge of the High court, which today vests in the President of India would continue to vest in the President of India. The power has to be exercised under the new dispensation in consultation with the National Judicial Service Commission. To that extent, Article 124 and Article 217 will have to be amended. Similarly Article 233 and 234 will have to be amended. (5) It is quite appropriate, in this context, to recall what Dr. B.R. Ambedkar said during the discussion about the problems, relating to superior judiciary in the draft Constitution. It reads thus : It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown in the same extent which we find 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 executive wishes to made subject to the coucurrence of Legislature is also not a very suitable provision. 109. A number of alternative modes that are in existence in different parts of the globe were also suggested in this regard during the discussion of the draft Constitution by various members for selecting the candidates to man the superior judiciary. (6) Even in several countries where the power of appointing Judges exclusively and unquestionably vests with the executive, the introduction of was drastic reforms are felt necessary. (i) In United Kingdom, recently opinions were expressed that there must be an advisory body to assist the Lord Chancellor in the matter of selection of personnel for appointment to higher judiciary. (ii) In 1972, the Justice Sub-committee on the judiciary recommended that while the Lord Chancellor should retain control of the appointment machinery, he should be helped in his task by a small Advisory Appointment Committee. (iii) The President of United States of America has established 'a circut Judges Nominating Commission' to recommend names of the best qualified persons for appointment to the United States Court of Appeal. (iv) The nominee of the President of USA for appointment of a Judge of the Federal Court of USA has to appear before the Senate Judiciary Committee for 'confirmation hearing' which usually takes place for a few days and during which the nominee's legal philosophy and his/her merit is exposed to the public. Then the Senate Judiciary Committee makes its recommendations for or against to Senate which in turn approves or disapproves the candidates. (v) The Chief Justice of Australia on being dissatisfied with the Australian system for selection and appointment of Judges which provides an opportunity for political influence, advocated in July 1977 that the time is now ripe for a Judicial Appointments Committee to be set up in Australia composed of Judges, lawyers and, indeed laymen likely to be knowledgeable in the achievements of possible appointee. (Vide Garfield Barwick, "The State of Australian Judicature" 51 Aus. L.J. 480) (vi) The Royal Commission (of Australia) on courts, chaired by Justice Beattk, recommended that a Judicial Commission should consider all judicial appointments including appointment of High Court Judges. Vide Harry Gibbs, "The Appointment of Judges", 61 Aus. L.J. 7,8. 110. Thus, there is a host of proposal and recommendations here in India and elsewhere for bringing vital changes in the existing procedure and methodology in the matter of selection and appointment of Judges to the superior judiciary and for restructuring the entire judicial system. (7) The Constitution (Sixty-seventh Amendment) Bill, 1990 (Bill No. of 1990 was introduced in Lok Sabha (Parliament) on 18.5.1990, empowering the President to constitute a high level Judicial Commission - known as the National Judicial Commission for making recommendation as to the appointment of a Judge of the Supreme Court (other than the Chief Justice of India), a Chief Justice of the High Court and as to the transfer of a Judge from one High Court to any other High Court and the said Commission was to consist of the Chief Justice of India who was to be the chairperson of the Commission and two other Judges of the Supreme Court next to the Chief Justice in seniority and for making recommendation as to the appointment of a Judge of any High Court, the Commission was to consist of the CJI, as

chairperson of the Commission, the Chief Minister of the concerned State or if a proclamation under Article 356 is in operation in that State, the Governor of the state, one more senior most Judge of the Supreme Court, the Chief Justice of the High Court and one other senior most Judge of that High Court. 111. The 'Statement of objects and Reason' declared that the Commission to be set up was "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 proposed amendment to the Constitution by inserting a new Part XIII A evidently was in view of the recommendations made by the Law Commission of India in its 121st Report, emphasising the need for a change in the system. By the Amendment Bill, certain amendments were to be brought to Articles 124(2), 217(1), 222(1) and 231(2)(a) to implement the recommendations of the National Judicial Commission. 112. The texture and tone of the amendment and the Statement of Objects and Reasons are in tune with the recommendations of the eminent Judges of this Court, jurists, Bar Associations, outstanding lawyers, Law Commissions and various Committees for improving the situation in the matter of the appointment of Judges on the diagnosis made by them. 113. When the referral order was passed on 26.10.1990 by this Court, hoping that the proposed amendment to the Constitution will relieve the grievance long felt by the judiciary in the matter of selection of proper and fit personnel and their appointment to the superior judiciary, the Constitution Amendment Bill pending before the Parliament. It was only having regard to the said Bill, this Court stated in para 50 of its judgment in Subhash Sharma's case (supra) thus : In the event of the Amendment being carried and a National Judicial Commission being set up, the correctness of the ratio in S.P. Gupta's case of the status of the Chief Justice of India may not be necessary to be examined in the view of the fact that by the Amendment the Chief Justice of India would become the Chairman of the Commission. In case the Commission is not constituted, the two questions indicated above which are of vital importance to the efficient functioning of the judicial system in the country require consideration and there is an element of immediacy in matter, we, therefore, suggest that the writ petition on the two issue indicated above may be taken up for hearing at an early date and preferably before the ending of this year. (emphasis supplied) 114. Though the passing of the amendment and its implementation had been watched with bated breath and awaited with a great deal of anxiety, nothing tangible in this regard had come out but no the other hand, the Bill unfortunately lapsed consequent upon the dissolution of the 9th Lok Sabha and there does not seem to be any ray of hope for the revival of the Bill. 115. It was only in the above brief historical recapitulation including the opinion of the experienced Judges and jurists etc. etc. and the compelling necessity, we now in the eleventh hour, boldly set ourselves with renewed energy to the task of reconsidering the decision in Gupta's case on a proper and just interpretation of the relevant constitutional provisions and definitely not on an imaginative re-interpretation and to explore the situation as to whether the needed change could be made by ourselves rather than by legislative process by entering into the realm of the original intention

of the Constitution thereby undoubtedly ensuring a palladium to protect the independence of judiciary from being violated or impaired or damage. Otherwise we apprehend that strikingly disastrous and calamitous results would follow in the proper functioning of the judiciary and that the system itself would become dysfunctional. 116. A battery of eminent senior counsel, M/s. D.S. Nariman, Ram Jeth-malani, Kapil Sibal, P.P. Rao and Shanti Bhushan consistently articulated demanding reconsideration of the decision in Gupta's case and expanded their argument by enlightening the various constitutional provisions with their extensive scholarly knowledge. According to them beneath the surface of the ruling in Gupta, lie more fundamental questions concerning the role of the CJI in the area of selection and appointment of Judges to the superior judiciary as well as transfer of judges from the High Court to another and fixation of strength of Judges. After making an extensive analysis of the present procedure followed, it has been seriously contended that the absolute 'right of primacy' and 'freedom of choice' in the field of selection and appointment of Judges now exclusively vested with one of the major constitutional functionaries, namely the Executive - that too with the judicial stamp of approval of this Court in Gupta, normally ends up with the excessive politicalization of the constitutional process which resultantly cause great harm to the institution and erodes the very foundation of constitutionalism and the 'Rule of Law'. In continuation of their submission, it has been contended that on account of the methodology in vogue, the very precious constitutional rights are at stake and need breathing space to survive' and that a prophylactic prohibition on all intrusions of this sort is, therefore, essential. 117. All the counsel eloquently raise a debatable question as to how any coarctation be imposed on the authority of judiciary and the independence of judiciary being kept in pensileness, when the Constitution itself recognises a clear demarcation separating the judiciary from the executive under Article 50 which injects the enduring principle of constitutional policy and which is the underlying strength for a sound judicial system. 118. Notwithstanding the above chorus of protest in general against the decision of the majority in Gupta, there was a small cleavage of opinion, in that while some learned Judges held the view that the opinion of the CJ1 in all matters of judicial administration should receive 'primacy', others were of the view that in exceptional circumstances the executive may veto the proposal of the CJI for sufficient and strong reasons to be recorded and communicated to the CJI. Likewise, there was some difference of opinion with regard to the extent of justiciability in the matter of fixation of Judge-strength. 119. Mr. Parasaran the learned senior counsel appearing for the opinion of India and the learned Attorney General offering his valuable assistance to the Court on notice, with their sound knowledge of constitutional law and intellectual capabilities denounced the submissions made on be;half of th petitioners, stating that in utter disregard of the intent of the framers of the Constitution, all the counsel seeking reconsideration of Gupta's case are making a futile attempt to undo and unsettle the well reasoned principles enunciated in Gupta's case by imposing their personal values and reading their personal philosophy into the Constitution under the guise of 'original intent' of

the Constitution and that the tenor of their argument was tainted with visible hostility indicating their predetermination to recochet the views in Gupta by assigning an invented legalistic nod by wrongly construing the constitutional provisions and drawing strained inferences. 120. Illuminating every aspect of the vital issue involved. Mr. Parasaran furthers his argument saying that the plea of primacy to the opinion of the CJI had been discussed threadbare and uftimately discarded by the Constituent Assembly and despite this, the Court in Gupta indeed tended to emphasise the primacy of CJI, even if not express language and that, therefore, the principles laid down in Gupta which are holding the field till date and successfully and satisfactorily working in the area of making appointment of judges in no way call for any interference or radical change. According to him, the present constitutional scheme which was evolved by the framers of the Constitution after taking into consideration the legislative history, Constituent Assembly debates and various modes of appointments in different countries - particularly U.K and U.S.A. wherein the executive alone enjoys the authority in making appointments is basically sound. 121. Drawing our attention to various relevant constitutional provisions, it has been contended that the independence of judiciary is well protected. According to him, the submission made by the other side on the basis of Article 50 is not well found and that the Constitution does not even remotely suggest the exclusion of the role of executive in the matter of appointment of Judges to the superior Courts. 122. The learned Attorney General in addition to his general submission urged that the opinion of the CJI had received the utmost acceptance in the actual working of the system except on one occasion during the last decade, and undue delay, if any, in making the appointment of Judges, can be rectified and remedied by issue of mandamus to the appointing constitutional functionary and ultimately requested acceptance of the view of Pathak, J (as the learned Chief Justice then was) in Gupta's case. 123. Among the various States which made their appearance on notice represented by their respective learned Advocates General, the State of Karnataka has urged for reconsideration of the majority opinion in Gupta's case whereas the other states-namely Gujarat, Assam, Sikkim and Orissa have fully supported the decision in Gupta. The State of Meghalaya does not express any positive opinion either way. The plea of the State of Nagaland is for the primacy to the opinion of CJI and also appointment of a National Judicial Commission. 124. The learned Advocate General of Sikkim by his oral submission affirmed the stand taken by his State and added that according primacy exclusively to the executive in the decision in question does not suffer from any infirmity. 125. Mr. R.K. Garg, the learned senior counsel forcefully advanced his submission with his usual eloquence using his formidable legal knowledge in constitutional law and his vast and rich practical experience and analysing various provisions under separate heads in the light of the well recognised concept of jurisprudence that the appointment must not be a manifestation of an absolute power in the executive but of the power to appoint with due consideration of the expert opinions, sought through effective consultation with CJI and CJ of the concerned High Court, that the opinion of the CJI must have

primacy in the event of any unfortunate, piquant and undesirable, situation leading to difference of opinion among three constitutional functionaries and that the decision in Gupta is bad law so far as it gives the appointing power to the executive ignoring the recommendation of CJI and Chief Justice of High Courts. The learned Counsel also supports the view of Pathak, J in Gupta as being a balanced view and more acceptable. 126. Apart from the above arguments, some more written submissions were filed, i.e. by the Sub Committee of judicial Accountability, by Mr. Prashant Bhushan, and the Delhi High Court Bar Association. 127. At the outset, we make it clear that we are no called upon to deal with any specific case, but to broadly lay down only the important principles and the general controversial problems involved. 128. We shall now unbiasedly proceed to judiciously examine the above highly sensitive issue involving constitutional importance without being influenced either by emotional and sentimental aspects or hostility or by the dazzling eloquence of the counsel putting forth their rival arguments in support of their conflicting views and without any passion or prejudice. 129. Since the entire arguments were advanced mainly on the principle of independence of judiciary, we shall disposed that question at the foremost. 130. Mr. Parasaran, elaborated his argument; submitting that the president, being the Constitutional head of the three major Constitutional functionaries makes the appointment of Judges to the Supreme Court and the High Courts on the aid and advice of the Council of Ministers with the Prime Minister at the head as contemplated under Article 124(2) read with 74(1) and 217(1) read with 74(1) of the Constitution of India as the case may be; that in that process it is only the executive which plays an important role but the CJI is only a consultee and that the independence of judiciary is in no way impaired by executive action but on the other hand it is firmly secured by various specific provisions, expressly articulated in the Constitution along with the extraordinary power of Judicial review. They are : (a) Every person appointed to be a Judge of the Supreme Court or of a High Court before he enters upon his office, makes and subscribes an oath or affirmation according to form Nos. IV and VIII as the case may be, as set out in the Third Schedule to the Constitution; before the authority prescribed under Articles 124(6) and 129 respectively whereby the Judge concerned bears true faith and allegiance only to the Constitution of India and not to the appointing authority (vide Special Reference No. 1 of 1964 : 1965 (1) SCR 413 at 447 F-H and 448 A-B). (b) The tenure of office that the appointee holds, is fixed by the Constitution itself stating that the Judge appointed shall hold office until he attains the age of sixty five years in the case of the Supreme Court as per Article 124(2) and of sixty two in the case of High Court as per Article 219, but not at the: pleasure of the appointing authority. (c) Every Judge of the Supreme Court or a High Court is entitled to such privileges, allowances, and to such rights in respect of leave of absence and pension as determined by and under law, made by the Parliament and they shall not be varied to his disadvantage after his appointment as guaranteed by Articles 725(2) and 221(2). (d) The salaries, allowances and pensions payable to the Judges of the Supreme Court are charged on the Consolidated Fund of India as mandated

by Article 112(3)(d)(i). In the case of a High Court Judge the expenditure in respect of the salaries and allowances are charged on the Consolidated Fund on each State as mandated by Article 202(3)(d) but the pensions payable to the High Court Judges are charged on the Consolidated Fund of India according to Article 112(3)(d)(iii) of the Constitution. The expenditure so charged on the Consolidated Fund of India shall not be submitted to the vote of Parliament though nothing prevents the discussion in either House of Parliament of any those estimates (vide Article 113(1)). Similarly the expenditure charged on the Consolidated Fund of a State shall not be submitted to the vote of Legislative Assembly, but nothing prevents the discussion in the Legislature of any of those estimates (vide Article 203(1)). (e) A Judge of the Supreme Court or a High Court cannot 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. The above procedure for removal of a Judge is embodied in Article 124(4) as regards the Supreme Court Judges and in proviso (b) to Article 217(1) read with Article 124(4) as regards the High Court Judges. In other words, the same procedure mutatis mutandis apply to the High Court Judges. (f) No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme court or High Court in the discharge of his duties except upon a motion before the Parliament but not in the legislature of a State for presenting an address to the President praying for the removal of the Judge as provided in the Constitution (vide Articles 121 and 211). (g) Both the Supreme Court and every High Court are Courts of record, having all power of such a Court including the inherent power to punish for contempt of themselves as empowered by Article 129 and 215 respectively (See Pritam Pal v. High Court of Madhya Pradesh, Jabalpur (1993) Supp. 1 SCC 529). (h) The entire judicial proceedings are in open Court, unless the Courts in rare and exceptional circumstances decide otherwise. The Judges are ensured total freedom, of course, after entering the office, from any overt or covert pressure of interference in the process of adjudicating causes brought before them. In this connection Mr. Parasaran drew our attention to a sentence from the book on "Constitutional Law" (8th Edn. Page 32) by E.C.S. Wade and A.W. Bradly, which reads thus: ... judicial independence is secured by law and public opinion and the standard of conduct maintained by both Bench and Bar. (i) Both Supreme Court and High Courts have jurisdiction of judicial review of all actions of "the State" as defined in Article 12 and all other statutory authorities. Recently it has been ruled in Sub-Committee on Judicial Accountability v. Union of India and Ors. (1991) 4 SCC 699: 1991 AIR SCW 3049. That even in relation to proceedings for impeachment of a Judge, there is an area of judicial review. 131. After listing out the Constitutional rights and privileges of the Judges vis-a-vis the other Constitutional appointments namely the Comptroller and Auditor General of India and the Chief Election Commissioner (vide Article 148 and proviso to

Article 324(5) as regards the security of tenure of office, irremovability from the office and ensuring of the conditions of service Mr. Parasaran reaffirms his earlier submissions that the elimination of executive action in the process of appointment is not all necessary to secure judicial independence. Relying on the rule in Re the Special Courts Bill (1979) 2 SCR 476 he has urged that the 'pleasure doctrine' which is subversive of judicial independence is neither attracted nor applicable in the matter of removal of Judges of Supreme Court except as provided for under Article 124(4) and High Court Judges except as provided for under proviso (b) to Article 217(2) read with Article 124(4) and added that this safeguard vouchsafes the judicial independence. 132. By way of supplementing the argument of Mr. Parasaran, it has been urged on behalf of some State Governments on a few tautological reasonings that when the pronouncement of this Court is to be accepted as the final verdict binding all including the other primary Constitutional functionaries, unless it is so plainly erroneous in the light of subsequent consideration, the decision in Gupta's case in which the principle of independence of judiciary is exhaustively considered and correctly decided, does not require to be taken to the legal smithy for either mending or tinkering with the view, already, already declared. According to them, the existing Constitutional protective conditions attached to the judicial office are more than sufficient to preserve the independence of the judiciary. 133. During the supplementary submission, much reliance was placed on the views of Desai, J in his separate judgment in Gupta's case holding : Independence of judiciary under the Constitution has to be interpreted which in the framework and the parameters of the Constitution. There are various provisions in the Constitution which indicate that the Constitution has not provided something like a 'hands off attitude' to the judiciary. 134. Quoting the various procedure in vogue in different parts of the globe - particularly in U.S.A. and U.K. wherein the executive is exclusively vested with the power of making judicial appointments to higher judiciary, it has been said that when the judicial independence has never been injured in those countries by the existing process, the contention that the mode of appointment of judges from the starting point goes a long way in securing the independence of judiciary cannot be countenanced. They were passionate in quoting some supporting passages of their view from various text books on the formation of judicial system in those countries. 135. 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, unable. In fact we are unable even to conceive such an argument for the reason to be presently stated. 136. When it is well-recognised that the Courts are an impenetrable bulwark against every assumption of power in the legislative or executive and that the understanding of the Courts and respect for their authority by the people are greatly influenced by adjudicative dispensation of justice by the presiding impartial Judges "without fear or favour, affection or ill-will", can it be rightly said that the assurance of the immutable rights and privileges in respect of service conditions alone are sufficient to achieve

the independence of judiciary and to protect it from being impaired and no other condition is required ? Our answer to this nagging question would be in the negative. 137. No doubt true, that the Constitutional assurances, relating to the basic service conditions are absolutely necessary to protect the independence of the judiciary but in our view they are not the be all and end all. More than the above, one other basic and inseparable vital condition is absolutely necessary for timely securing the independence of judiciary; 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 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 fullfilment of the rights, privileges and other service conditions. The resultant inescapable conclusion is that only the consummation or totalty 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 reality. 138. The essence of the above deliberation and discussion is that the independence of judiciary is the livewire of our judicial system and if that wire is snapped, the 'dooms day' of judiciary will not be far off. Concept of Independence of the Judiciary 139. Faced with the unpleasant reality of the present system in vogue, we shall examine what the concept of independence of judiciary means in the background of the breathtaking and cascading argument, advanced by both the parties, of course with the motive of invigorating the judicial system and emphasizing the importance of its various aspects which is absolutely indispensable for ensuring the 'Rule of Law', as adumberated by the Constitution. 140. Our Constitution is a radiant vibrant organism and under the banner of Sovereign, Socialist, Secular, Democratic Republic, steadily grows spreading the fragrance of its glorious objectives of securing to all citizens: Justice, Social Economic and Political. 141. For securing the above cherished objectives equally to all citizens irrespective of their religion, race, caste, sex place of birth and the socio-economic chronic inequalities and disadvantages, the Constitution having very high expectations from the judiciary, has placed great and tremendous responsibility, assigned a very important role and conferred jurisdiction of the widest amplitude on the Supreme Court and High Courts, and for ensuring the principle of the 'Rule of Law' which in the words of Bhagwati, J (as the learned Chief Justice then was) "runs through the entire fabric of the Constitution." To say differently, it is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours. 142. 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 independence and efficient judiciary has been steadily kept in view. Vide The Framing of India's Constitution Volume IB Page 196 by B. Shiva Rao. 143. 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". 144. 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 centers round 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. 145. Regarding the significance of this principle, Chandrachud, J. (as the learned Chief Justice then was) in Union of India v. Sankal Chand Himatlal Sheth and Anr. (1978) 1 SCR 423: AIR 1977 SC 2328, said that the independence of judiciary is the 'cardinal feature' and observed that the judiciary which is to act as a bastion of the rights and freedom of the people is given certain constitutional guarantees to safeguard the independence of judiciary. 146. Bhagwati, J (as the learned Chief Justice then was) who led on behalf of the minority observed in the same judgment i.e. Union of India v. Sankal Chand Himatlal Sheth and Anr. (supra) observed: ... the independence of judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document.... Justice, as pointed out by this Court in Shamsher Singh v. State of Punjab (1975) 1 SCR 814 : AIR 1974 SC 2192, can become "fearless and free only if institutional immunity and autonomy are guaranteed. 147. Again Bhagwati, J in Gupta's case has said in paras 223- 224 as follows : 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 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. ... ... But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence that it is a much wider concept which takes within its weep, independence from many other pressures and prejudices. ... ... Judges should be of stern stuff and tough fibre, unbending before power economic or political, and they must uphold the core principle of the rule of law which says,"Be you ever so high, the law is above you". This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution. Fazal Ali, J in his judgment in Gupta's case in para 320 has held : ... that independence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot be beyond the Constitution. Tulzapurkar, J. in para 634 of his judgment in Gupta's case has pointed out : Such a literal construction is difficult to accept because no provision of the Constitution can be interpreted in a manner which will be in conflict with any of the basic features of the Constitution and the cardinal principle of independence of judiciary is one such basic feature; therefore, the construction to be put on the phrase in the article must be consistent with the said principle. 148. Venkataramih, J. (as the learned Chief Justice then was) in the same case did not go so far but observed that it is"one of the central values on which our Constitution is based." Vide para 1051. 149. See also (1) Union of India v. J.P. Mitter (1971) 3 SCR 483 : AIR 1971 SC 1093 Sub-Committee on Judicial Accountability v. Union of India (supra) and (3) Shri Kumar Padmaprasad v. Union of India (1992) 2 SCC 428 : 1992 AIR SCW 1093. 150. There is plethora of judicial pronouncements on this concept, but we think that it is not necessary to recapitulate all those decisions and swell this judgment, except saying that to have an independent judiciary to meet all challenges, unbending before all authorities and to uphold the imperatives of the Constitution at all times, thereby preserving the judicial integrity, the person to the elevated to the judiciary must be possessed with the highest reputation for independence, uncommitted to any prior interest, loyalty and obligation and prepared under all circumstances or eventuality to pay price, bear any burden and to meet any hardship and always weded only to the principles of the Constitution and 'Rule of Law'. If the selectee bears a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of his appointing authority, then the independence of judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity. Though it is illogical to spin out a new principle that the key note is not the Judge but the judiciary especially when it is accepted in the same breath that an erroneous appointment of an unsuitable persons 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 and that the necessity for maintaining independence of judiciary is to ensure a fair and effective administration of justice. Further, if this prized concept is injured or maimed even from inside by self-infliction, the invaluable judicial independence will be devalued and debased. 151. The above fallacious principle receives a fitting reply from the 14th Report of the Law Commission 73 in which the following opinion of a High Court Judge is quoted : If the State Ministry (Minister in the State Government) continues to have a powerful voice in the matter, in my opinion, in ten years' time, or so, when the last of Judges appointed under the old system will have disappeared, the independence of the judiciary will have disappeared and the High Courts will be filled with Judges who owe their appointments to politicians. 152. Shri M.C. Setalvad, who was a most distinguished jurist and Attorney General and known for his impeccable integrity and sturdy independence and who presided over the 14th Law Commission had painfully stated in his Report that the Commission, during its visits to all the High Court Centres, heard 'bitter and revealing criticism about the appointment of Judges' and that 'the almost universal chorus of comment is that the selections are unsatisfactory and that they have been inducted by executive influence. 153. Mr. Ram Jethamalani, senior counsel after pointing out certain infirmities in Gupta's case to demonstrate the baneful effects on public welfare of a practice of appointment, sanctified by it forcibly stated that the creed of judicial independence in our constitutional religion and the executive continue to imperil this basic tenet and quoted the word of Krishna Iyer, J. form the judgment in Sankal Chand (supra) reading "This Court must 'do or die"'. In Bradly v. Fisher 80 US 335 (1871) it was said : Our judicial system is guided by the principle that a judicial officer, in exercising the authority vested in him must be free to act upon his own connections, without apprehension of personal consequences to him self. 154. As Dr. Robert Mac Gregor Dawason has pointed out that "the Judge must be independent of most of the restraints, checks and punishments which are usually called into play against other public officers. . . "and he should be "devoted to the conscientious performance of his duties." 155. In Subhash Sharma (supra), it has been rightly observed "for Rule of Law to prevail, judicial independence is of prime necessity." 156. As we arc going to deal with this aspect in detail, while examining the most important question, concerning the primacy of the opinion of CJI under a separate heading, this aspect need not detain us any more in disposing of the rival contentions of the parties with regard to the principle of independence of judiciary. Separation of Judiciary from executive 157. By way of meeting the arguments advanced on behalf of petitioners with reference to Article 50, it has been submitted by Mr. Parasaran that Article 50 cannot be availed of with regard to the appointment of Judges to the Supreme Court and High Courts especially in the context of independence of judiciary. We shall now consider the independence of judiciary vis-a-vis separation of power. 158. According to Mr. Jethamalani Gupta's case paid no attention or certainly not adequate attention to the mandate of Article 50 and its implications and effect on the

interpretation of Article 124 and 217 and also over-looked the impact of Article 51(A) and that Article 50 is the culmination of a long drawn out movement and struggle for judicial independence. In support of this contention, our attention was drawn to the report of a Commission appointed in 1946 in Bombay consisting of eleven members, headed by a Judge of the Bombay High Court in which the unanimous conclusion, recorded was that the separation of judicial and executive functions was a feasible and practical proposition. 159. By way of meeting the above contention, Mr. Parasaran has stated that the reference to Article 50 in the context of the independence of the judiciary relating to appointment of Judges to Supreme Court and High Courts is not appropriate; but it is only in the context of District and Subordinate Magistrates exercising both executive and judicial functions; to say in other words, the principle is that the same person should not be a member of both executive and judiciary. In support of his contention, he draws inspiration from (1) a passage found in 'Constitutional Law', Eighth Edition by E.C.S. Wade and A.W. Bradley, under the heading "Meaning of Separation of Powers" reading that "one organ of Government should not control or interfere with the exercise of its function by another organ"; (2) the Constituent Assembly Debates relating to Draft Article 39-A; (3) "The Framing of Indian Constitution - A Study" by B. Shiva Rao (page 507) and; (4) a passage in "Encyclopedia of American Constitution, 1986 Edition Vol. IV - Union of India Compilation Page 185 (B) under the heading"Separation of powers" reading thus: The doctrine of the separation of powers consists of a number of elements; the idea of three separate branches of government, the legislature, the executive and the judiciary; the belief that there are unique functions appropriate to each branch of the government should be kept distinct, no one person being able to be a member of more than one branch of government at the same time. 160. For properly appreciating the above rival contentions and understanding the implication of Article 50, we shall first of all go to its historical background. 161. Article 50 appears in para IV dealing with "Directive Principles of State policy" under the heading 'separation of Judiciary from Executive' and it reads as follows : Article 50 - The State shall take steps to separate the judiciary from the executive in the public services of the State. 162. In the draft Constitution, there was no reference to this Directive Principle, but no being reminded of the important plank of the freedom movement, Article 39-A was introduced which read thus : 39A, The 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. 163. The Drafting Committee in the amendment purposely had used the expression 'complete separation of the judiciary etc.'; the Special Committee, however, considered that the word 'complete' was unnecessary, and this word has accordingly been omitted. 164. Thereafter, the time limit of three years within which this directive was to be implemented was omitted at the final stage and Article 39-A became Article 50 in the present from. 165. During the Constituent Assembly Debates on Article 39-A, one of the members, Shri R.K. Sidwa on 25th November 1948 made the following pertinent observation : As Dr. Ambedkar stated yesterday, ever since

its inception the Congress has been stating that these two functions must be separated if you really want impartial justice to be done to the accused persons. The arguments advanced yesterday were that in Free India the conditions have changed and that therefore, it is not desirable that these two functions should be separated. The real secret, so far as I know, of those who advocate retaining the same position is that they want to retain their power. If the Honourable Ministers of the provincial Governments feel that these two should not be separated, it is because they feel the power of appointments which is in their patronage, would go away from them to the High Court Judges. 166. The above speech of Shri Sidwa makes it clear that implementation of Article 50 involves as a necessary consequence the power of appointment being taken away from the Executive and its transference to the Judiciary. Article 50 being one of the fundamental principles of governance of the country and constitutionally binding on the government, the latter is obviously obliged voluntarily to refrain from any interference in judicial appointments and reduce its role to one which is purely formal or ceremonial, ensuring that the decisive factor is the wish and will of the judicial family. 167. Prime Minister Jawaharlal Nehru reacted to this on behalf of the Government and declared : I may say straight off that so far as the Government is concerned, it is entirely in favour of the separation of the judicial and executive functions. I may further say that the sooner it is brought about the better. 168. Realising the significance of the independence of judiciary and in order to give a full life to that concept, the founding fathers of our Constitution, felt the need of separation of judiciary from executive and designedly inserted Article 50 in the Constitution after a heated debate; because the judiciary under our constitutional scheme has to take up a positive and creative function in securing socio-economic justice to the people. 169. Bhagwati, J (as the learned Chief Justice then was) in Sankal Chand (supra) after quoting various constitutional provisions, speaking about the privileges, rights and tenure of office of Judges of the higher judiciary while dealing with the concept of independence of judiciary described the role of Article 50 as follows : And hovering over all these provisions like a brooding omnipresence is Article 50 which lays down, as a Directive Principle of State Policy, that the State shall take steps to separate the judiciary from the executive in the public services of the State. This provision, occurring in a chapter which has been described by Granvile Austin as "the conscience of the Constitution" and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals without any scope for doubt or debate, the intent of the Constitution makers to immunise the judiciary from any form of executive control or interference. 170. Chandrachud, J (as the learned Chief Justice then was) speaking for the majority did not by any means dissent from or dilute this basic tenet and he while making reference to various provisions of the Constitution to secure and safeguard the independence of the judiciary, referred to Article 50 stating, "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. 171. In MM Gupta and Ors. v. State of Jammu and Kashmir (1982) 3 SCC

412 : AIR 1982 SC 1579, A.N. Sen, J in his separate judgment speaking for himself and on behalf of Bhagwati, J observed thus: Various Articles in our Constitution contain the relevant provisions for safeguarding the independence of the judiciary. Article 50 of the Constitution which lays down that"the State shall take steps to separate the judiciary from the executive in the public services of the State," postulates separation of the judiciary from the executive. 172. In Gupta's case, Bhagwati, J who spoke for the majority has not made reference to Article 50 though he did refer to that Article in Sankal Chand. 173. 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 Chapter IV (Directive principles of State Policy) and which read thus : Article 36 - In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III. 174. 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 analamous 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. 175. The Power of appointment of Judges and the primacy to the opinion of the CJI thereof 176. The key and substantial questions that spring up for deep consideration among the various topical issues and that were hotly debated before us are, firstly, as to where the power of appointment of Judges of the Supreme Court and the High Courts is located; secondly, who is the final authority to make the appointments of those Judges; thirdly, whether there are any canalised guidelines in making the appointments; fourthly, whether the power of appointment of Judges vested in the constitutional functionaries is unfettered and uncircumscribed; and fifthly, whether the opinion expressed by the CJI who is one of the three principal constitutional functionaries during the mandatory consultation required by the Constitution has primacy over the opinion of the other constitutional functionaries ? 177. In a democratic polity, the supreme power of the State is shared among the three principle organs - constitutional functionaries - namely, the legislature, the executive and the judiciary. Each of the functionaries is independent and supreme within its allotted sphere and none is superior to the other. As pointed

out in Subhash Sharma (supra), justice has to be administered through the Courts and such administration would relate to social, economic and political aspects of justice as stipulated in the preamble of the Constitution and the judiciary, therefore, becomes the most prominent and outstanding wing of the constitutional system for fulfilling the mandate of the Constitution. 178. The constitutional task assigned to the judiciary is in no way less than that of other functionaries - legislature and executive. Indeed, it is the role of the judiciary in carrying out the constitutional message, and it is its responsibility to keep a vigilant watch over the functioning of democracy in accordance with the dictates, directives and imperative commands of the Constitution by checking excessive authority of other constitutional functionaries beyond the ken of the Constitution. In that sense, the judiciary has to act as a sentinel on the qui vive. 179. 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 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, has never been successful. Therefore, faced with such a piquant situation, it has become imperative for us to solve there 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. 180. We, before starting with these onerous task, would like to make it clear that it is not an attempt to get the judiciary locked up in a power struggle either for social aristocracy or judicial imperialism of its own or for any vainglory of establishing judicial supremacy over and above all other constitutional functionaries but only to enjoy its legitimate right of demanding recognition of primacy to the opinion of CJI in the matter of appointment of Judges to the justice delivery system. Incontrovertibly, the CJI being at the helm of the judicial system is the principle protector of judiciary showing his keen insight into the practical problems of the judicial system from beginning to end. In fact, the CJI has pride of place in the Constitution. 181. In the backdrop of the above important role given to the judiciary and the obligation of the CJI as required under Articles 124(2) and 217(1) of the Constitution we shall examine the various questions which are posed for deep consideration. 182. The Indian judicial system being pyramidic in character is an integrated one in contradistinction to the dual system of USA and Australia. Our judicial system is vertically structured with this Court (Supreme Court) at the apex with the intervening layers consisting of subordinate judiciary at the grassroots lever, district Judge at the middle level and the High Court at the State level. 183. We shall presently give a brief note of the appointment of Judges in the pre and post Constitution era with reference to the concerned provisions of

the then existing Act and the present Constitution which throw considerable light on the discussion that we proposed to undertake. Appointment of Judges under the Government of India Act, 1919 184. There is a long evolution of the method of appointment of Judges of the superior judiciary in India. The process of Indianisation of Judiciary was in the offing and ground norms were laid for the same in the Government of India Act of 1919. Section 101 of that Act conferred the authority to appoint a Judge of a High Court on His Majesty. Sub- section (3) of Section 101 set out the qualifications of a person for being appointed as a Judge of the High Court. Some of the qualification clauses of that Section opened up a possibility of Indians being appointed as High Court Judges with concept of quota reservation. Appointment of Judges under the Government of India Act, 1935 185. Under the Government of India Act, 1935, Sub-section (2) of Section 200 which dealt with appointment of Federal Court Judges provided that "every Judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty-five year". The High court Judges were also appointed in the same manner under Sub-section (2) of Section 220 of the Act of 1935 but the tenure of office was upto the age of sixty years. 186. It was only after considerable discussion and debate in the Constituent Assembly and in the various Committees which were appointed in connection with the appointment of Judges and other allied matters, the present provisions - viz. Article 124 (regarding appointment of Judges to Supreme Court) and 217 (regarding appointment of Judges to the High Courts) were incorporated in the Constitution. (It may be pointed out in this context that one of the suggestions made in the course of discussion in the Constituent Assembly was that the appointment of Judges of the Supreme Court should be with the concurrence of the Chief Justice of India, but this suggestion was accepted.) 187. Appointment of Judges of the Supreme Court and High Courts under the Constitution of India 188. The fasciculus of Articles 124 to 147 in Chapter IV of Part V under the caption "The Union Judiciary" deals with the establishment and Constitution of Supreme Courts, the appointment of Judges and their powers, rights, jurisdiction and service conditions etc. etc., whilst Articles 214 to 231 in Chapter V of Part VI under the caption "The High Courts in the State" deal with the Constitution of High Courts, the appointment and conditions of the office of a Judge of a High Court, their powers, rights, jurisdiction, service conditions including the transfer from one High Court to another etc. etc. The power to appoint a Judge to the Supreme Court or to a High Court vests in the President under Articles 124(2) and 217(1) respectively. It is obligatory upon the President before making an appointment of a Judge to the Supreme Court other than the Chief Justice of India to consult the CJI. If the President, in his discretion, deems it necessary for that purpose to have "consultation with such of the Judges of the Supreme Court and of the High Courts in the States" he can do so as contemplated under Article 124(2). For appointment of CJI, there is no specific provision. Similarly, it is obligatory upon the President before making an appointment of a Judge to a High Court to consult the CJI, the Government of the State and the Chief Justice of the High Court (in the case

of appointment of Judge other than the Chief Justice) to which the selectee is to be appointed as required under Article 217(1). 189. The Constitution except stating that "there shall be a Supreme Court of India consisting of a Chief Justice..." (vide Article 124(1)) and that "there shall be a High Court for each State (vide Article 124) and the"every High Court shall consist of a Chief Justice... "does not prescribe a separate and distinct procedure for appointment of Chief Justice. As the word 'Judge' includes the Chief Justice also, the procedure prescribed for appointment of a Judge to the Supreme Court or to a High Court has to be followed in compliance with Articles 124(2) and 217(1) as the case may be. 190. Till date, the proposal and procedure followed in the appointment of Chief Justices and Judges to the Supreme Court and High Courts during the pre-S.P.Gupta period is more or less the same. No ostensible material change is brought to our notice in the present existing procedure. Two memoranda dated nil have been furnished along with the written submissions made in behalf of Union of India, showing the procedure prior to the decision in Gupta's case. We shall now reproduce those two memoranda as well as the present procedure as found in the 121st Report of the Law Commission so as to have a clear idea of the procedure hitherto followed in the selection as well as appointment of Judges to the superior judiciary. Those two memoranda are said to have been issued earlier to the decision in Gupta's case. 191. This first memorandum dealing with the appointment of a permanent Chief Justice of India and Judges of the Supreme Court under Article 124(2) prescribes the following procedure : Whenever a permanent vacancy is expected to arise in the office of the Chief Justice, the necessary action will be taken by the Minister of Law and Justice through the private and personal channel. Whenever a permanent vacancy is expected to arise in the office of a Judge of the Supreme Court, the Chief Justice of India will intimate the fact to the Minister of Law and Justice and at the same time forward his recommendations as to the manner in which the vacancy should be filled. Unless the Minister of Law and Justice considers that the recommendation of the Chief Justice of India should be accepted straight-away, he may consult such Judges of the Supreme Court and High Courts as he may deem necessary and, if after such consultation, the Minister of Law and Justice considers it desirable to bring any point to the notice of the Chief Justice of India or to suggest the consideration of the claims of any other person not recommended by the Chief of India, he may by personal correspondence convey his suggestions to the Chief Justice of India. On obtaining the views of the Chief Justice of India finally, the Minister of Law and Justice will, with the concurrence of the Prime Minister, advise the President of the selection. 192. In the case of appointment of Chief Justice and Judges of High Court under Article 217(1), the following procedure is made mention of in the second memorandum : When permanent vacancy is expected to arise in the office of Judge, the Chief Justice will as early as possible communicate to the Chief Minister of the State his views as to the person to be selected for permanent appointment. The Chief Minister will, in consultation with the Governor, forward his recommendation to the Minister of Law and Justice in the Central Government. Full details

of the persons recommended particularly those mentioned in the Annexure I, should invariably be sent. When the Chief Minister or the Governor proposes to recommend the name of a person different to the one put forward by the Chief Justice, the Chief Justice should be informed accordingly and his comments invited. These comments should invariably be forwarded along with the communication from the Chief Minister to the Minister of Law and Justice in the Central Government. The Minister of Law and Justice in consultation with the Chief Justice in consultation with the Chief Justice of India and the Prime Minister, will then advice the President as to the selection. The same procedure will be observed with regard to the appointment of Chief Justices, except that the recommendation for appointment of Chief Justice will originate from the Chief Minister. 193. We would like to extract the present existing procedure adopted as found in the One Hundred and Twenty First Report of the Law Commission of India (July 1987) page 10 : The present situation is that ordinarily a formal proposal for filling up of a vacancy in the Supreme Court is initiated by the Chief Justice of India by recommending the name of the person considered suitable by him to the Minister of Law and Justice. If the Minister accepts the recommendation, the proposal is forwarded to the Prime Minister of India who, if he approves, advises the President to issue a formal warrant of appointment under his own signature. Similarly, in the case of a Judge of the High Court, the formal proposal emanates from the Chief Justice of the High Court and if that is accepted by the Chief Minister of the State, the Governor of the State, the Chief Justice of India and the Minister of Law and Justice, Government of India, the same is processed and submitted to the Prime Minister of India, who, if he approves, the recommendation, advises the President to issue a formal warrant of appointment. 194. Ever since the advent of our Constitution, the President in appointing a Judge"by warrant under his hand and seal" acts on the aid and advice of the Council of Ministers under Article 74 in the case of Supreme Court and High Courts. In the matter of appointment of a High Court Judge, the opinion of the Council of Ministers of the State on whose aid and advice the Governor expresses his opinion is also taken into consideration in addition to the aid and advice of the Council of Ministers of the Central Government under Article 74. 195. A mounting dissatisfaction has been and is voiced against this existing method and strategy of selection through the process of which selecters have to man the superior judiciary. It is stated in the One Hundred Twenty-first Report of the Law Commission of India that “This dissatisfaction stems from what is the idolised view of the members of the superior judiciary and what is available. In order to appreciate the fairness and reasonableness of this strident criticism, it is first necessary to determine what is expected of the superior judiciary individually and institutionally.” 196. While the procedure for appointment of Chief Justices and Judges stood thus, a number of writ petitions were filed before this Court, one of which was S.P. Gupta, a Senior Advocate practicing in the Allahabad High Court. All the writ petitions had challenged the constitutional validity of a circular/letter dated March 18, 1981 addressed by the then Law Minister of Government of India to the Governor of Punjab and Chief Ministers

of the other States. In addition to the above prayer, in a writ petition filed by Mr. V.M Tarkunde, a senior advocate practicing in this Court, the procedure and practice followed by the Central Government in appointing Judges of various High Courts were assailed. A seven-Judges Bench presided over by P.N. Bhagwati, J (as the learned Chief Justice then was) heard all the writ petitions together. All the seven Judges delivered separate judgments. Bhagwati, J who gave the leading judgment has spelt out his opinion as under : It would, therefore, be open to the Central Government to override the opinion given by the constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court, so long as such decision is based on relevant consideration and is not otherwise malafide. 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 the 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 malafide or based on irrelevant ground. The same position would obtain if an appointment is made by the Central Government Contrary to the unanimous opinion of Chief Justice of the High Court and the CJI. . . . 197. The above view expressed in Gupta's case which affixed the judicial stamp of approval on the present existing mode of selection and appointment of Judges to the superior judiciary at the exclusive discretion of the Central Government, even disregarding the opinions of the constitutional functionaries including the CJI and the long felt need for a change in the present mode and method of appointments appear to be the immediate provocation for filing these present writ petitions. 198. The grievance articulated by the petitioners is that under the present scheme the executive which is given the 'right of primacy' and the 'freedom of choice' in the matter of selection and appointment of Judges to the superior judiciary, assumes the role of "Lord of Lords" and indeed acts as an "overlord" with the result that the right of making appointments even in defiance of the unanimous opinion of all the three constitutional functionaries including the CJI; that during the entire process, wholly concerning the judicial system, the CJI is reduced to passive by-stander and mute spectators instead of being an an active participant in process except being a consultee at an early initial stage and that the superior judiciary headed by the CJI who is the final arbiter of all constitutional questions is regrettably placed in that process under the 'despotism of an oligarchy'. According to them, the cherished principle of independence of the judicatory is being strangulated by this kind of recognition of the executive's superiority by keeping it on a high pedestal in preference to the judiciary and reducing the judiciary to an ignoble position. This ignominy, it is said, makes the judicial system suffer convulsions and struggle for its normal breathing in its own field, in the matter of appointment of Judges to man the judiciary itself. 199. Justifying the initiation of these proceedings, it has been said that as the Judges particularly the Chief Justice who are/is sidelined in this juris-dictional struggle could not even temporarily

put aside their judicial robes and enter into political debate on this burning and sensitive problem, the petitioners who are more interested in and wedded to the principle of independence of judiciary have approached this Court entertaining a genuine apprehension that if the 'primacy' is not accorded to the opinion of the CJI in the matter of appointment of Judges, the majesty of the entire judicial system would be completely devalued and eroded. 200. Mr. Parasaran appearing on behalf of UOI countervails the above arguments contending that the emotional submissions and verbal gymnastics are nothing more than mere verbiage. According to him, there is no grey area in the present existing procedure of appointment of Judges to be annulled or altered. It is further contended that the arguments, advanced on behalf of the petitioners are barren of force, muchless expose hollow-ness because the present existing procedure which has stood and is standing the test of the day, is the only acceptable procedure which is strictly in conformity with the constitutional mandate. He states that there is absolutely no riddle wrapped in a mystery inside an enigma in the present mode and strategy of selection and appointment of Judges as magnified and projected by the learned Counsel for the petitioners requiring any change or modification. He further continues to state that any change or modification in the system will offend the Constitution. But at the same time, he has said that he is second to none in upholding the dignity and independence of the judiciary. 201. Before undertaking a painstaking voyage on an obsessive mission to find out as to whether there are any defects in the present mode and strategy to the selection and appointment of Judges for the higher judiciary contrary to the constitutional scheme; if so what those defects are and what would be the remedy that would cure that disease, we would even at the threshold make it clear that it is not for us to enter and investigate or to make a research, 'what the law was, what the law is and what the law ought to be', but only to interpret the relevant constitutional provisions as they stand in their spirit and true objectives without subjecting them to any hard construction or drawing any strained inferences. 202. To put it differently, we are constrained to undertake this process of disposing these hotly debatable issues with an avowed object re-designing and re-juvenating the structure and the system of judiciary, if so warranted, so that the stability of the system for ages to come may have firm footrest an lumber support because if the system is weak-kneed or crippled or becomes impotent of sterile, it will lose its strength and authority. Resultantly, the other constitutional functionaries will try to prevail upon the justice delivery system as the saying goes, "When the eagle of empire falls, each sparrow takes a feather". The judiciary is neither subservient to nor a 'cheer- leader' of the executive or any other authority, however, powerful it may be. 203. It is worthwhile to recall the speech of Elmira in 1907 as a prelude for the discussion to be made in the ensuring part of this judgment. He stated, "we are under the Constitution, but the Constitution is what the Judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution." 204. Marshal, CJ with reference to judicial activism in interpreting has observed thus : We must never forget that it is a Constitution which we are expounding,

a Constitution intended to endure for ages, and consequently to be adapted to the various crises of human affairs. Nor did they imagine that it was to be so strictly interpreted that amendments and radical revisions would be constantly required to keep Government functioning smoothly. 205. Keeping the above view, let us examine the relevant constitutional provisions in their true spirit and without stretching them too far. 206. Clauses (1) and (2) with its first proviso of Article 124 reads thus : 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 Now "twenty-five" vide Act. 22 of 1966 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 State 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. 207. Article 217(1) with regard to the appointment of Judges to the High Courts read thus : 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 judge other than the Chief Justice, the Chief Justice of the High Court, and.... 208. Under the above provisions, it is the President who is vested with the authority of appointment by warrant and under his hand and seal "after consultation" with specified constitutional functionaries. The consultees whom the President may in his discretion consult in case of appointment of a Judge of the Supreme Court are, (1) Such of the Judges of the Supreme Court, and (2) Such of the Judges of the High Courts in the States as the President may deem necessary for this purpose. But the proviso to Clause (2) of Article 124 makes it obligatory on the part of the President to consult the Chief Justice of India in case of an appointment of a Judge other than the Chief Justice. Thus, Article 124(2) envisages two kinds of consultation, one being discretionary on the part of the President and the other being mandatory. In case of appointment of a Judge of the High Court other than the Chief Justice, the constitutional functionaries are, (1) Chief Justice of India (2) The Governor of the State (3) Chief Justice of the High Court concerned 209. It is clear that under Article 217(1), the process of 'consultation' by the President is mandatory and this clause does not speak of any discretionary 'consultation' with any other authority as in the case of appointment of a Judge of the Supreme Court as envisaged in Clause (2) of Article 124. The word 'consultation' is powerful and eloquent with meaning, loaded with undefined intonation and it answers all the questions and all the various tests including the test of primacy to the opinion of the CJI. This test poses many tough questions, one of them being, what is the meaning of the expression 'consultation' in the context in which it is used under the Constitution. As in the case of appointment of a Judge

of the Supreme Court and the High Court, there are some more constitutional provisions in which the expression 'consultation' is used. Those provisions are : 210. Clause (5) of Article 148 states that subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor General. 211. In Clause (1) of Article 222, it is stated that the President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court. 212. Clause (3) of Article 320 states that the Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted on matters enumerated under Sub-clauses (a) to (e) of that clause. 213. Clause (9) of Article 338 reads," The Union and every State Government shall consult the Commission on all major policy matters affecting Schedule Castes and Scheduled Tribes". 214. The consultation in all the above Articles is mandatory in character. Vide Manpodhan Lal Srivastava v. State of U.P. (1958) SCR 533. 215. However, the question of consultation by the President as in the case of appointment of a Judge is not constitutionally warranted in respect of the appointment of some other constitutional appointees by the President, namely, (1) the Chairman and Members of Finance Commission under Article 280(1), (2) the Chairman and Members of Public Service Commission in the case of Union Commission or a Joint Commission under Article 316(1); (3) the Chief Election Commissioner and other Election Commissioners under Article 324(2); and (4) the Chairman and other members of the Commission representing the different languages specified in the Eighth Schedule under Article 344(1); (5) the Special Officer for linguistic minorities under Article 350-B. 216. The word 'consultation' is a noun whilst the word 'consult' is a verb and 'consultative' is an adjective. The meaning of the expression 'consultation' is given in Shorter Oxford English Dictionary as : Consultation: 1. The action of consulting or taking counsel together; deliberation, conference; 2. A conference in which the parties, e.g. lawyers or medical practitioners consult and deliberate. 3. The Action of consulting.... 217. In Webster's Encyclopedic Unabridged Dictionary of the English Language, the meaning of consultation is given thus : Consultation: 1. The act of consulting; conference. 2. a meeting for deliberation, discussion, or decision.... Black's Law Dictionary defines the expression as under : Consultation: Act of consulting of conferring; e.g. patient with doctor; client with lawyer. Deliberation of persons on some subject. A conference between the counsel engaged in a case, to discuss its questions or arrange the method of conducting it. Stroud's Law Lexicon gives the following definition: Consultation: (New Towns Act, 196 (9 & 1) (Geo. 6.C.68), s 1(1), 'consultation with any local authorities 'Consultation means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice" per Blucknil, L.J. in Rollo v. Minister of Town and Country Planning (1988) 1 All E.R. 13 C.A.;

see also Fletcher v. Minister of Town and Country Planning (1947) 2 All E.R. 99. 218. Word and Phrases - Permanent Edition gives the meaning of 'consult' thus : Consult means to seek opinion or advice of another, to take counsel; to deliberate together; to confer; to deliberate on; to discuss; to take counsel to bring about; devise; contrive; to ask advice of; to seek the information of; to apply to for information or instruction; to refer to. Teplisky v. City of New York 133 N.Y.S. 2d 260, 261. 219. In common parlance, whenever the expression 'consultation' is used in connection with lawyers, or with the physician of with the engineer etc. it would mean as seeking opinion or advice or aid or information or instruction. In Corpus Jusris Secundum Vol. 16A at page 1243, the meaning of the word 'consultation' is given thus: Consultation: The word 'consultation' is defined general as meaning the act of consulting; deliberation with a view to decision; and judicially as meaning the deliberation of two or more persons on some matter; also council or conference to consider a special case. In particular connections, the word has been defined as meaning a conference between the counsel engaged in a case, to discuss its question or to arrange the method of conducting it, the accepting of the services of a physician, advising him of one's symptoms, and receiving aid from him. In Law Lexicon by P. Ramanath Aiyar, it is stated as follows : Consultations always require two persons at least, deliberations may be carried on either with a man's self or with numbers; an individual may consult with one or many; assemblies commonly deliberate; advice and information are given and received in consultation; doubts, difficulties, and objection are stated and removed in deliberations. Those who have to co-operate must frequently consult together; those who have serious measures to decide upon must cooly deliberate. 220. The expression used in Clause (2) of Article 124 is 'after consultation' whereas in the proviso to that clause the expression 'shall always be consulted, is used. In Article 217(1), the expression used is 'after consultation. 221. This word 'consultation' when used in legal sense has come up for judicial scrutiny before this Court as well as High Courts and foreign Courts on many occasions. We shall now recall a few of the decisions, interpreting that words. 222. The word 'consult' was subject of judicial scrutiny in Fletcher v. Minister of Town Planning (1947) 2 All E.R. 496 in which the learned Judge observed thus : The word 'consultation' is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which the consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultations may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one. In Madras District Municipalities Act, 1920, Section 3 read that"for the purpose of election of Councillors to a Municipal Council, the Local Government 'after consulting the Municipal Council' may by notification decide the Municipality into wards. . . ." K. Subba Rao, J (as the learned Chief Justice of this Court then was) who then adorned the Bench

of the Madras High Court interpreted the word 'consult' in R. Pushpam and Anr. v. State of Madras AIR 1953 Madras 392, as under: 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. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions. The consultation must enable the consultor to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject-matter of the consultation. A consultation may be between an uniformed person and an expert or between two experts. A patient consults a doctor, a client consults his lawyer; two lawyers or two doctors may hold consultations between them-selves. In either case the final decision is with the consultor, but he will not generally ignore the advice except for good reasons. So too in the case of a public authority. Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, a performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions. In either case the order is not made in compliance with the provisions of the Act. 223. A five-Judges Bench of this Court in Chandramouleshwar Prasad v. Patna High Court and Ors. (1970)2 SCR 666 : AIR 1970 SC 370, while interpreting the word 'consultation' as appearing in Article 233 of the Constitution has 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. The Government cannot discharge his function under Article 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto. It was strenuously contended on behalf of the State of Bihar that the materials before the Court amply demonstrate that there had been consultation with the High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was consultation sufficient for the purpose of Article 233. 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 other 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 proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. 224. In Shamsher Singh and Anr. v. State of Punjab (1975) 1 SCR 814 : AIR 1974 SC 2192, Krishna Iyer, J speaking for himself and on behalf of Bhagwati, J has articulated the evaluation of the opinion of the Chief

Justice of India in the matter concerning judiciary and expressed his views thus : 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. 225. Thereafter, in Sankal Chand (supra), Krishna Iyer, J speaking for himself and Fazal Ali, J. in his concurring but separate judgment has ruled thus : 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. 226. In the same case, Krishna Iyer, J after giving lexicon meaning of 'consultation' has stated : We consult a physician or a lawyer, an engineer or an architect, and thereby we mean not casual but serious, deliberate seeking of informed advice, competent guidance and considered opinion. Necessarily, all the materials in the possession of one who consults must be unreservedly placed before the consultee. Further, a reasonable opportunity for getting information, taking other steps and getting prepared for tendering effective ad meaningful advice must be given to him. The consultant, in turn, must take the matter seriously since the subject is of grave importance. The parties affected are high-level functionaries and the impact of erroneous judgment can be calamitous. Therefore, it follows that the President must communicate to the Chief Justice all the materials 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 possess 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. However, consultation is different from consentaneity. They may discuss but may disagree, they may confer but may no concur. And in case, the consent of the Judge involved is not a factor specifically within the range of Article 222. 227. Chandrachud, J. (as the learned Chief Justice then was) in his separate judgment gave a homely analogy and stated that "it may not be a happy analogy, but it is common sense that who wants to 'consult' a doctor cannot keep facts up his sleeve. He does so at his peril of he can receive no true advice unless he discloses facts necessary for diagnosis of his malady." Thereafter, making reference to Pushpam's case (supra), the learned

Judge stated. "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." 228. Bhagwati, J in Sankal Chand has wholly endorsed what Krishna Iyer, J. has observed about the nature and intent of the expression, 'consultation with the Chief Justice of India' occurring in Clause (1) of Article 222. 229. Bhagwati, J (as the learned Chief Justice then was) in Gupta's case has articulated that Articles 124(2) and 217(1) speak of only constitutional functionaries having a consultative role and held thus : ...It is not an unfettered power in the sense that the Central Government cannot act arbitrarily without consulting the constitutional functionaries specified in the two Articles but it can act only after consulting them and the consultation must be full and effective consultation. The question, immediately arises what constitutes 'consultation' within the meaning of Clause (2) of Article 12 and Clause (1) of Article 217. Fortunately, this question is no longer res Integra and it stands concluded by the decision of this Court in Sankalchand Seth's case (supra) related to the scope and meaning of 'consultation' in Clause (1) of Article 222.... ... ... 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. But while giving the fullest meaning and effect to 'consultation' it must be borne in mind that it is only consultation which is provided by Government and consultation cannot be equated with concurrence.... ... ... It is, therefore, clear that where there is difference of opinion amongst the constitutional functionaries in regard to appointment of a Judge in a High Court, the opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of each of the constitutional functionaries and giving it due weight, the Central Government as entitled to come to its own decision as to which opinion it should accept in deciding whether or not to appoint the particular person as a Judge. So also where a Judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted, but again it is not concurrence but only consultation and the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India though it is entitled to great weight as the opinion of the head of the Indian Judiciary.... ... ... It is clear from the language of Clause (1) of Article 217 that the appointment of a Judge of a High Court can be made by the President only after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India and, according to the interpretation placed by us, consultation within the meaning of this Article means full and effective consultations with each of the three constitutional functionaries after placing all relevant material before them. 230. Fazal Ali, J. in Gupta's case has agreed with the view expressed by Bhagwati, Desai and Venkataramiah, JJ as regards the exposition of the concomitants

of consultative process. 231. Desai, J. has accepted the view expressed in Chandramouleshwar Prasad v. Patna High Court (supra) as being a good law even for Article 217(1). 232. Pathak, J. (as the learned Chief Justice then was) has expressed his view stating : At the same time I am unable to accept the contention that as the Constitution stands today, the President is obliged in all cases to agree with a recommendation in which the Chief Justice of the High Court and the Chief Justice of India have concurred. During the Constituent Assembly Debates a proposal was made by a member that the appointment of Judges should require the concurrence of the Chief Justice of India (although that suggestion was made in connection with the appointment of Judges of the Supreme Court), but that proposal was not accepted. The Law Commission of India in its Fourteenth Report, Vol. 1 p.7 surveyed the machinery for appointing a Judge of a High Court and considered it desirable that the provision in Clause (1) of Article 217 should be altered to provide for 'not merely consultation with the Chief Justice of India but his concurrence in the proposed appointment.' That recommendation has not borne fruit and we are concerned with the position which prevailed then and continues today. 233. In Subhash Sharma (supra), Ranganath Mishra, CJ speaking for the three-Judges Bench explained the significance of the word 'consultation with the Chief Justice of India' as appearing in Article 124(2) and 217(1) as follows : The word 'consultation' is used in the constitutional provision in recognition of the status of the high constitutional dignitary who formally expresses the result of the institutional process leading to the appointment of judges. To limit that expression to its literal limitation, shorn of its constitutional background and purpose, is to borrow Justice Frankfurther's phrase "to stick in the bark of words.... ... ... 'Consultation' should have sinews to achieve the constitutional purpose and should not be rendered sterile by a literal interpretation. 234. Mr. F.S. Nariman, the learned senior counsel has submitted that the meaning of the expression 'after consultation with' must be determined in the constitutional context and conditions only by the true nature and object of such consultation. In support of this submission, he places reliance on Port Louis Corporation v. Attorney General 1965 AC 1111 at 1112 P.C. wherein Lord Morris has pointed out that the nature and object of consultation must be related to circumstances which call for it. 235. He continues to state that when no consultation is provided for with regard to any other constitutional office - i.e. other than the judicial office, the consultation which is required in the Constitution with reference only to judicial office (as contrasted with other high ranking constitutional offices) shows that it does not bear the ordinary literal meaning but it means something more than merely seeking an advice. 236. According to him, the word 'consultation' especially in the context of the authorities constitutionally required to be consulted cannot be dissociated from the advice sought, and given, as a result of such consultation and that the requirement of prior consultation in respect of judicial offices in the Constitution was truly intended to be a reservation or limitation on the power to appoint and that it is not merely a condition precedent to the exercise of the power to appoint. It is further submitted that the link between

the advice given as a result of the consultation and the ultimate appointment of the person about whom there is consultation for judicial office, is inextricable making the entire process of appointment of Judges under the Constitution as one 'integrated process'. In this connection, our attention was drawn to the illustrative observation of Subba Rao, CJ speaking for the Constitution Bench in Chandra Mohan v. State of Uttar Pradesh and Ors. (1967) 1 SCR 77 : AIR 1966 SC 1987wherein, he had said : To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and C. 237. This passage, according to Mr. Nariman indicates that the advice tendered by the constitutional authority required to be consulted, of a binding character, though it does not specifically decide so. 238. He cites a decision of the Supreme Court of Tennessee in Colyar v. Wheeler et.al. mentioned in Words and Phrases - permanent Edition Volume 9, in which the following principled are laid down : 1. Where, by a post-nupital settlement, a husband and wife conveyed to a trustee all of the wife's property, reciting that the purpose of the deed was that the trustee might hold the legal title for the wife's sole and separate use, with the absolute right of disposition as she might choose on consultation with said trustee, such conveyance created an active trust, the imposed on the trustee the duty of preserving the property for the wife's separate use during coverture. 2. Where a married woman's property was conveyed to a trustee to hold the legal title for her sole and separate use, with the absolute right of disposition as she might choose, on consultation with said trustee, the provision requiring consultation was equivalent to a requirement of the consent of the trustee, to be evidence by his signature to the conveyance and hence mortgages executed by the wife and her husband without the trustee's consent, and in which he did not join were void, 239. Mr. Ram Jethamalani, learned senior counsel expressed his grievance that the principles laid sown in Chandra Mohan's case (supra) were not appreciated by the learned Judges while dealing with Shamsher Singh's case who in his submission, have ignored the principle of harmonious construction which was articulated in K.M. Nanavati v. State of Bomaby (1967) 1 SCR 97. According to him, the judgment in Gupta's case 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.' 240. According to Mr. Kapil Sibal, the learned senior counsel, there is no mention of Government in Article 124(2) but this Article refers only to the President which means the President acting with the aid and advice of the Government, namely, the Council of Ministers. He brought to our notice certain observations of Bhagwati, J in Gupta's case firstly,"It is obvious on a plain reading of Clause (2) of Article 124 that it is the President which in effect and substance means the Central Government which is empowered by the Constitution to appoint Judges of the Supreme Court"; secondly"the power of appointment resides solely and exclusively in the Central Government" and thirdly, "the opinion of the Governor of the State which means State Government. . . ." 241. By the above observation in Gupta's case, according to him this Court has erred

in reading into the words, The President' and 'the Governor of the State' as meaning 'the Central Government' and 'the State Government' respectively" which is neither the true intent of the Constitution nor warranted in the field of appointment of Judges. He regrets that where there are guide to nuts and bolts, it is highly distressing and derlorable that there are no canalised guidelines as regards the method of selection and appointment of Judges to the higher judiciary. 242. Mr. K. Parasaran, the learned senior counsel appearing on behalf of the respondents strenuously and fervently refutes the above arguments stating that when the Constitution points out three functionaries including the CJI who have to be consulted by the President, there is no question of giving primacy to the opinion of the Chief Justice of India over and above the opinion of the other consultees with regard to the same subject matter under the same context. He states that there could be no reason to give primacy to the opinion of the CJI expressed during the consultation except on the principle of so called hierarchy. He adds that the very scheme of the Constitution not providing for administrative control of the High Courts by the Supreme Court, itself militates against giving primacy to the opinion of the CJI in the process of 'consultation' over the Chief Justice of the High Court who is also one of the constitutional functionaries to be consulted by the President as adumbrated under Article 217(1). Similarly, the Executive also has an important role to play in the process of consultation since the Executive may have knowledge as to the qualities and affiliations and personal integrity of the selectee other than his/her legal ability and professional attainments. In support of his submission he referred to the debates of the Constituent Assembly and to certain proposed amendments to the draft Article which, according to him, would show that 'consultation' does not mean 'consent' or 'concurrence'. For understanding and appreciating his arguments, we would like to reproduce the proposed amendments. 243. Shri B. Pocker Sahib moved the following amendment to Article 103: (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 Courts in the States and every Judge of the Supreme Court shall hold office until he attains the age of sixty-eight years. 244. Similarly, Mr. Mahboob Ali Baig Sahib proposed the following amendment : 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's be substituted. 245. To the draft Article 193 with respect to the appointment of High Court Judges, Mr. B. Pocker Sahib suggested the following amendment : (1) 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 concerned after consultation with the Governor of India State concerned and with the concurrence of the Chief Justice of India and shall hold office until he attains the age of sixty-three years. 246. All the

above amendments were rejected after a long deliberation in the Constituent Assembly. Mr. Parasaran urges that when those amendments expressly providing for the concurrence of the CJI were rejected and the present Article 124 and 217 have been enacted placing all the constitutional functionaries including the CJI as only consultees, no interpretation can be justifiably given that consultation with the CJI must be given primacy. According to him, if such a construction is given to the word 'consultation', we would be rewriting the Articles. Then he cites an observation from the Special Courts Bill (1979) 2 SCR 476 wherein the word 'consultation' was not construed 'concurrence' but only as 'consultation' as ruled in Sankal Chand. That observation reads thus : ... the process of consultation has its own limitation and they are quite well known. The obligation to consult may not necessarily act as a check on the executive.... 247. Referring to the new Clause (4) to Article 22 which is a proposed substitution by the Constitution (Forty-fourth) Amendment Act, 1978 (for which date of enforcement is yet to be notified) in relation to the composition of the Advisory Board, reading "Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court", it has been asserted by Mr. Parasaran that this newly proposed clause is introduced bearing in mind the interpretation made by this Court in Sankal Chand and Special Courts Bill that consultation does not mean concurrence. He states that this is, therefore, a case of legislative ratification by the constituent power of the interpretation made by this Court as to the meaning of the word 'consultation'. For principle of legislative ratification, he cites the following decisions, (1) Commissioner of Income Tax v. Basi Dhar & Sons (1985) Suppl. 3 SCR 850, (2) State of Tamil Nadu v. Neelai Cotton Mills (1990) 2 SCR 33 F.S. Gandhi v. Commissioner of Wealth Tax 1990 (2) SCR 886 : AIR 1991 SC 1866 Keshavji Ravji v. Commissioner of Income Tax (1990) 1 SCR 243 at 257. 248. After having made reference to the proposed amendments to Articles 103 and 193 of the draft Constitution Mr. Parasaran has recalled the reply of Dr. B.R. Ambedkar while winding up the debate on this topic concerning judiciary which reads thus : With regard to the question of concurrence of the Chief Justice, it seem to me that those who Advocate that proposition seem to reply implicit 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. 249. According to Mr. Parasaran, the entire debate on this topic in the Constituent Assembly, the rejection of the proposed amendments and the texture of the reply given by Dr. B.R. Ambedkar, in this context, are indicative of the fact that the framers of the Constitution designedly used the expression 'consultation' instead of 'concurrence' or 'consent' which in turn shows that the opinion expressed by all the constitutional functionaries during the consultation by the President

have equal weightage and none of them can be placed superior to the other. 250. Mr. Parasaran finally makes a blistering attack against and fends off the petitioners' counsel's arguments stating that it is rather difficult to accept the construction of the word 'consultation' as on behalf of the petitioners and that if such a construction that the primacy should be given to the opinion of the Chief Justice expressed during the consultation, is accepted, then Article 124(2) Main Part will become redundant and otiose. He continues to state that had the intention of the framers of the Constitution been that the consultation with the CJI alone is sufficient, Article 124 would have been drafted without a proviso reading, that every Judge of the Supreme Court shall be appointed by the President always in consultation with the Chief Justice of India and in his discretion may in consultation with such of the Judges of the Supreme Court and the High Courts in the States, if the President so deems necessary for the purpose. Reliance was placed on an observation of this Court in State of Uttar Pradesh and Ors. v. Radhey Shyam Nigam and Ors. etc. etc. (1989) 1 SCR 92 : AIR 1989 SC 682 , wherein Sabyasachi Mukharji, J (as the learned Chief Justice then was) speaking for the Bench had said that it is a settled rule of the interpretation of statutes that provisions of an Act should be interpreted in such manner as not to render any of its provisions otiose unless there are compelling reasons for the Court to resort to that extreme contingency. He also cites Shri Balaganesan Metals v. M.R. Sanmugham Chetty Ors. 1987 (2) SCR 1173 : AIR 1987 SC 1668, which decision has been relied upon in Radhey Shyam Nigam and Ors. (supra). According to him, the purpose of enacting Article 124(2) with a separate proviso is that in the process of consultation, the Chief Justice of India is always a consultant, who should be consulted and the other Judges whom the President my choose to consult, are variable in that the President may consult different Judges on different occasions as the facts and circumstances of the case may suggest to him. 251. The learned Attorney General projects the view expressed by Pathak, J (as the learned Chief Justice was) in his minority judgment. According to him, the circulars as well as the actual practice of the working of the system clearly establishes that the Chief Justice's views in the evaluation by the President should not be treated as one of parity but should be given greater weight. Finally, be emphasizes that the views expressed in Gupta's case are neither basically wrong nor intrinsically defective so as to bring about any radical changes and devise a new method. 252. The controversy that arises for scrutiny from the arguments addressed boils down with regard to the construction of the word consultations. 253. Incontrovertibly, our Constitution is structured with a wealth of influential and choice words, measured phrases and expressions - the real meaning and message of which are sometimes missed and on many occasions, are hidden or unforeseen. However, the implication, relevance, signification, spirit and core of that word, as used in the Constitution are beyond the range of the interest of a layman. 254. In Chapter 4 of the Treatise titled, "The Loom of Language", it is stated : Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. They do not come in standard shapes and sizes like coins from the mint, nor do they go forth

with a degree to all the world that they shall mean only so much, no more and no less. Through its own has a penuntire of meaning which no draftsman can entirely cut away. It refuses to be used as a mathematical symbol. 255. In Town v. Eisher 245 U.S. 418, Mr. Justice Holmes said that "a word is not a crystal, transparent and unchanged; it is the skein of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used." 256. Bhagwati, J in Sankal Chand has pointed out that "the words used in a statute cannot be read in isolation, their colour and content are derived from their context and, therefore, every word in a statute must be examined in its context.... The context is of the great importance in the interpretation of the words used in a statute." 257. The Privy Council in Minister of Home Affairs and Anr. v. Fisher and Anr. (1979) All ER 21, has held that a constitutional instrument is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the privileges, rules and presumption of statutory interpretation. 258. The essence of the various decisions of this Court, High Courts as well as foreign Courts is that when we give a liberal construction to a word used in a statute particularly in the Constitution, we must first of all take note of the relevant and significant context in which that word is used and then interpret that word in that context with meaningful purpose. If the construction of the word is made only in a literal or lexical meaning, then is every possibility of missing the real intent of the provisions. 259. When it is commonly said that words are the daily currency of the law, the value of which will never become obsolete; the exchanged value of those currencies would depend upon the context of their usage. In fact, the word 'consultation' coined in the Constitution in one sense is well suited to the age though the said word has given room for different connotations. We are not deliberately contributing any hyperbolic and exaggerated meaning but only the manifested meaning that the currency of the word intends to convey. 260. In the above background of the constitutional scheme, we shall now examine the relevance and significance of consultation with the CJI in the context of appointment of Judges to the Supreme Court and High Courts. In that context, the derivative meaning of the word would depend not merely on its ordinary lexical definition but greatly upon its contents according to the circumstances and the time in which the word or expression is used. Therefore, in order to ascertain its colour and content, one must examine the context in which the word is used. 261. The word 'consultation' is used in the context of appointment of Judges to the Supreme Court under Article 124(2) and to the High Courts under Article 217(1). Though such a consultation is not constitutionally required in the case of appointment of other constitutional appointees, which we have indicated and itemised in the preceding part of this judgment. In Gupta's case, there is a consensus of opinion that consultation does not mean concurrence. In that case, Bhagwati, J in his leading judgment has gone to the extent of holding the words 'President' and the 'Governor' meaning 'the Central Government and 'the State Government' respectively, and that "it would, therefore, be open to the Central Government to override the opinion given by the constitutional

functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge of the High Court or the Supreme Court so long as such decision is based on relevant considerations and is not otherwise malafide. 262. This dictum laid down in Gupta's case is that the power of appointment of Judges rests with the President who will act on the advice given by Council of Ministers after making consultation and upon due consideration of the opinions of the persons consulted. As to the nature of the consultation required, the Constitution does not lay down any specific mode, and in fact there is no guideline as pointed out by Mr. Kapil Sibal. But the view has been taken that since the consultation is a mandatory condition precedent, it should be effective which means what (1) the President must disclose all the facts which are necessary for due deliberation by the CJI, (2) the CJ1 must express his opinion with nothing less than the full consideration of the matter on which he is consulted upon the relevant facts; and (3) the quintessence of consultation being that the two parties must exchange their views and examine the merits of the proposal and counter proposal upon the identical materials. Vide Sankal Chand. 263. In this context, a baffling question is as to what would be the effect of non consultation. In State of U.P. v. Manbodhan Lal Srivastava (1958) SCR 533, while construing the expression 'shall be consulted' occurring in Article 320(3) held that"Article 320(3)(c) of the Constitution does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation should not afford him a cause of action in Court of law, or entitle him to relief under the special powers of a High Court under Article 226 of the Constitution. See also Ram Gopal v. State of Madhya Pradesh 1970(1) SCR 472 : AIR 1970 SC 158 and A.N.D.'Silva v. Union of India (1962) Supp. (1) SCR 968. 264. The question that follows is whether the same view may be taken it the President appoints a puisne Judge of the Supreme Court without consulting the CJI at all. If the view taken in Srivastava's case (supra) as regards the non-observance of Article 323, is imported in the first proviso to Article 124(2) or in Article 217(1), the answer would be that such appointment is nevertheless valid notwithstandings the violation of the first proviso. A different conclusion has, however, been taken in Sankal Chand presumably being prompted by the need for judicial independence under the parallel provisions under Article 222(1) as regards the transfer of a High Court Judge. The view taken in that case by Chandrachud, J is : ... if he proposes to transfer a Judge he must consult the Chief Justice of India before transferring the Judge. That is the nature of a condition precedent to the actual transfer of the Judge. In other words, the transfer of a High Court Judge to another High Court cannot become effective unless the Chief Justice of India is consulted by the President in behalf of the proposed transfer. Indeed, it is euphemistic to talk in terms of effectiveness, because the transfer of a High Court Judge to another High Court is unconstitutional unless, before transferring the Judge, the Presi dent consults the Chief Justice of India. 265. Krishna Iyer, J. in the same judgment speaking for himself and Fazal Ali, J has expressed his view that "a proper construction of Article 222(1), having realistic regard to the setting and scheme of the Constitution, leads necessarily to the

conclusion that 'consultation' with the Chief Justice of India has, its inesapable component, the securing of the transferee Judge's consent to the transfer." 266. Bhagwati, J. found himself entirely in agreement with what Krishna Iyer, J has expressed. 267. Untwalia, J. while generally agreeing with the view expressed in this regard by Chandrachud, J. added that "no order of transfer can be made by the President without the consultation with the Chief Justice of India." 268. 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. 269. The above view of the mandatory character of the requirement of consultation taken in Sankal Chand has been followed and reiterated by some of Judges in Gupta's case, Fazal Ali, J. has held in Gupta's case : (3) If the consultation with the CJI has not been done before transferring a Judge, the transfer becomes unconstitutional. Venkataramiah, J in Gupta's case has also expressed the same view. 270. In the light of the above view expressed in Sankal Chand and some of the Judges in Gupta's case, it can be simply held that consultation with the CJI under the first proviso to Article 124(2) as well under Article 217 is a mandatory condition, the violation of which would be contrary to the constitutional mandate. 271. Before we come to the next phase of the aspect of this matter as to whether the President (which in the opinion of Bhagwati, J. meant the Central Government), can ignore completely the opinion of the CJI and act contrary to his opinion after due consultation, we shall examine the ostensible purport of consultation with the CJI. 272. The vital role to be played by the CJI in the process of selection of candidates for Judgeship for the superior judiciary is to sponsor and recommend properly fit and competent persons by evaluating their merit and efficiency. It will not be out of place to mention that Shri M.C. Setalvad, the eminent jurist and former Attorney General of India has expressed his deep resentment in the Fourteenth Report of the Law Commission chaired by him, over the existing mode and method of selection of judges, the motivation for their selection, the external forces and influences working on the method and selection of candidates having a bearing on judicial administration. In fact, the Fourteenth Law Commission Report emphasising the importance of the opinion of the Chief Justice of India recommended the use of the expression 'concurrence' instead of 'consultation' thought it agree with the use of the expression 'consultation' so far as Governor of the State is concerned. The relevant portion of Article 217 in the Light of the Amendments suggested read as follows : 217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Governor or the State and with the concurrence of the Chief Justice of India, and in the case of appointment of a Judge other than the Chief Justice on the recommendation of 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 years. See Law Commission Fourteenth Report Page 70 para 9. 273. It is beyond controversy that merit selection is the dominant method for judicial selection and the candidates to

be selected must possess high integrity, honesty, skill, high order of emotional stability, firmness, serenity, legal soundness, ability and endurance. Besides the above, the hallmarks of the most important personal qualifications required are moral vigour, ethical firmness and imperviousness to corrupting or venal influences, humility and lack of affiliation, judicial temperament, zeal and capacity to work. In Texas Law Review (Volume 44) 1966 at page 1068 and 1071, the following passage are found emphasising the desirable qualities of the Judges: It is easy to understand why the active judges deem noble inner qualities highly desirable. It is also natural that they should give the highest ratings to good repute, "Good name in man or woman... is the immediate jewel" of their souls, Shakespears said, and judges share with you and me a taste for such treasures. As for good health, is there anyone who does not prize it? Nobility and virtue, good name and well-being - these are never out to place. In a man who wields the power and enjoys the standing of a judge, they are more than welcome. No one seeking judicial office would boast that he lacked any of them, and no appointing authority would look for men without them.... While qualities of the mind were not named as frequent, as qualities of the heart and spirit, intellectual power was not entirely neglected. In the judges' own words, "a capacity for abstract though", "imagination", "learning", "a retentive memory," "quick thinking", "intellectual curiosity", and "ability to analyze and articulate" deserve attention. 274. It would be most appropriate to recall the speech of Sir Winston Churchill while moving a Bill for raising the salary Judges. It reads thus : The service rendered by judges demands the highest qualities of learning, training and character. These qualities are not to be measured in terms of pounds, shillings and pence according to the quantity of work done. A form of life and conduct far more severe and restricted than the of ordinary people is required from Judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct." Vide Parliamentary Debates (Hansard) House of Commons Debates dated 23.3.54 Vol. 525 Cols. 1061-62. 275. In 'The Role of the Trial Judge in the Anglo-American Legal System 50 ABAJ 125, 127 (1964), Chandler has observed that the Judges "should not only know the laws of procedure and evidence... he must be either to use them functionally in making adroit and incessive rulings." 276. It is befitting, in this context, to describe in short, an outstanding and distinguished Judge, in the words of Shakespears in 'The Merchant of Venice' reading, "A Daniel come to judgment yea, a Daniel" 277. The crucial question that follows for deliberation is who is to honestly and realistically evaluate the required qualities under the appointive system and select "Daniel to sit in the Solomon's chair". Is it the CJI or the executive who has to undertake this process of evaluation and selection? 278. Unfortunately, we have no systematic set of criteria to evaluate or rate the desirable qualities of the selectees to the judicial office. There are global reactions that there are some patent obstacles and defects in the existing process of selection of Judges and that the present impressionistic evaluation is not a satisfactory tool to use in selecting Judges on merit. It cannot be gainsaid that only those who know what criteria they

should adopt in assessing merit, can alone evaluate meaningfully a candidate's merit and select the prospective candidate. While weighing and evaluating the qualifications of the prospective candidate, whose names come to attention, the sponsoring authority has to assess their merit by whatever useful non-bromidic guidelines it could devise based on its longstanding experience both on the Bar and the Bench. That authority could be only the Chief Justice of India and the Chief Justice of the High Court concerned who and who alone can speak of a candidate's professional attainments, his learned ability and his legal experience though the executive can speak of the other qualities such as affiliation, personal integrity, antecedents and background of the candidate. In this connection, it will be worthwhile to mention the observation of Sir Winston Churchill in the House of Commons that "Perhaps only those who have led the life of a Judge can know the lonely responsibility which rests upon him." Vide Parliamentary Debates (Hansard) of Commons Debates dated 23.3.54 Vol. 525, Col. 1061. The recipe regarding the professional qualifications could be evaluated only by the Chief Justice. The views advanced that the Government can inexcusably ignore the opinion of the CJI expressed during the process of consultation as well as of the Chief Justice of the High Court and appoint its selectees on its own evaluation of the merit of the candidates, in our considered opinion, cannot be a conceivable logical conclusion. 279. 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 offer his opinion. Therefore, there cannot be any justification in scanning that opinion of the CJI by applying a super-imposition test under the guise of over-guarding the judiciary. 280. In this context, it will be relevant to quote the verse of Decimus Junius Juvenalis, a Roman satirist who while denouncing the vices of imperial Rome stated thus : Sed quis custodiet ipsos Custodes? (But who is to guard the guards themselves?) 281. 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 and Ors. v. Union of India and Ors. (1993) 4 JT 618, rendered by a three-judges Bench presided over by M.N. Venkatachaliah, CJ and consisting of A.M. Ahmadi and P.B. Sawant, JJ, the following observations are made : ... 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 three pillars of the State, that 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 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 U.S.A., 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 par with the members of the Judiciary, either constitutionally or functionally.... It is high time that reasons pointed out above there cannot be any link between the service conditions of the judges and those of the members of the other services.... As pointed out earlier, the parity in status is no longer between the judiciary and the administrative executive but between the judiciary and the political executive Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged. (emphasis supplied) 282. With a view to contradicting and overthrowing the above argument and the executive should not have any unfettered 'say' and 'control' over the selection and appointment of Judges to the highest echelon of the judiciary, various methods followed in different foreign countries have been projected and pressed into service. Firstly, they referred to the methods adopted in the appointment of Judges in the United States of America by nomination or by election as the case may be, in that the Judges to the federal Supreme Court of the United States are nominated by the President of USA and the Judges to some State judiciaries are elected. They also referred to the Constitution of Courts in the United Kingdom, namely, Supreme Court of England and Wales consisting of the Court of Appeal, the High Court of Justice and the Crown and to the status accorded to the Lord Chancellor as the President of the Supreme court as embodied in the Supreme Court Act of 1981. See Halsbury's Statutes Fourth Edition Volume 11 Page 756 to 865. Is not necessary to swell this judgment by referring to the detailed procedure of appointment of Judges made in some other countries such as Canada, France, West Germany, Japan and Australia etc. where also, of course, the executive is exclusively vested with the power of appointment of Judges. 283. True, the power of appointment of Judges in many democratic countries is vested in the executive. Though it is said that the Judges of the federal judiciary in USA are nominated and appointed by the President, in fact, that process itself is a very difficult and lengthy one. To put in short, the nominee of the president of USA to the Federal Supreme Court has to appear before the Senate Judiciary Committee for 'confirmation hearing' which usually extends over for a few days. During the process of hearing, the nominee is subjected to an incisive and searching questioning regarding the constitutional philosophy of the candidate concerned his/her ability, potentiality etc. The views expressed by the candidate is made know to the entire people of America

through media such as newspapers, televisions etc. It is only thereafter, the Committee makes its recommendations for or against to the Senate which in turn approves or disapproves the candidate by a simple majority of the Senate. If the candidate is approved, his appointment is made for life tenure. Present methods of appointment of State level Judges in United States are : (1) Partisan election (16 States); (2) Non-partisan election (16 States); (3) Appointment by executive (Federal System, 9 States and Puerto Rico); (4) Selection by the Legislature (4 States); (5) Merit system (13 States). 284. In the process of election to the State judiciary there is always an element which is unknown to our legal system. 285. Mississippi, in 1832 was the first state to adopt a completely elective judiciary. New york, however, by action of its constitutional convention in 1864, led the switch from legislative and gubernatorial appointment to election. All states entering the Union from then until the entrance of Alaska in 1958 came in with an elected judiciary and even the colonial states of Georgia, Marryland, Virginia and Pennsylvania joined in the switch from appointment to election. 286. Dissatisfaction began to develop immediately after election of the judiciary came into vogue in the mid 1800's. In the 1860's, the Tammany Hall organisation in New York City seized control of the elected judiciary and aroused public indignation by ousting able judges and putting in incompetent ones. As a result, the question of a return to the appointment method was submitted to the people by referendum in 1873 but was defeated. Tammany control of the judiciary continued, and similar conditions in other states led to a revulsion against the elective system soon after it was established. Virginia went back to legislative selection after fourteen years of judicial elections. Vermont elected minor court judges for twenty years but abandoned this method in 1870. Even Mississippi went back to appointmet in 1868 and retained it until 1910. Furthermore, states which retained the elective system became increasingly, concerned about the adverse effect of political selection on the quality of judicial personnel and developed the nonpartisan ballot as a means of "taking the judges out of politics." 287. After long experience with judicial selection by merit in Mississippi, the plan by name Missouri Plan was adopted in 1940. Under that plan, the nominating commissioners become important for they set the patter of the judicial appointments. According to that plan, when a vacancy occurs, the names of all applicants are submitted to the proper judicial commission, generally by letter from the applicant or some friend who wishes to present the application for consideration. The Commission encourages the filing of applications since there is no restriction on the number of applicants. The Commissioner carefully screen the applications to determine their qualifications and eligibility and select and submit to the Governor, a panel of three names, all of whom are recommended as being competent and well qualified for judicial office. Thereafter, the Governor appoints one of the nominees to judicial office from the panel. This, under the Missouri Plan, the judiciary in Missouri had moved from political dependence to judicial independence. See Texas Law Review (Volume 44) 1966. 288. Thus, it is seen that even in some of the states in the USA, there was rethinking of the selection process of Judges

and going back to the process of 'nomination' because it had been felt that the direct election system produces politically oriented opinions and invited apathy to judicial activity. 289. In United Kingdom, the Lord Chancellor who is politically designated as head of the judicial hierarchy advises on all appointments to the judicial office from the rank of Justice of the Peace to the higher offices of the English judiciary. The appointments to the Court of Appeal and the House of Lords and to the offices of Lord Chief Justice, Master of the Rolls and President of the Family Division are made of the advice of the Prime Minister after consultation with the Lord Chancellor. He (Lord Chancellor) presides over the House of Lord besides being Member of the Cabinet and Head of the Judiciary. He combines in his position three fold functions of Executive, Legislature and Judiciary. In short in United Kingdom, the power to select and appoint Judges unquestionably vests in the Executive. However, opinions were expressed that there must be an advisory body to assist the Lord Chancellor in the matter of selection of personnel for appointments to higher judiciary. Consequent upon that in 1972, the Justice Sub committee on the Judiciary recommended that while the Lord Chancellor should retain control of the appointment Machinery, he should be helped in his task by a small Advisory Appointments Committee. Vide Law Commission of India (One Hundred Twenty-first Report page 38 para 6.16). 290. As we have pointed out in the preceding part of this judgment while dealing with the concept of independence of judiciary even in foreign countries, there is a demand for a change in the system of selection and appointment of Judges. In fact, similar argument was advanced before the Constituent Assembly and suggestions for appointments of Judges were made on the models in existence in different parts of the globe. But Dr. B.R. Ambedkar repelled and rejected that line of argument and suggestions, stating thus : It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent which we find in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation of limitation, what is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which executive wishes to make subject to the concurrence of legislature is also not a very suitable provision. 291. It is not necessary to expatiate on this topic any more and this aspect need detain us from proceeding further. 292. 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 group 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. 293. When an argument was advanced in Gupta's case to the effect that where there is difference of opinion amongst the Constitutional functionaries required to be consulted, the opinion of the CJI should have primacy, since he is the head of the Indian Judiciary and paterfamilias of the judicial fraternity, Bhagwati, J rejected that contention posing a query, as to the principle on which primacy can be given to the opinion of one constitutional functionary, when Clause (1) of Article 217 placed all the three constitutional functionaries on the same pedestal so far as the process of consultation is concerned. The learned Judge by way of an answer to the above query has placed the opinion of the CJI on par with the opinion of the other constitutional functionaries. The above answer, in our view, ignores or overlooks the very fact that the judicial service is not the service in the sense of employment, and is distinct from other services and that "the members of the other services... cannot be placed on a par with the members of the judiciary, either constitutionally or functionally". (See All India Judges Association and Others case (supra). There are innumerable impelling factors which motivate, mobilise and impart momentum to the concept that the opinion of the CJI given in the process of 'consultation' is entitled to have primacy, they are : (1) The 'Constitution' 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 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. (3) The 'consultation' by the President is a sine-qua-non or a condition precedent to the exercise of the constitutional power by the President to appoint Judges and this power is inextricably mixed up in the entire process of appointment of Judges as an integrated process. The 'consultation' during the process in which an advice is sought by the President cannot be easily brushed aside as an empty formality or a futile exercise or a mere casual one attached with no sanctity. (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) Article 124 and 217 do not speak in especific 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 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's case that the 'consultation' must be full and effective there is no conceivable reason to hold that such 'consultation' need not be given primacy consideration. (7) The very emphasis of the word "always be consulted" signifies and indicates that the mandatory consultation should be unfailingly made without exception on every occasion and at every time by the President with the constitutional consultees. 294. 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 context in which the word is used as in our constitution. 295. The foregoing considerable deliberation leads to an inexorable conclusion that the opinion of the Chief Justice of India in the process of constitutional consultation in the matter of selection and appointment of Judges to the Supreme Court and the High Courts as well as transfer of Judges from one High Court to another High Court is entitled to have the right of primacy. In sum, the above logical conclusion and our special sense dictate : Like the Pope, enjoying supremacy in the ecclesiastical and temporal affairs, the CJI being the highest judicial authority, has a right of primacy, if not supremacy to be accorded, to his opinion on the affairs concerning the 'Temple of Justice.' It is a right step in the right direction and that step alone will ensure optimum benefits to the society. 296. No doubt, it is true that under Article 217 the President has to consult three constitutional functionaries, namely (1) the CJI; (2) the Governor of the State; and (3) in case of an appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court concerned. In the matter or appointment of Judges to both of the Supreme Court and the High Courts, it is the President who "by warrant under his hand and seal" has to make the appointment. In discharging the constitutional functions under Article 124(2), 217(1) and 222, the President acts on the aid and advice of the Council of Ministers with the Prune Minister at the head and exercises his functions in accordance with such advice as contemplated under Article 74(1). Similarly, the Governor in the discharge of his constitutional duties acts on the aid and advice of the Council of Ministers with the Chief Minister of that State at the head and exercise all his constitutional functions except in so far as he is by or under the Constitutional required to exercise his functions

or any of them in his discretion as contemplated in Article 163(1) read with Articles 166(3) and 167. To say in other words, the President exercises his constitutional duty in making appointments of Judges to the Supreme Court and the High Courts on the aid and advice of the Council of Ministers with the Prime Minister at the head. 297. Krishna Iyer, J. speaking for himself and Bhagwati, J. and concurring with the majority view has pointed out in Shamsher Singh's case (supra) 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." 298. The Governor, being at the apex of the executive is vested with all the executive powers of the State (vide Article 154(1) and he is also at the apex of the State Legislature (vide Article 169). In both the capacities, the Governor has several functions to perform which include powers and duties. Therefore, the Governor during the process of 'consultation' by the President discharges his constitutional duty in giving his opinion to the President in the matter of appointment of Judges to the High Court of his State on the advice of Council of Ministers with Chief Minister at the head. Therefore, the executive of the Union while advising the President and the executive of the State while advising the Governor in the discharge of their duty (as the case may be) in giving their opinion during the process of 'consultation' perform an important role. 299. Under the proviso, introduced by the Constitution (Forty-fourth Amendment) Act, 1978 to Article 74(1), the President can require the Council of Ministers to reconsider such advice either generally or otherwise, but the President cannot dispense with the advice rendered after such reconsideration and is bound by the advice. Therefore, nothing is left to the discretion of the President under this Article in contrast to Article 163(1) which expressly excepts certain matters in which the Governor is, by or under the Constitution required to act in his discretion. In case, the President has got some objection to the proposed course of action on the advice of his Ministers, the only course open to him is to require the Council of Ministers to reconsider such advice either generally or otherwise. But if the same opinion is reiterated by the Ministers, the President has no other option except to accept the advice of the Ministers. Krishna Iyer, J adverting to that position in Shamsher Singh v. State of Punjab (supra) said : Does this reduce the President, under the Indian Constitution, to a figurehead? Far from it. Like the King in in England, he will still have the right 'to be consulted, to encourage and to warn'. Acting on ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers in Council, if necessary, to reconsider the matter. It is only in the last resort that he much accept their final advice.... The President of India is not at all a glorified cipher. He represents the majesty of the State, is at the apex, though only symbolically, and has rapport with the people and parties, being above politics. His vigilant presence makes for good government if only he uses, what Bagehot described as, 'the right to be consulted, to warn and encourage". Indeed, Article 78 wisely used, keeps the President in close

touch with the Prime Ministers on matters of national importance and policy significance, and there is no doubt that the imprint of his personality may chasten and correct the political government, although the actual exercise of the functions entrusted to him by law is in effect and in law carried on by his duly appointed mentors, i.e. the Prime Minister and his colleagues. In short, the President, like the King, has not merely been constitutionally romanticised but actually vested with a pervasive and persuasive role. 300. Thus, it is seen that the President has no discretionary powers as in the case of the Governor even though the discretionary power of the Governor is only a small strip, with which we are not very much concerned in this case. The president is required to perform his administrative duty under the Constitution, the performance of which requires his formal approval or seal and in respect of which nothing is left to his discretion even if the character of such constitutional functions is often tinged with a political flavour. The result of what we have arrived at is that the power of the President to appoint a Judge does not prevail over the authority of the executive but is confined purely to the executive's discretion. 301. Even though all the constitutional functionaries have their own constitutional duties in making appointment of Judges to the superior judiciary, the role of one of the principal constitutional functionaries, (namely, the judiciary) is incontrovertibly immeasurable and incalculabe. The task assigned to the judiciary is no way less than those of other functionaries - legislative and executive. On the other hand, the responsibility of the judiciary is of a higher degree. As frequently said, judiciary is the watch dog of democracy, checking the excessive authority of other constitutional functionaries beyond the ken of the Constitution. It cannot be disputed that the strength and effectiveness of the judicial system and its independence heavily depends upon the calibre of men and women who preside over the judiciary and it is most essential to have a healthy independent judiciary for having a healthy democracy because if the judicial system is crippled, democracy will also be crippled. 302. In practice, whenever the Council of Ministers both at the Central and State level, as the case may be, plays a major role in its self-acclaimed absolute supremacy in selecting and appointing the Judges, paying no attention to the opinion of the CJI, they may desire to appoint only those who share their policy performances or show affiliation to their political philosophy or exhbibit affinity to their ideologies. This motivated selection of men and woman to the judiciary certainty undermines public confidence in the rule of law and resultantly the concept of separation of judiciary from the executive as adumbreatcd under Article 50 and the cherished concept of independence of judiciary untouched by the executive will only be forbidden fruits or a myth rather than a reality. In that situation, the consultation with the CJI will be an informal one for the purpose of satisfying the constitutional requirements. As it has been pointed out in Gupta's case that the judiciary may be the weakest among the constitutional functionaries, for the simple reason that it is not possessed of the long sword (that is the power of enforceability of its decisions) or the long purse (that is the financial resources), but if the opinion of the executive is to prevail over, the opinion of CJI in matters, concerning

judiciary on account of that reason, then the independent judiciary which is a power of strength for all - particularly for the poor, the downtrodden and the average person cofronting the wrath of the Government will be a misnomer. 303. It will be quite appropriate in this connection to recapitulate the view expressed by Sir Winston Churchill emphasising the independence of judiciary in a parliamentary debate before the House of Commons in the year 1954 which reads thus: The Judge has not only to do justice between man and man. He also - and this is one of the most important functions considered incomprehensible in some large parts of the world has to do justice between the citizens and the State. He has to ensure that the administration conforms with the law, and to adjudicate upon the legality of the exercise by the executive of its powers. (emphasis supplied) 304. The above view as to the need of restraint upon executive appointment of judges has been emphasised and re-emphasised by Sir Garfield Barwick, Chief Justice of Australia in his suggestions as to the manner of selection of Judges, which reads thus : In my view, the time has arrived in the development of this community and of its institution when the privilege of the Executive Government in this area should at least be curtailed. One can understand the reluctance of a government to forgo the element of patronage which may inhere in the appointment of a Judge. Yet I think that long term considerations in the administration of justice all for some binding restraint of the exercise of this privilege.... ... ... It is not for me to express here my own preferences. It should suffice that I say with a degree of emphasis that the time is here when some restraint should be placed upon and accepted by the Executive Government in its choice of judicial appointees. 305. 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 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 to 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 view 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'. 306. The polemics of the learned Attorney General and Mr. Parasaran for sustaining the view expressed in Gupta's case, though so distinguished for the strength of their ratiocination, is found to be not acceptable and falls through for all the reason aforementioned because of the inherent weakness of the doctrine which they have attempted to defend. 307. The aforementioned discussion leads to an inescapable conclusion that all the factors mentioned above coalesce to support the view that the executive will not be justified in enjoying the supremacy over the opinion of the CJI in the matter of selection of Judges to the superior judiciary. 308. The procedure in vogue as regards the formal proposal for filling up the vacancy in the Supreme Court in initiated by the CJI by recommending the name of the person found suitable by him to Minister of Law and Justice who if accepts the recommendations, forward the proposal to the Prime Minister of India who thereupon, if he approves that proposal, advises the President to issue a formal warrant of appointment. Similarly, in the case of appointment of a Judge to the High Court, the formal proposal emanates from the Chief Justice of the High Court and that proposed is considered by the Chief Minister of the State duly processed through the Governor and forwarded to the CJI through the Ministry of Law and Justice. The Minister of Law and Justice, if he agrees with the recommendation of the CJI, forwards the proposal to the Prime Minister who then, if he approves that proposal, advises the President to issue a formal warrant. So far as the proposal initiated by the CJI for appointment of a Judge of the Supreme Court is concerned, if at all there is any disapproval that will only be from the side of the Central Government. In case of an appointment of a Judge to the High Court, since the proposal has to emanate from the Chief Justice of the High Court, the question of disapproval, if any, may arise either from the State Government, the CJI or the Central Government. In a case where the Chief Justice of the High Court proposes a name but the State Government turns it down, the proposal may not reach the second stage, i.e. the stage of the scrutiny by the CJI and the Central Government. In case, the State government agrees with the proposal of the Chief Justice of the High Court but the CJI disagrees on any ground then what would be the outcome of that proposal? In such a situation, if the consultation of the CJI is considered to be an informal one then as per the dictum laid down in Gupta's case, the Central Government if it agrees with the Chief Justice of the High Court and the State Government concerned can advise the President regardless of the opinion of the CJI. Even in extreme cases where the Chief Justice of the High Court initiates the proposal but it is turned down by the State Government and the CJI, even then the Central Government on the dictum laid down in Gupta's case can approve that candidate and recommend to the President for appointment. It is true that while recommending a candidate for the higher State judiciary, the Chief Justice of the High Court has the advantage of proximity in evaluating the calibre and legal ability of the candidate. However, the CJI before whom the opinion of the Chief Justice of the High Court as well of the State Government is placed with all the relevant materials concerning the proposal is in a better position either to accept the recommendation or

reject it for strong and cogent reasons to be recorded. As pointed out in the earlier part of this judgment, the merit of a candidate with regard to his/her professional attainments, legal soundness, ability, skill etc. can be evaluated only by the Chief Justice of the High Court in the matter of appointment of Judges of the High Court and by the CJI in the matter of appointment of a Judge to the Supreme Court. However, since the judiciary does not have sufficient machinery of its own to check the antecedents and background of a candidate, the Chief Justice of the High Court and the CJI may not be in a position to express any opinion about the conduct, character and antecedents of the candidate. But the Government with its powerful machinery can check the antecedents and background of the candidate and give its opinion on that aspect. Therefore, when a recommendation of the Chief Justice of a High Court comes to the CJI with all particulars including the background of such candidate, he will be in a better position on examination of all the materials placed before him, to evaluate the fitness of the candidate. Therefore, in all circumstances, the opinion of the CJI is entitled to have the right of primacy in the matter of selection of judges to the Supreme Court as well as the High Courts. 309. While proviso to Article 124(2) contemplates the consultation with the CJI by the President, Article 217(1) contemplates the consultation of the Chief Justice of the High Court concerned in addition to the opinion of the CJI and the Governor of the State. But these two Articles do not require the CJI and the Chief Justice of a High Court in the formation of their opinion to have a consultative process with the entire body of Judges of the Supreme Court and High Courts. To say differently, the opinion sought by way of consultation is not the opinion of the entire body of the Court concerned, as embodied in Article 235 of the Constitution which vests 'Control over subordinate courts' 'in the High Court'. Notwithstanding this legal position, in order to have a pragmatic approach to matters relating to appointments of Judges to the Supreme Court, it would be a healthy practice as a matter of prudence that the CJI given his opinion on a consultative process by taking into account the views of two senior-most Judges of the Supreme Court and the views of any other Judge or Judges of the High Court whose opinion is likely to be significant in adjudging the suitability of the candidate, as pointed out by my learned brother, J.S. Verma, J in his separate judgment. Similarly in matters relating to appointment of Judges to the High Courts, it would be better if the Chief Justice of the High Court concerned forms his opinion on a consultative process by ascertaining the views of at least two of the senior-most Judges of the High Court and such other Judges, whose opinion is likely to be significant in the formation of his opinion. The CJI whilst forming his opinion on the recommendation made by the Chief Justice of the High Court concerned for appointment of a Judge to the High Court, may 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, as pointed out by my learned brother, J.S. Verma, J. This consultative process is neither opposed to the constitutional provisions nor stands in the waty of the President consulting, in his discretion, such of the Judges of the Siupreme Court, and of the High Courts in the states

while considering the recommendation made by the CJI for appointment of a Judge to the Supreme Court. On the other hand, the opinion so expressed by the CJI through such a consultative process, would be of much assistance to the President in forming his independent opinion. 310. The next key issue involving grave and far reaching doubts is whether the President is bound by the opinion of the CJI under all circumstances in view of the primacy to be attached to the opinion of the CJI and whether the president has or has not the right of vetoing the opinion of the CJI for weightly reasons to be recorded and communicated to the CJI. Since this issue has been well considered and answered by my learned brother, J.S. Verma, J with whose opinion, I concur, I feel that it is not necessary to launch any more discussion on this point except saying that when the CJI disapproves the proposal after the application of his mind on due consideration of all the materials placed before him with which the other consultees of the Supreme Court also agree, that opinion of the CJI deserves acceptance at the hands of the President of India. If for any other potent reasons, the President forwards all materials available with him which influenced his mind to take a contrary view requesting the CJI to reconsider his opinion and the CJI expresses the same opinion of disapproval, after consulting his colleagues, then the opinion of the CJI should prevail and that candidate is not appointed. In any exceptional case, for weighty and cogent reasons indicating that the recommendee is not suitable for appointment, that appointment recommended by the CJI may not be made. However, if the stated reasons are not acceptable to the CJI and the other Judges who have been consulted in the matter, and the recommendation by the CJI is reiterated, the appointment shall be made. 311. Has the executive got the right of proposing the candidates for the Judgeship? 312. In this connection, we would like to cogitate an important issue as to whether the executive also has got a right of proposing the candidature for the judgeship to the Supreme Court and High Courts or whether the executive is totally debarred from exercising such right. 313. We have already observed that by convention and practice, the initiation of proposal for judgeship is to be made only by the CJI whose opinion in this matter, is entitled to primacy or the Chief Justice of the High Court concerned non else and that the procedure in vogue alone is a healthy practice. Therefore, at the forefront we may emphatically say that the Central or State Government shall not have any right of directly initiating the name of any candidate for judgeship bypassing the CJI or Chief Justice of the State and that if such a right of initiation by the Government is recognised and accepted regarding the judicial appointments then it will not be violative of the well accepted long standing practice but also destructive of the independence of the judiciary. 314. It will be pertinent, in this connection, to take note of the fact that recruitment to the judiciary at the level below the District Judges is either through a State Public Service Commission which is an independent body or through an entrance test organised by the High Court. The recruitment at the level of District Judges is made by the Governor in exercise of his powers under Article 233 of the Constitution which power of appointment is conditioned by the obligation to consult the High Court. In practice, the High Court selects

the candidates by an interview and sends a panel to the Government from which the required strength of the candidates is selected and appointed by the Governor but after the appointment, the entire"control over the district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of State and holding any post inferior to the post of district judge" is vested in the High Court. 315. On cogitation of this problem, we are of the view that there will be not unconstitutionality or illegality in making proposals and that such proposals will not be violative of the existing practice or opposed to the public policy. Indeed the Central Government which is accountable to the people should have the right of suggesting the names of the suitable candidates with sterling character for consideration to the CJI for Judgeship of the Supreme Court and to the Chief Justice of a State to that High Court. Similarly, the State Government which is also equally accountable to the people should have the right to suggest the names of candidates for consideration to the Chief Justice of its State. The above view is based on the following reasons : (1) In the context of the plurastic society of India where there are several distinct and differing interests of the people with multiplicity of religion, race, caste and community and with the plurality of culture brought together and harmonised by the Constitution makers by assuring each section, class and society 'equality of status and of opportunity, it is inevitable that all people should be given equal opportunity in all walks of life and brought into the mainstream so that there may be participation of all sections of people in every sphere including the judiciary. (2) The Government which is accountable to the people has its constitutional obligation to treat all alike and afford them equal opportunity in all spheres including the superior judiciary. (3) 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 not by any selective or insular group. (4) In the normal or accepted way of making such suggestion regarding the names of the candidates by the Chief Justice even after consulting his senior colleagues, he may not have sufficient opportunity to evaluate the merit and suitability of the most deserving and worthy legal practitioners other than those who have appeared before him or whose names alone have brought to his notice by his consultees. It is especially so in cases where some of the suitable and fit persons are specialising in some other branches of law and who may not have any chance of appearing before the Chief Justice or his consultees. But the Government may be in a position to come to know about those candidates from other source or through its powerful machinery. (5) There may be most meritorious and suitable candidates practicing in forums other than the the High Courts. Therefore, it may not be possible for the Chief Justice of a State to know the legal ability and suitability of those candidates either personally or even form his consultees. In such cases, the Government may be in a position to know the candidates and bring the names of such persons to the

notice of the Chief Justice. In the present day, when Chief Justices are being transferred from one state to another, they may not be in a position atleast for some period, to know personally about the candidates unless he is well informed from other sources. (6) It cannot be gainsaid that there is a general grievance that suitable candidates for judgeship who are at the grassroot level of society are inexcusably neglected from being considered for judicial office for one reason or another. Therefore, the Government will be justified in proposing the names of those candidates to the Chief Justice concerned from the neglected section or class along with others whom the Government thinks fit and suitable to be considered for appointment of Judges. 316. It may be worthy to note that even in well advanced countries like U.S.A. or United Kingdom, in practice, regional, social and racial representations are kept in view in making appointments of judges to superior judiciary, without of course sacrificing merit. 317. I would like to emphatically declare that the above view of mine should not be construed as a plea for reservation or quota system, of any kind, but it is expressed only with the sole object of attracting the best in judicial talent from all sections of society on equal footing and bringing them within the zone of consideration by the concerned Chief Justice. 318. I am emboldened to express this view because with the years or experience for nearly two decades at the Bar and two decades on the Bench and with knowledge and experience I have gained so far about the manner and method of selection of Judges I had opportunity to notice that on few occasions, the candidates have been initiated for judgeship either on regional or caste or communal basis or on extraneous considerations. There have been complaints, which cannot be easily brushed aside that some of the recommendations have been tainted with nepotism and favour-tism. No doubt, there is an abundance of sermons, preachings and teachings that the selection and initiation of candidates for judgeship should be free extraneous consideration, nepotism and favourtism - yet can it be said that in reality, such high flown sermons are implicity followed by all including some of the preachers? Can it be said that anyone is exempted from following such sermons and preachings or anyone enjoys any immunity therefrom, Regretably, it is a fact of life that some have followed such homilies more in the breach than in their observance. Even today, there are complaints that generations of men from the same family or caste, community or religion, are being sponsored and initiated and appointed as judges, thereby creating a new "theory of judicial relationship." 319. In this connection, it is worthy to note the view of Sardar Vallabhbhai Patel in his letter of the 8th December 1947 addressed to the Governor General of India regarding a memorandum issued on the procedure for filling vacancies in His Courts. It reads thus : Purity of motives is not the monopoly of a Chief Justice nor nepotism and jobbery the vices of politicians, only. 320. As rightly pointed out by Dr. B.R. Ambedkar, "the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have. . . ." 321. The Eightieth Report of the Law Commission on this aspect of matter has stated thus : Criticism has occasionally been levelled that the selection has not been proper and has been induced by ulterior considerations. 322. Having stated so, it

has lamented that a person appointed not on merit but because of favourtism or other ulterior considerations can hardly command real and spontaneous respect from the bar. 323. In Gupta's case, Bhagwati, j has stated, "We are all human beings with our own likes and dislikes, our own predelictions and prejudices and our mind is not so comprehensive as to be able to take in all aspects of a question at one time and moreover sometimes, the information on which we base our judgments may be incorrect or inadequate and our judgment may also sometimes be imperceptibly influenced by extraneous or irrelevant considerations... it is unwise to entrust power in any significant or sensitive area to a single individual, howsoever high or important may be the office which he is occupying." 324. I venture to express that the right of entry into superior judicial office is not the exclusive prerogative of any particular coterie or privileged class or group of people. To say differently, it is neither inheritable nor a matter patronage. 325. The above view of mine regarding the inadequate representation of various sections of people is neither illusory nor imaginary but is the actual and real existing fact and it is fully fortified by the following statements made in the Parliament by the Minister of Law, Justice and Company Affairs pertaining to the OBCs, STS, SCs and women Judges in the Supreme Court and High Courts. STATEMENT IN REPLY TO PARTS (a) & (b) OF LOK SABHA UNSTARRED QUESTION NO. 1410 FOR ANSWER ON 4TH AUGUST, 1993. AS ON 20.5.1993

S.No.	High Court	Number of Judges	No. of Judges	Belonging to SC	Belonging to ST	Women
1.	Allahabad	3	-	1		
2	Andhra Pradesh	-	1	1		
3.	Bombay	4	-	1		
4.	Calcutta	-	-	2		
5.	Delhi	-	-	2		
6.	Gauhati	-	3	1		
7.	Gujarat	1	-	-		
8.	Himachal Pradesh	-	-	1		
9.	Jammu Kashmir	-	-	-		
10.	Karnataka	2	2	-		
11.	Kerala	1	-	1		
12.	Madhya Pradesh	-	-	-		
13.	Madras	2	-	1		
14.	Orissa	-	-	1		
15.	Patna (Do not maintain official record)		1			
16.	Punjab Haryana	-	-	1		
17.	Rajasthan	-	1	1		
18.	Sikkim	-	-	-		
TOTAL		13	7	15		

Statement in reply to parts (a), (b) (c) & (d) of Lok Sabha Unstarred Question No. 4742 for 31.3.93 regarding sanctioned strength of Judges in High Courts and Supreme court. As on 1.1.1993

___ S. High Court Sanc- No. of No. of Source of ap- Judes belonging No. tioned Judges post pointment to strength in posi- vacant _____ (Per- tion Bar Service SC ST OBC manent/ Addi- tional) _____

___ 1 2 3 4 5 6 7 8 9 10 _____

___ 1. Allahabad 70 66 4 44 22 3 - 2 _____

___ 2. Andhra Pradesh 26 24 2 15 9 - 1 3 _____

___ 3. Bombay 54 47 7 32 15 4 - 4 _____

___ 4. Calcutta 46 37 9 23 14 - - - _____

___ 5. Delhi 30 25 5 17 8 - - - _____

___ 6. Gauhati 16 11 5 7 4 - 3 - _____

___ 7. Gujarat 30 27 3 17 10 1 - - _____

___ 8. Himachal Pradesh 8 5 3 4 1 - - - _____

___ 9. Jammu Kashmir 10 9 1 5 4 - - - _____

___ 10. Karnataka 30 21 9 12 9 1 2 14 _____

___ 11. Kerala 24 23 1 15 8 1 - 8 _____

___ 12. Madhya Pradesh 30 26 4 17 9 - - - _____

___ 13. Madras 28 25 3 18 7 2 - 11 _____

___ 14. Orissa 14 13 1 9 4 - - - _____

___ 15. Patna 35 32 3 22 10 - - - _____

___ 16.Punjab Haryana33 29 4 18 11 - - - _____

___ 17. Rajasthan 25 22 3 14 8 - 1 - _____

___ 18. Sikkim 3 1 2 - 1 - - - _____

___ TOTAL 512 443 69 289 154 12 7 42 _____

___ Supreme Court 26 23 3 - - 1 N.A N.A. _____

326. On the basis of the above statements, as on 1.1.1993, out of 18 High Courts in the country, 12 High Courts are without a single Judge belonging to Scheduled Caste and 14 High Courts are without a single judge from Schedule Tribes. The backward classes are also not better placed and only 6 High Courts are shown to have Judges belonging to OBCs and 12 High Courts are without a single Judge belonging to the OBCs. 327. As per the second statement, as on 20.5.1993, out of the total strength Judges in the whole of India in the 18 High Courts, there are 13 Judges belonging to Scheduled Castes, 7 Judges belonging to Scheduled Tribes and only 15 women Judges. Eleven High Courts are unrepresented by any single Judge of Scheduled Castes, 13 High Courts are unrepresented by Scheduled Tribes and 5 High Courts are unrepresented by women Judges. 328. Though the strength of the Judges belonging to OBCs as shown in the statement (as on 1-1-93) may or may not reflect the correct position at the present moment, we can safely assume the percentage of such Judges to be not exceeding 10% of the total sanctioned strength. Likewise, the percentage of the Judges belonging to SCs and STs put together does not exceed 4% as per the latest statement dated 20.5.93. So far as women Judges are concerned, their strength as on 20.5.93 does not exceed 3%. 329. However, unpalatable

the above scenario may be to some, it is nevertheless a ground reality. Our democratic polity is not only for any self perpetuating oligarchy but is for all people of our country. 330. If the vulnerable section of the people are completely neglected, we cannot claim to have achieved real participator democracy. Therefore, there is every justification for the Government to forward lists of candidates belonging to diverse sections of the people to the Chief Justice concerned, who has to ultimately scrutinise the list and take his decision on the merit of the candidates without giving room for any criticism that the selection was whimsical, fanciful or arbitrary or tainted with any prejudice or bias. It is open to the Chief Justice of the High Court to get more particulars from the Government before taking any decision in this regard. Once the decision is taken by the Chief Justice of a State and the list is forwarded to the CJI then the opinion of the CJI based on the materials placed before him, should have the primacy. 331. I feel that it is not necessary to dwell any more on this aspect except to say that to speak alone with my conscience will be judgment enough for me. Fixation of Judge Strength 332. Article 124 deals with the establishment and Constitution of Supreme Court. Sub- clause (1) of that Article reads : There shall be a Supreme Court of India consisting of a Chief Justice of India an, until Parliament by law prescribes a larger number, of not more than seven other Judges. 333. The Judge strength of the Supreme Court originally fixed in the Constitution as no more than seven Judges besides the CJI has been raised to 'thirteen' by the Supreme Court (Number of Judge) Amendment Act, 1960 and again increased to "seventeen" by the Supreme Court (Number of Judges) Amendment Act, 1977 and subsequently it was once again increased to "twenty-five" by Act 22 of 1986. Consequent upon the periodical revision, at present, the number of puisne Judges stands at twenty five. Article 216 which deals with 'Constitution of High Courts' reads : Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. 334. Earlier to 1.11.1956 there was a proviso to this Article which read thus : "provided that the Judges so appointed shall at no time exceed in number such maximum number as the President may from time to time, by order fix in relation to that Court". This proviso was omitted by the Constitution (Seventh Amendment) Act of 1956. The legislative power to constitute a High Court belongs to Parliament and it falls under Entry 76 List I of Seventh Schedule. The fixation of Judge strength in each of the High Court is no doubt an executive function entrusted by Article 216 of the Constitution as a mandatory obligation to the President, that is the Government of India. Hitherto, the existing procedure is that the Government of India has to decide in exercise of its judgment as to what shall be the strength of Judges in each High

Court upon consideration of various factors and as to how many permanent Judges or how many additional Judges are necessary to be appointed in a particular High Court. But there are no judicially manageable standards for the purpose of controlling or guiding the discretion of the Union of India in that respect. Therefore, the questions are (1) whether there are any standards or norms on the basis of which the Government of India can fix the Judge strength; (2) whether the opinion of the CJI, requesting the President to review the Judge strength in a High Court deserves greater weight and (3) whether this issue of fixation of Judge strength is justiciable. There cannot be any mathematical formula to fix the Judge strength either on the pendency of cases or on the average rate of disposals per Judge per year. However, there must be a periodical review of the Judge strength of the Supreme Court and every High Court with reference to the felt-needs for disposal of cases having regard to the backlog and expected future volume of cases. 335. Successive Law Commissions of India have expressed their grave concern more often than not about the Judge strength of the High Courts and made recommendations for increase of such Judge strength, but the implementation of the recommendations of the Law Commissions is tardy and more often ignored. 336. It is relevant to not that the Law Commission chaired by Mr. Justice D.A. Desai in its 120th Report has examined the problem concerning "the scandalous delays in judicial administration" and stated in its first interim report dated 31.7.87 that though the previous Law Commissions had examined this problem, they "have not given the necessary impetus for a comprehensive restructuring of judicial administration in India" and gave its primary answer to this problem, stating that it "is at once inescapably both political and technical" - 'political' in the sense that "it includes the overall lack of attention to this problem on the part of political parties, free press, social activists and the Bar", and " none of these groups shown any effective will to campaign for adequate man power planning for the Indian Judiciary", and 'technical' in the sense that"the developing science of man power planning has not attracted the attention of policy opinion makers in the field of administration of justice in India." After answering some 'illustrative question', posed for its considerations, the Commission concluded that the "report will invoke sufficient parliamentary, public and specialist discussion in order to assist a viable and comprehensive man power planning for the Indian Judiciary." 337. Our Court system has a pyramidal structure with trial courts at the base and the Supreme Court at the apex. Though normally the appellate and revisional jurisdiction of the High Courts and finally the appeals to the Supreme Court on grant of special leave or on certificate are on a hierarchical basis, Parliament has by Section 46 of the Constitution (Forty-second Amendment) Act, 1976 has inserted Articles

323-A and 323-B in.Part XIV A with effect from 3.1.1977, thereby excluding the jurisdiction of all courts, except that of the Supreme Court under Article 136 with respect to the disputes or complaints referred to in Clause (1) of Article 323-A and with respect to all or any of the matters falling within jurisdiction of the Tribunals for other matters, enumerated under Article 323-B. Appeals respecting all other matters arising out of the judgments/orders of the Special or Designated Courts have to be filed directly before the Supreme Court. 338. In addition, it may be noted that law are multiplying faster than over before. Every year legislative bodies at all levels pass hundreds of new laws, each of which leads to the issuance of new rules and sometimes to new regulations. Consequent upon the increase of new legislations which perhaps are inevitable in a complex society, there arise corresponding massive intricate and volatile issues which the executive finds too hot to handle. In recent decades, people at large, politicians and the executive - whenever in difficult situation - turn more and more to the judiciary to solve their problems. In this sense, courts are now looked upon as the 'lightning arrester' of many complicated and serious problems including the issues with a touch or politics. Resultantly, judicial responsibility has expanded corresponding to the expansion of the scope of the governmental activities in general and increase of new kind of litigations involving complex issues, some kinds of which seem to be political rather than legal in nature. Consequently, there is heavy work load both in the Supreme Court and High Courts and the volume of cases is increasing alarmingly. 339. In spite of the fact that the flow of litigations is limited to the extent possible by the 'winnowing process' or 'scanning or screening process' even at the admission stage and by the policy of 'dejudicialization' -i.e. keeping issues out of the courts - whereby some disputes are settled through arbitration and mediation such as accident claim cases, and divorce matters etc. through Lok Adalats in which the Legal Aid Committee takes active participation, the pendency of cases before courts is mounting and there is a docket explosion. 340. Therefore, the question would be how to meet this challenge and who is the proper authority to advise the President (the Union Government) to review the strength of the Courts by revising the Judge strength, so that this grave situation may be tackled effectively. We have painfully experienced many a time that the proposals sent by the CJI for increasing the Judge strength are more often than not turned down by the executive on one ground or other stating that the expenditure on administration of justice is non-plan expenditure or that there is financial restraint or that there is no sufficient infrastructure available or a request to wait for the next phase programme. Invariably, a Section Officer or Superintendent or an Additional Secretary at his desk or the Secretary concerned in the Secretariat with total ignorance of the

aspects of judicial administration decide the requirement of the Judges strength. 'Financial implication' which is usually a reason for turning down the proposal of the CJI and the Chief Justice of the High Courts as put forward by the learned Attorney General in his written submission cab never serve as a justifiable cause. Similarly, the "Law of Diminishing Returns: can have no application in the matter of disposal of case. It is deplorable that sometime courts are established but without presiding officers. The High Courts are plagued by intractable backlog and all predictions forecast the increase of work-load. In our considered opinion, unless there is an increase of Judge strength, which alone will deliver long range assistance, the superior courts cannot fulfill their national duties. 341. The litigation explosion stares us in the face and unless it is dealt with by adopting radical measures, the situation is likely to go out of hand. Even after taking note of the resounding failure of the past attempts at solving the unmanageable and intractable problems concerned with the judicial administration of the High Courts and Supreme Court, one cannot be expected to be a silent spectator or an inveterate optimist looking to the executive in the fond hop of getting invigorative solutions to make the justice delivery system more effective and resilient meet the contemporary needs of society which hope, as experience shows has never been successful The torrential inflow of work in the Supreme Court and High Courts is disproportionate to the output as a result of which there is an alarming volume of arrears. The diagnosis made and the remedial measures for improving the situations; the recommendations made by various Commissions for the periodical upward revisions of Judge strength of the superior courts on the basis of the empirical analysis and the manifold means and guides offered by various reports for expeditious disposal of cases and for reduction of the mounting arrears are still being watched with bated breath. One of the important causes which constitutes the delay in disposal of cases and the enhancement of arrears is due to the total indolence to the periodical upward revision of Judge strength. Having a realistic approach to the raising crescendo of work-load, this Court has on many prior occasions expressed its serious concern and called for remedial measures. 342. This Court in Kanubhai Brahmbhatt v. State of Gujarat 1987 (2) SCR 314 : AIR 1987 SC 1159, has expressed it remorse over the long pendency of cases as follows : As it is, more than then years old Civil Appeals and Criminal Appeals are sobbing for attention. It will occasion great misery and immense hardship to tens of thousands of litigants if the seriousness of this aspect is not sufficiently realized. And this is no imaginary phobia. 343. Subsequently in P.N. Kumar v. Municipal Corporation of Delhi 1987 (4) SCC 609 at 610, this Court has observed : This Court has no time today even to dispose of cases which have to be decided by it

alone and by on other authority. Large number of cases are pending from 10 to 15 years. Even if no new case is filed in this Court hereafter, with the present strength of Judges it may take more than 15 years to is pose of all the pending cases. 344. No doubt, Judges of Supreme Court and High Courts are overworked. The non- filling of vacancies for months, sometime even years together, impose a heavy unbearable and intolerable work- load on those who are in office. In fact, Bhagwati, CJ was provoked to say in his Law Day Speech on 26th November 1986 that failure on the part of Government of fill in the vacancies has operated as an act of cruelty to the existing Judges to carry on under this unbearable burden. 345. In Subhash Sharma's case (supra) this Court realising this aspect of the matter has expressed its opinion in the following words : For its sound functioning, it is, therefore, necessary that there must be in efficient judicial system and one of the factors for providing the requisite efficiency is ensuring adequate strength. 346. A litigant is not interested in making an analysis of the causes of delay, but he thinks in his own way that courts have caused the delay resulting in criticism galore, occasionally pungent, from different sections of the people not only against the present day justice system, but also against the personnel manning the same. The restructuring of the Court system is an encouraging part of the reform of the justice delivery system. Any structure to be internally sound and externally long lasting must be constructed from the foundation. Therefore, this problem of tacking arrears of the cases as well as speedy disposal of cases, which is a requirement of Article 21 is a concern of the CJI as well as the Chief Justices of the High Courts. Therefore, in making the periodical review of the Judge strength of the superior courts, particularly the High Courts, the President must attach greater weight to the opinion of the CJI and the Chief Justice of the High Courts and that exercise must be performed with due dispatch. 347. Any proposal made by a Chief Justice of the High Court for increasing the Judge strength of his concerned Court must be routed through the CJI, who on such recommendation has to express his opinion either by giving his consent or modifying the recommendation or otherwise for sufficient and sound reasons and forward the same to the President. Once the CJI has concurred with the proposal, then the Government should accept that proposal without putting any spoke in the wheel or disapproving it. As we have figuratively stated even at the prefatory not of the judgment, the primary right of proposal of any celebrated judicial structural reforms as well as reforms by the Constitution and composition of the Court is to vest only with the judiciary and judiciary alone because those reforms are concerned only with the judiciary. In this context, we wish to recapitulate the conclusion Nos. 5 and 30 arrived at by the 14th Report of the Law Commission Vide para 82 at page 105 :

(5) Any proposals made by the Chief Justice of a State for increasing the strength of the High Court, if it has the concurrence of the Chief Justice of India, should be accepted without demur or delay. (30) The strength so fixed should be reviewed at intervals of two to three years. 348. In the background of the above factual position, let us examine the question whether the issue relating to the fixation of Judge strength is a justiciable one or not. In Gupta's case Bhagwati, J dealt with this question and ruled : What should be the number of Judges necessary to be appointed in a particular High Court must essentially remain a matter within the discretion of the Government of India and if the Government of India does not appoint sufficient number of judges, the appeal must be to the legislature and not to the Court. All that the Court can do is to express the hope that the Government of India will periodically review the strength of judges in each High Court and appoint as many judges as are found necessary for the purpose of disposing of arrears of pending cases. 349. But Venkataramiah, J (as the then was) gave a dissenting opinion concluding thus : For the reasons given above, I am of the view that the Union of Government, which has the responsibility of appointing sufficient number of Judges in every High Court should be directed to review the strength of permanent Judges in every High Court, to fix the number of permanent Judges that should be appointed in that High Court on the basis of the workload and to fill up the vacancies by appointing permanent Judges. While making these appointments the Union Government should first consider the cases of additional Judges who are now in office for appointment as permanent Judges in those vacancies. A writ in the above terms shall be issued to the Union Government. 350. The learned Judge, therefore, ruled that mandamus could be issued to the Government to review the strength of permanent Judges to be appointed in each High Court on the basis of the work-load. Tulzapurkar, J expressed his opinion holding : On a consideration of the two relevant Articles, namely, 216 and 224 (1) it seems to me quite clear that Article 216 unquestionably casts a mandatory obligation on the President (appointing authority) to provide adequate strength of permanent Judges in every High Court to cope with and dispose of its normal business and further to review periodically such permanent strength. The word"shall" and the further words "such other Judges as the President may from time to time deem it necessary to appoint" occurring in the article are a clear pointer in that direction. 351. The leaned Attorney General has submitted in his written arguments that fixation of Judge strength is no justiciable. 352. As we have found that duty cast upon the President under Article 216 is a mandatory obligation, the failure to perform this obligation will certainly result in negation of the rule of law by the law" delay as opined by my learned brother, J.S. Verma, J. and hence it must

be justiciable. Accordingly, such failure to perform that mandatory duty is justiciable to compel performance of that duty to the extent and the manner indicated in his separate judgment. Further, as pointed out by him (J.S. Verma, J.) the area of justiciability does not extend further to enable the Court to review and fix the actual Judge strength itself, but it can require the performance of that exercise in accordance with the recommendation of the CJI. Transfer of Judges 353. With regard to the interpretation of Article 222 regarding transfer of Judges from one High Court to another, I entirely agree with the reasoning and conclusion arrived at by learned brother, J.S. Verma, J. CONCLUSIONS 354. Though I have given my reasons separately, as indicated even at the threshold of the judgment, I am in agreement with the conclusions of my learned brother, J.S. Verma, J regarding the process of appointment of Judges, initiation of the proposal for appointments and the right of primacy to the opinion of Chief Justice of India in the matter of appointment of Judges, transfer of High Court Judges/Chief Justices of the High Courts, fixation of Judge-strength, the summary of which is given under Point Nos. (1) to (8), (10), (12) and (13). 355. In view of the above conclusion, the majority opinion in S.P. Gupta's case insofar as it is in conflict with the view relating to the primacy of the opinion of the Chief Justice of India in matters of appointments, transfer and the justiciability of these matters as well as in relation to Judge-strength stands over-ruled. 356. In addition to the above, the Government which is accountable to the people, should have the right of suggesting candidates to the concerned Chief Justice for consideration but the government has no right to directly send the proposal for appointments bypassing the Chief Justice concerned. 357. The suggestions made by the Government whether Central or State, should be routed only through the Chief Justice of India in the matter of appointment of a Judge to the Supreme Court and Chief Justice of the High Court in the matter of appointment of a Judge to the concerned High Court, whose opinion with regard to the acceptance or disapproval of the said proposed candidates by the Government on the materials placed before him, will be decisive of the matter. Though appointment of Judges to the superior judiciary should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society. 358. The above conclusions of ours may amount to small step for the law but a giant leap for real justice. 359. The questions referred are answered as above and these matters are disposed of accordingly. No order as to costs. I am grateful for concurrence on the main points. 360. I have carefully perused your erudite and elaborate opinion in the Nine Judges' Bench matter, expressing your agreement with the conclusions recorded by Brother Verma, J. on his behalf and on

behalf of Brothers Ray, Anand, Bharucha, JJ. and myself on points 1 to 8, 10, 12 and 13. (YOGESHWAR DAYAL) 361. I have carefully perused your considered and erudite judgment in the Nine Judges' Bench matter and thank you for expressing your concurrence with the conclusions recorded by Brother Justice Verma on his behalf and also on behalf of myself and three other Brother Judges on points 1 to 8, 18, 12 and 13. (G.N. RAY) 362. I have carefully perused your erudite and elaborate opinion in the Nine Judges' Bench matter, expressing your agreement with the conclusions recorded by Brother Verma J. on his behalf and on behalf of Brothers Yogeshwar Dayal, Ray, Bharucha JJ. and myself on points 1 to 8, 10, 12 and 13. (DR. A.S. ANAND) 363. I have read with due care your judgment in what I may call the second Judges' case, May I very respect fully say that I stand by the judgment written on my behalf and that of Brothers Dayal, Ray and Anand by Brother Verma, May I also say that I am very gratified that you have, broadly, agreed with us and supported our conclusions by your learning and eloquence. (S.P. BHARUCHA) A.M. Ahmadi, J. 364. When a Seven-Judge Constitution Bench of this Court commenced the hearing of the writ petitions questioning the constitutional validity of the circular letter dated March 18, 1981 issued by the then Union Minister for Law, Justice & Company Affairs, by which the consent of Additional Judges serving in different High Courts and those whose names were already proposed or may in future be proposed for elevation to the High Court was sought for the transfer/initial appointment to any other High Court, it was thought that the storm raised by the controversial circular would eventually subside and the dust would settle down by an authoritative pronouncement of this Court. Immediately after the circular was issued it was engulfed in a serious controversy and passionate appeals to protect the independence of the judiciary were made from different quarters as it was generally assumed to be an attempt on the part of the executive to trifle with judicial independence. The first salvo was fired by Shri Iqbal Chagla, an advocate practising in the Bombay High Court, by filing a writ petition wherein he impleaded the Union Law Minister as respondent No. 1 and the Union of India as respondent No. 2 with 10 other Additional Judges of the High Court. A learned Single Judge of the High Court admitted the Writ Petition, issued rule and granted interim relief restraining respondents Nos. 1 and 2 from further implementing the said circular letter. Two other advocates S/Shri V.M. Tarkunde and J.L. Kalra, practising in the Delhi High Court, also filed Writ Petitions questioning the legality and validity of the disputed circular and sought similar and certain other incidental reliefs. The fourth Writ Petition was filed by Shri S.P. Gupta an advocate practising in the Allahabad High Court. It seems that he filed a Writ Petition on the same day on which the circular was

issued but amended the same with a view to assailing the circular. Meanwhile, it appears orders regarding the transfer of Mr. Justice M.M. Ismail, Chief Justice of the High Court of Madras, as Chief Justice of the High Court of Kerala, came to be issued. This order was challenged by way of a Writ Petition under Article 32 of the Constitution in this Court. Two other Writ Petitions were filed in the Madras High Court questioning the transfer of Mr. Justice M.M. Ismail. Since, in the meantime, Mr. Justice K.B.N. Singh, Chief Justice of Patna High Court, was transferred as Chief Justice of the High Court of Madras, the said transfer was also challenged in the said two Writ Petitions. Similarly, two advocates practising in the High Court of Patna also challenged the constitutional validity of the transfer orders concerning Mr. Justice M.M. Ismail and Mr. Justice K.B.N. Singh. All these eight Writ Petitions were transferred to this Court under Article 139-A of the Constitution. There was yet a Special Leave Petition No. 1509 of 1981 directed against the summary rejection of a Writ Petition by the Patna High Court challenging the constitutional validity of the order of transfer of Mr. Justice K.B.N. Singh which was pending before this Court. Both the groups of Writ Petitions, those questioning the constitutional validity of the disputed circular and those questioning the constitutionality of the transfer orders were heard together by the Constitution Bench. The Writ Petition filed by Shri S.P. Gupta was treated as the lead petition. 365. A preliminary objection was raised on behalf of the respondents to the maintainability of the Writ Petitions on the ground that the petitioners who were lawyers practising in different Courts had no locus standi to maintain Writ Petitions. This contention was brushed aside by the Constitution Bench on the ground that they were vitally concerned with the independence of the judiciary and the exercise of power to appoint Judges to the High Court. Since the question of locus standi has not been raised before us we need say no more in that behalf. 366. Several issues were raised before the Constitution Bench. The pivotal issue related to the content of the concept of judicial independence. It was the kingpin around which the submissions concerning the other issues revolved. The main issues which we need to notice were (i) whether the Court can issue a mandamus for fixation of the strength of judges of the High Court under Article 216 of the Constitution, (ii) whether Article 222(1), properly construed, covered consensual transfers only (iii) the nature of 'consultation' with the Chief Justice of India which must precede any transfer effected or any transfer policy finalised under Article 222(1), (iv) whether among the opinions of the constitutional consultees under Article 217(1), primacy must be accorded to the opinion of the Chief Justice of India, and (v) whether the circular in question held out a direct threat to the concept of judicial independence, inasmuch as, it purported to secure

the consent of the Additional Judges and those whose names were already proposed for appointment as High Court Judges on pain of their being discontinued or dropped from consideration if they failed to consent to their transfer. Certain other incidental issues were also considered but it is unnecessary to notice them as they have no bearing to the points raised before us. 367. Before we set out the conclusions recorded on the issues of great importance projected before the Constitution Bench, we deem it proper to give an abridged version of the factual background in which these momentous issues arose for decision. Although the immediate cause for moving the High Courts was the controversial circular-letter of the Law Minister, certain other events projected in the writ petition filed by Shri V.M. Tarkunde in the Delhi High Court need mention. In that petition beside assailing the controversial circular-letter the petitioner also assailed the practice of appointing additional Judges in the High Courts for short terms. Three additional Judges of the Delhi High Court who had initially been appointed for a period of two years w.e.f. March 7, 1979 and whose term was expiring on the midnight of March 6, 1981 were further appointed as additional judges for a period of three months. The petitioner contended that such short term appointments were not justified having regard to the language of Article 224 of the Constitution and were in any event subversive of the independence of the judiciary. The petitioner, therefore, sought a mandamus to direct the Central Government to convert the posts of additional Judges into permanent ones. He contended that in any event since there existed a vacancy in a permanent post, the seniormost of the three additional Judges should be appointed as a permanent Judges to fill the said vacancy and the term of the other two additional judges should be extended to two years. The claim made on behalf of the Government that Article 224(1) only fixes the maximum period of two years at a time and does not limit the Government's discretion in the matter of the period for which an additional judge can be appointed provided it does not exceed the ceiling of two years regardless of the increase in the court's business raised the question regarding the true scope and import of Articles 216, 124(2) and 217(1) of the Constitution. In the backdrop of these facts the Constitution Bench by a majority of 4:3 concluded that among the opinion of the three constitutional functionaries the opinion of the Chief Justice of India does not enjoy primacy over the other two opinions in the matter of appointment of judges. By a majority of 6:1 the court held that on a plain reading of Article 222(1) it cannot be argued that the consent of the judge proposed to be transferred is a sine qua non to the exercise of the power of transfer conferred on the President. Bhagwati, J. however stuck to his view in the Union of India v. Sankal Chand Himatlal Sheth and Anr. 1978 (1) SCR 423 : AIR 1977 SC 2328, that the requirement

of consent of the concerned judge must be read in Article 222(1) to protect the independence of the judiciary. Even there the majority did not subscribe to this view as it resulted in granting a veto to the concerned judge. While upholding the non-extension of Shri Justice Kumar after the expiry of his term and the transfer of Chief Justice Shri K.B.N. Singh the court held by a majority that a mandate could not be issued to the President for the fixation of Judge strength by invoking Article 216 of the Constitution. There was unanimity on the point that the Government's claim that the Constitution empowered it go grant short term extensions of three months or six months was not well founded. The Court, however, ruled that such short term appointment could be countenanced only if there existed strong reason for believing that the services of the Additional Judge would not be required for two years or that there existed compelling reasons which necessitated a short term appointment. The Court further held that ordinarily if there is a vacancy in the sanctioned strength of permanent judges, there would be no justification for appointing an Additional Judge. The majority of the judges, however, took the view that in the absence of judicially manageable standards for controlling or guiding the discretion of the Government for the performance of the duty under Article 216, a mandamus could not be issued to secure the fixation of Judge strength for each High Court. However, taking note of the Court's anxiety at the inordinate delay in filling up vacancies and the inadequacy of the Judge strength in the context of docket explosion, the learned Counsel for the Union of India assured the Court that the Government had already decided to increase the number of posts of permanent Judges in various courts keeping in view the load of work. This, in brief, is the import of the seven-Judge Constitution Bench decision in S.P. Gupta, etc. etc. v. Union of India and Ors. etc. etc. 1982(2) SCR 365 : AIR 1982 SC 149, pronounced on December 28, 1981. 368. The general belief that the Constitution bench judgment would set at rest the misgivings and controversy sparked by the letter of the Law Minister was soon belied. Doubts were expressed regarding the correctness of the majority view that the opinion of the Chief Justice of India as one of the consultees under Article 217(1) of the Constitution was not entitled to primacy vis-a-vis the other two consultees and that a mandamus could not issue in regard to the executive function of fixation of judge strength under Article 216 of the Constitution. Criticism was also levelled against certain observations made by the majority judges in regard to the concept of judicial independence. Even the view that the consent of the judge proposed to be transferred to another High Court was not a condition precedent to transfer under Article 222(1) of the Constitution was questioned. This becomes evident from the critical discussion of the issues arising from the findings of the

Constitution Bench in S.P. Gupta's case in Part III of Chapter XXV of Seervai's Constitutional Law of India, Volume II, Third Edition (1984). The controversy continued to simmer and the events that followed the decision in S.P. Gupta's case in regard to judicial appointments to superior courts were being closely monitored. Three Writ Petitions Nos. 13003 of 1985,1303 of 1987 and 302 of 1989 came to be filed under Article 32 of the Constitution by Shri Subhash Sharma, a practising Advocate of this Court, the Supreme Court Advocates on Record Association and Honorary Secretary, Bombay Bar Association, respectively, seeking a mandamus commanding the Union of India to fill up the vacancies in the Supreme Court and several High Courts and certain other incidental reliefs. These writ petitions were clubbed together as common pleas were raised and the reliefs sought were more or less similar in nature. In response to the rule issued, the Union of India entered an appearance and contended that the petitions were not maintainable as the question of filling up the vacancies in the superior courts was not justiciable as held in S.P. Gupta's case. This objection raised by the learned Attorney General was repelled by the Court drawing a distinction between fixing of Judges strength or selection of judges and filling up of existing vacancies. Since the relief claimed belonged to the latter issue the matter in issue was not concluded by the ratio in S.P. Gupta's case. With the Change in Government at the Centre, the succeeding Attorney General Shri Soli Sorabjee withdrew the objection and stated that in his view it was the constitutional obligation of the Union of India to provide the sanctioned Judge strength in the superior courts and default, it any, could be remedied by a court's directive. The two-Judge Bench which heard the submissions felt that not sufficient attention was paid to filling up of vacancies in good time and instead in Kerala Judge strength was actually reduced by two posts without proper justification. Their Lordship also doubted the correctness of the majority view in S.P. Gupta's case in this behalf and felt that it required reconsideration. Pointing to the fact that an independent non-political judiciary is crucial to the sustenance of our chosen system, their Lordships prima facie felt that the majority view in S.P. Gupta's case not only seriously detracts from but also denudes the primacy of the Chief Justice of India's opinion which is implicit in our constitutional scheme. Consistent with the constitutional purpose and process, it is imperative that the role of the institution of the Chief Justice of India be recognised as crucial. So observing, their Lordships directed as under : The view which the four learned Judges shared in Gupta's case, in our opinion, does not recognise the special and pivotal position of the Institution of the Chief Justice of India. The correctness of the opinion of the majority in S.P. Gupta's case relating to the status and importance of consultation, the primacy of the position of the Chief Justice

of India and the view that the fixation of Judge strength is not justiciable should be reconsidered by a larger bench. The first and the third Writ Petitions were disposed of on the statement of the learned Attorney General but the second Writ Petition filed by the Advocates on Record Association was kept pending. It was directed that the papers of the said Writ Petition be placed before the learned Chief Justice of India for constituting a Bench of Nine Judges to examine the aforestated two questions, namely, the position of the Chief Justice of India with reference to primacy and secondly, justiciability of fixation of Judge strength, afresh. Accordingly the present Nine-Judge Bench came to the constituted. The petitioners and their allies (intervenors) contended for a reconsideration of the majority view in S.P. Gupta's case on the aforesaid two points while the Union of India and the States contended that the majority view in the case was correct and did not call for reconsideration. 369. The battle lines between the two contesting groups are clearly drawn. The main weapon in the armory of the petitioners and their allies is 'protection of the independence of the judiciary'. The battle cry is that the independence of the judiciary is imperilled by the majority view in S.P. Gupta's case which in effect has surrendered the independence of the judiciary to the executive on the platter in flagrant violation of the doctrine of independence enshrined in Article 50 of the Constitution. Counsel after counsel tried to impress upon us that if the majority view in S.P. Gupta's case is allowed to stand there is a real danger to the concept of judicial independence which is an article of faith and a basic feature of our Constitution. Although they used different instruments they played the same tune of judicial independence being in peril. They travelled by different routes but their destination was the same, namely, primacy must rest in the judiciary. They made a fervent plea that the Court should bear in mind the historical background of the development of this doctrine in Britain and should be alive to the long and gruelling struggle which British Judges had to put up against the Monarch and the sacrifices that strong willed judges like Sir Edward Coke had to make to realise the dream of an independent judiciary, independent from all including the executive and the legislature. Let their sacrifices not go in vain was the emotive and impassioned plea made before us. Counsel submitted we in India inherited the said noble concept from the Britishers who introduced their judicial system and common law doctrines in our country and our founding fathers, wisemen as they were, decided to capsulise it by directing the State 'to take steps to separate the judiciary from the executive in the public services of the State'. Counsel for the petitioners and their allies, therefore, argued that the constitutional scheme in regard to the selection and appointment of judges of the Supreme Court and the Chief Justice and Judge of the High Court

and the transfer of the latter must be viewed in the backdrop of this concept which is the conscience of the Constitution. 370. Shri F.S. Nariman, Learned senior counsel, who opened the submissions on behalf of the petitioners emphasised that insofar as appointments by the President to non- elective constitutional offices are concerned, it is only in the case of appointments to the higher judiciary that provision is made for prior 'consultation' with certain constitutional functionaries including the Chief Justice of India. He invited our attention to Articles 148, 155, 280(1), 316(1), 324(2), 338(1), 344(1) and 350(b) to point out the language used in regard to appointments to be made by the President to certain non-elective non- judicial posts. This is so because, counsel submitted, the framers of the Constitution were alive to the need to insulate the judiciary to protect its independence. On the assumption that the consultees would be in a better position to assess the suitability and competence of the candidate proposed for appointment, counsel submitted, that this requirement of consultation with members belonging to the judicial family and in particular the Chief Justice of India was provided for in the Constitution with a view to institutionalise the judiciary and make an autonomous body wholly independent of the executive in its own field. Since the concept of judicial independence is inextricably linked or connected with appointments to judicial offices, it is essential that the process of appointments to the Supreme Court and the High Courts should be finalised as per the opinion given by the judicial wing. The process of consultation, it must therefore be understood, was introduced to subserve this objective of the Constitution and hence the provisions cannot be given a narrow or literal meaning. This is so because the Constitution has not used the word 'consultation' in the limited sense of interaction between high constitutional functionaries i.e. the President and the Chief Justice of India, but in the wider sense of seeking binding advise for making the appointment. The requirement of prior consultation is not an idle formality but a constitutional obligation intended to operate as a restriction or limitation on the President's power of appointment. The link between the duty to consult and the ultimate exercise of power to appoint is inextricable connected with the advise received from the consultee thereby making the entire process of appointment an integrated one. It is, therefore, difficult to imagine that the makers of the suprema lex intended the advise of the consultees to form a link which could be snapped at any time. If the power can be exercised only after consultation, consultation must be meaningful and purposeful which it will not be if it is not made binding on the executive. Article 124(2) read as a whole does indicate plurality of consultation; so also Article 217(1) and hence if there is a difference of opinion among the consultees, the Central Government must place the entire material before the Chief Justice of India and seek

his opinion thereon. Once the opinion is expressed by the Chief Justice of India after weighing the material placed before him and the view of the other consultees, it is incumbent on the executive to accept the same view and advise the President accordingly under Article 74(1) of the Constitution so that the President may acting on that advise based on the opinion of the Chief Justice of India, make the necessary appointment. In regard to the appointment of Chief Justice of India, counsel submitted, that there is no provision for consultation in the Constitution and it is for that reason that a healthy convention has developed of appointing the senior most Judge of the Court as the Chief Justice of India. According to him this convention is in keeping with the concept of independence of judiciary as it excludes the possibility of executive interference in the matter of choice of the next Chief Justice of India. Referring to the affidavit of Mr. S.K. Bose dated 22nd April, 1993 he submitted that the fact that all except 7 appointments out of a total of 547 appointments made in the last decade were in accordance with the opinion of the Chief Justice of India also signifies that barring a few exceptions even the executive has conceded primacy to the opinion of the Chief Justice of India. Counsel, therefore, emphasised that the decision of the majority in S.P. Gupta's case requires re- consideration as their opinion was founded on an erroneous interpretation of the relevant constitutional provisions. He also submitted that the independence of the judiciary would be diluted if vacancies are not filled in promptly and if the Judge-strength is not revised from time to time as ordained by Article 216 of the Constitution. He, therefore, submitted that if the executive fails in the discharge of its duty or obligation under Article 216 of the Constitution, a writ of mandamus can certainly issue commanding it to perform that duty for otherwise Article 216 will be rendered a dead letter. He, therefore, prayed for an appropriate mandamus to issue as prayed. Other learned Counsel Messrs. Kapil Sibal, P.P. Rao, R.K. Garg and S.P. Gupta reinforced the submissions of Mr. Nariman adding their own flavour and emphasis. Mr. Shanti Bhushan and Mr. Ram Jethmalani sought to reach the same destination through a different route. 371. Shri Kapil Sibal submitted that in order to preserve and protect the concept of an independent judiciary as enshrined in Article 50 of the Constitution, it is essential that consultation must be institutional in the sense that the Chief Justice of India must before expressing his view consult two or three of his senior colleagues who can enlighten him on the merit of the recommendation made by the Chief Justice of the concerned State. Such a view when expressed would be the view not merely of the Chief Justice of India but of the judicial family as such; it must, therefore, carry weight and should be binding on the President of India. Mr. P.P. Rao pointed out that under Article 233 of the Constitution appointments of person to be

District Judges in any State has to be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to that State. The expression 'district judge' is defined in Article 236(a) of the Constitution. He submitted that in law the appointments are made on the recommendation of the High Court which recommendation is held to be binding on the executive. If that be the understanding of 'consultation' under Article 233 of the Constitution there is no reason why same meaning or understanding should not be read into the concept of consultation under Article 124(2) and 217(1). Therefore, submitted counsel, consultation with the executive can only be in respect of the character and antecedents of the concerned candidate and not with reference to this competence and suitability. If there is any difference of opinion between the Governor and the Chief Justice of the High Court, the ultimate view of the Chief Justice of India must prevail as the institutional head. Mr. R.K. Garg complained that the majority view in S.P. Gupta's case has tended to erode the respect for judges appointed after that decision and has consequently robbed them of the confidence and sense of pride in being members of the higher judiciary, so essential for the efficient discharge of his duties. He submitted that to restore this respect and confidence it is essential that the majority view in S.P. Gupta's case on the question of primacy of the Chief Justice of India is set right. He also submitted that the delay in making the appointments occasioned on account of executive interference is unpardonable and the courts cannot and should not be silent spectators to executive interference, indifference or neglect. He was also in favour of setting up of a permanent body to monitor the judge-strength from time to time in different High Courts and the Supreme Court so that timely revision of judge-strength can be made on the basis of the recommendation of that body. Mr. S.P. Gupta who had filed the earlier petition leading to the Constitution of Seven-Judge Bench, also supported the submissions of Mr. Nariman on the question of primacy and said that the court's power to issue a mandamus for performance of the duty enjoined by Article 216 of the Constitution cannot be denied on the specious plea of want judicially manageable standards for controlling and guiding the discretion of the executive. 372. Mr. Shanti Bhushan pointed out that prior to the 42nd Amendment of the Constitutional in 1976, there was no express provision in the Constitution which provided that the President shall be bound by the advise of the Council of Ministers. Even after the insertion of the expression 'shall' in Article 74(1) the President is bound by the advice only in relation to the exercise of executive functions and not other constitutional obligations or duties. By Article 53 the executive power of the Union is undoubtedly vested in the President which he must exercise either directly or through officers subordinate to him in accordance with the Constitution.

Article 73 indicates the scope of the executive power of the Union which broadly extends to matter in respect whereof Parliament is empowered to make laws i.e. matters enumerated in List I and III of the VII Schedule to the Constitution. Since matters pertaining to the appointment of Judges of the Supreme Court and the High Court are not covered under any entry in the said Lists the exercise of the President's power of appointment falls outside the scope of executive power and hence the President cannot be held bound by the advice of the Council of Ministers. Drawing our attention to the residuary entry in List I, counsel submitted, it cannot cover the field pertaining to the appointment of Judges of Supreme Court and the High Court. That being so, according to counsel, the President cannot be held bound by the advise of the Council of Ministers in the matter of appointments to the superior judiciary. Since the Chief Justice of India is best equipped to assess the merit, competence and suitability of given candidate for appointment to high judicial office, the constitutional scheme mandates that the President must abide by the advise of the Chief Justice of India and it is in that sense that the latter's opinion must have primacy over the opinions of other constitutional consultees, on the question whether a writ of mandamus can issue for filling up the vacancies and for fixation of judge strength. Counsel adopted the submissions made by Shri Nariman. Shri Ram Jethmalani assigned six reasons in support of the contention that the majority view in S.P. Gupta's case needs re- consideration. These are : (i) no attention, in any case not adequate attention, was paid to Articles 50 and 51A, (ii) principles of interpretation valid for statutes were applied in interpreting the Constitution, (iii) inadmissible material in the form of speeches of members of the Constituent Assembly including Dr. Amedakar were used and relied upon, (iv) it was erroneously assumed that the President in Articles 124(2) and 217(1) meant President aided and advised by the Council of Ministers, (v) primacy was wrongly denied on the ground that the Chief Justice of India held a non-elective office which lacked public accountability, and (vi) the decision in S.P. Gupta case is per incurium. In addition to these submissions he also supported the approach, albeit with some variations, of Mr. Shanti Bhushan. On the question of the court's power to issue a mandamus for fixation of judge-strength, counsel submitted that if the judicial system is no manned by judges adequate in number and possessed of high integrity and competence, the judiciary will be crippled and justice will become a teasing illusion and the fundamental rights a mirage. He, therefore, shared the view of Mr. Nariman that if the executive fails in the performance of its duty under Article 216 and betrays administrative indifference or perversity, it is the bounden duty of the court to pull up the executive and command it to perform its Constitution obligation. He concluded by saying that the setting

up of a National Judicial Commission which was contemplated by a constitutional amendment may provide the answer but till that materialises court must authoritatively lay down that the opinion of the Chief Justice of India shall be binding on the President. 373. On behalf of the Union of India Mr. K. Parasaran submitted that while independence of judiciary is indisputably one of the cardinal principles of the Constitution it is only a means for achieving a laudable end, namely, dispensation of justice. In all democratic countries, the concept of independence of the judiciary is generally understood to mean independence from all external and internal pressures, including executive and legislative influence, but that has never been understood to mean that the head of the State is rendered a rubber stamp in the matter of appointment of judges to the Supreme Court and the High Court by reading the requirement of 'consultation' to mean 'concurrence' of the head of the judiciary. He pointed out that neither Article 124(2) nor Article 217(1) conveys the impression that provision in regard to consultation with the Chief Justice of India was made with a view to giving primacy to the opinion of the Chief Justice of India. According to him, appointment of Judges to the superior court under the Constitution is an executive function and since the executive power vests in the President of India the ultimate decision must rest with that authority albeit aided and advised by the Council of Ministers. Similarly, the Governor is also required by virtue of Article 163(1) to act in accordance with the aid and advise of his Council of Ministers. There is no hierarchy amongst the consultees named in Article 217(1) since the exercise is purely executive in character and not judicial or quasi-judicial. In the matter of administrative control it must be borne in mind that the Chief Justice of India has no administrative control over the High Courts whereas the High Courts have administrative control over the subordinate judiciary. It is for that reason that the recommendation made by the High Court under Article 233 of the Constitution in regard to the appointment of district judges is treated differently from the appointments to be made to the superior judiciary under Article 124(2) and 217(1) of the Constitution. In the absence of the principle of hierarchy in said two Articles no question of giving primacy to the opinion of the Chief Justice of India can at all arise. The executive being accountable to the people through the Parliament has, therefore, been enjoined with the duty to take the responsibility for the appointment so that if a wrong appointment is made it is answerable to the people. If the appointment is made solely on the opinion of the Chief Justice of India and it is later found to be erroneous it will cause avoidable embarrassment to the Chief Justice of India as happened in the case of Shri Kumar Padma Prasad v. Union of India and Ors. 1992 (2) SCC 428, in which case the appointment of Shri K.N. Srivastava made with the concurrence

of the Chief Justice of India was struck down by this Court on the ground that the appointee did not possess the qualification prescribed by Article 217(2). Counsel, therefore, submitted that the question of independence of the judiciary is a post-appointment guarantee and does not figure at the pre-appointment stage. He pointed out that in all democratic countries including the United Kingdom, the United States of America, Australia and Canada the appointment of Judges to the superior courts is in the hands of the executive and not the judiciary. So far as our Constitution is concerned, it has taken a middle course and while conferring the power on executive it as conditioned it by the requirement of prior consultation with certain constitutional functionaries to ensure that a proper selection is made on merits and the margin of error is minimised. In support of this submission he also invited our attention to the speech of Dr. Ambedkar and other members of the Constituent Assembly and laid stress on the fact that the amendment proposed by Shri Pocker Sahib to provide for the 'concurrence' of the Chief Justice of India instead of mere 'consultation' was defeated which, said he, was a positive indication of the intention of the Constituent Assembly and militates against the contention favouring primacy to be accorded to the opinion of the Chief Justice of India. He, therefore, submitted that it would tantamount to rewriting the Constitution and usurpation of power if the word 'consultation' is construed to mean 'concurrence' in Articles 124(2), 217(1) and 222(1) of the Constitution. He negatived the contentions of Mr. Shanti Bhushan and Mr. Ram Jethmalani on the ground that under the scheme of our Constitution there is no vacuum so far as legislative power is concerned since if there is no specific entry in any of the three list in the Seventh Schedule of the Constitution, the power can always be traced to Article 248 read with Entry 97 in List I, which confers residuary powers. As regards the contention that a convention has grown over a period of time and has crystallised into a rule that no appointment would be made contrary to the view of the Chief Justice India, he invited our attention to the affidavit of Mr. S.K. Bose dated 22nd April, 1993 wherein it is disclosed that in the last decade from 1st January, 1983 to 10th April, 1993 in all 547 appointments came to be made to different Courts out of which 7 appointments (2 in January, 1983, 2 in July, 1983, 1 in August, 1983, 1 in September, 1985 and 1 in March, 1991) were nude contrary to the views of the Chief Justice of India negativing any such hardened convention. He submitted that the endeavour on the part of the executive to accord with the views of the Chief Justice of India should not be construed as the executive having conceded primacy to the Chief Justice of India. Its true significance is that the executive attaches great weight to the views of the Chief Justice of India as emphasised in S.P. Gupta's case but in certain cases, the number

whereof must of necessity be minimal, departs from his Views if the situation so demands. The endeavour of the executive to make the appointments with mutual agreement attaching great weight to the views of the Chief Justice of India shows its desire to avoid conflict as far as possible unless inescapable. In the end he insisted that the majority view in S.P. Gupta's case lays down the correct law and no interference is called for. All the Advocates General, except the Advocate General of Karnataka, have adopted the submissions of Mr. Parasaran. The Advocate General of Karnataka has, however, expressed the view that the Chief Justice of India holds a unique position under the Constitution insofar as the India Judiciary is concerned and hence his opinion is entitled to great weight. So the executive cannot appoint a person whose appointment is opposed by the Chief Justice of India and similarly the Chief Justice of India cannot expect the executive to appoint a person whose candidature does not meet with executive approval. In other words the executive wing is not bound to appoint a person whose name is cleared by the judicial wing, including the Chief Justice of India, for good and valid reasons but it cannot appoint a person who has not been cleared by the Judicial wing. On the question of fixation of the judge-strength he contended that the Chief Justice of the High Court and the Chief Justice of India are best suited to take a decision in this behalf and made a recommendation to the President who should invariably accept the same. In his view, therefore, the majority view in S.P. Gupta's case needs to be modified or explained as above. 374. Mr. Milon Banerjee, the learned Attorney General, was present in the Court on 5th March, 1993 when the aforesaid petitions were called on for hearing before this Bench. At the request of the Court he accepted notice on the two questions formulated by the Division Bench in Subhash Sharma's case (supra). Subsequently he was served with a written notice dated 16th March, 1993 in which four questions were formulated. The learned Attorney General states that the four questions formulated in the written notice dated 16th March, 1993 are not in conformity with the two points referred to this Bench by Subhash Sharma's case. On the principal issue of primacy of the learned Chief Justice of India, the learned Attorney General submitted that the constitutional provisions in regard to appointment of judges to the superior court have to be examined keeping in view the fact that the consultation contemplated at the pre-appointment stage would be of the same intensity as consultation at the post-appointment stage. He submitted that before entry into the judicial family the executive has a larger say in the process of consultation than at the post-entry stage for the simple reason that at the post-entry stage the independence of the judiciary assumes considerable significance. He also submitted that the word 'consultation' is used in contra-distinction to the word 'concurrence' in

Articles 124(2) and 217(1) and hence it would be unfair to construe the former to mean the latter and thereby confer a veto on the Chief Justice of India not contemplated by the provisions of the Constitution. He submitted that consultation at the post-entry stage would entitle a greater weight to be given to the opinion of the Chief Justice of India, for example, under Article 217(3) or 222(1) of the Constitution. Similarly, the word 'recommended' in Article 233(2) has a different connotation from consultation. In fact the two clauses of Article 233 clearly bring out this distinction. He also submitted that the concept of independence of the judiciary assumes greater importance at the post- appointment stage only and not at the pre-appointment stage. At the pre-appointment stage the executive has an equally important role to play in the choice of a candidate for appointment and it was for that reason that the attempt to substitute the word 'concurrence' for 'consultation' did not find favour with the Constituent Assembly. The mere fact that normally the executive responds positively to the views of the Chief Justice of India cannot be misconstrued to concede the right of veto to the Chief Justice of India in the matter of appointment of a candidate or refusal to appoint a candidate. He submitted that the President is under an obligation to act on the aid and advise of the Council of Ministers and he cannot depart from the advice and accept the advice of the Chief Justice of India if there is a conflict. He submitted that in our constitutional scheme the question of primacy over other constitutional functionaries does not arise as there is no hierarchy amongst the consultees and such a view would be inherently inconsistent with the very concept of consultation. However, if by primacy it is meant that greater weight should be attached to the view of the Chief Justice of India in the event of a difference of view amongst the consultees, this interpretation may perhaps be acceptable. In this connection, he submitted that the view of Pathak, J. in S.P. Gupta's case can be adopted. Lastly, he submitted that it two views are reasonably possible and he earlier decision has made a choice in favour of one this bench should not disturb that choice by the exercise of review powers merely because the other view sounds more convincing unless the interest of public or the like compels such re-consideration. In the present case, submitted counsel, even the referring judgment does not say that such a compelling necessary for review has arisen. 375. On the question of fixation of judge-strength, he submitted that there being no judicially manageable standards for the purpose of fixation of judge-strength it would be unwise to issue a mandamus to the executive as a number of varying factors with several imponderables enter the decision making and hence the Constitution has rightly cast the duty on the executive under Article 216 of the Constitution. At best in a given case the Court can, draw the attention of the

executive to the need to revise the judge-strength and leave it to the executive to take an appropriate decision within a reasonable time. According to him Courts are hardly equipped to adjudicate on such matters which are essentially executive in nature and should, therefore, exercise restraint. In the end he urged that the Court should confine itself to the two issues formulated in Subhash Sharma's Case and should refrain from going into the other questions as the pleadings are confined to those two questions only. Since the various State Governments as well as the Union of India and the various Advocates General were put to notice to respond to these two questions only, it would be unwise and hazardous to go into the other questions which were raised by counsel for the petitioners and allies across the Bar without specific pleadings thereon. Any decision that may be rendered on such serious constitutional issues without proper pleadings would be hazardous and at best merely obiter and wisdom demands that the Court should refrain from answering those question. To put it in a nutshell, the learned Attorney General urged that the majority view in S.P. Gupta's case does not require re-consideration, that the concept of primacy of the Chief Justice of India cannot be spelt out from the constitutional provisions in regard to the appointment of judges to the superior judiciary and that in any event Constitution cannot mean concurrence and the Chief Justice of India cannot be conferred that right of veto in the name of primacy. He submitted that at best when there is a difference of opinion between the consultees under Articles 124(2) or 217(1) the view of the Chief Justice of India may ordinarily prevail unless there are strong, cogent and compelling reasons to disapprove of the same. But that opinion cannot be held to be binding on the executive. In other words, he submitted, that even if the court rejects his submission, at best the view of Pathak, J. in S.P. Gupta's case on the question of primacy of the Chief Justice of India can be adopted.

376. A word of caution before we proceed further. The Constitution is what the Judges say it is. That is because the power to interpret the Constitution vests in the Judges. A heavy responsibility lies on the Judges when they are called upon to interpret the Constitution, the responsibility is all the more heavier when the provisions to be construed relate to the powers of the judiciary. It is essential that complete objectivity is maintained while interpreting the Constitutional provisions relating to the power of the judiciary vis-a-vis the executive in the matter of appointments to the superior judiciary to avoid any feeling amongst the other constitutional functionaries that there has been usurpation of power through the process of interpretation. This is not to say that the judiciary should be unduly concerned about such criticism but merely to emphasize that the responsibility is greater in such cases. To put it differently where the language of the Constitution is plain and the words used are

no ambiguous, care should he taken to avoid giving an impression that fancied ambiguities have been conjured with a view to making it possible to place a convenient construction on the provisions. If the words are plain and unambiguous effect must be given to them, for that is the constituent body's intent, whether you like it or not, and any seeming attempt to depart therefrom under the guise of interpretation of imaginary ambiguities would cast a serious doubt on the credibility and impartiality of the judiciary. It would seem as if judges have departed from their sworn duty; any such feeling would rudely shock peoples' confidence and shake the very foundation on which the judicial edifice stands. The concern of the judiciary must be to faithfully interpret the Constitutional provisions according to its true scope and intent because that alone can enhance public confidence in the judicial system. 'The one public interest which the courts of law are properly entitled to treat as their concern is the standing of and the degree of respect commended by the judicial system' said Lord Keith of Kinkel in Duport Steel Ltd. v. Sirs and Ors (1980) 1 All England Reporter 529 at 550. We can do no better than reproduce Lord Scarman's advice in the same case at page 551 of the Reporter : Great judges are in their different ways judicial activists. But the Constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (off as Selden put it by the length of the Chancellor's foot), confidence in the judicial system it becoming replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today. Having put ourselves to caution, rather made ourselves conscious of our special responsibility, we may now proceed to deal with the questions posed for our determination. 377. The concept of separation of powers is a well known fundamental political maxim which many modern democracies have adopted. Our Constitution has not strictly adhered to that doctrine but is does provide for distribution of powers to ensure tha one organ of the Government does not trench on the constitutional powers of other organs. This is evident from Part V and Part VI of the Constitution. There is and can be no dispute that the distribution of powers concept assumes the existence of a judicial system free from external as well as internal pressures. Under our constitutional scheme, the judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and of upholding the rule of law. Since the Courts are entrusted the duty to uphold the Constitution and the laws, it very often comes in conflict with the State when it tries to enforce its orders by exacting

obedience from recalcitrant or indifferent State agencies. Therefore, the need for an independent and impartial judiciary manned by persons of sterling quality and character, undaunting courage and determination and resolute impartiality and independence who would dispense justice without fear or favour, ill-will or affection. Justice without fear or favour, ill-will or affection, is the cardinal creed of our Constitution and a solemn assurance of every judge to the people of third great country. There can be no two opinion at the Bar that an indedendent and impartial judiciary is the most essential characteristic of a free society. Even though on the question that our judiciary should be independent of he executive and the legislature there is no divergence of views at the Bar, there was some difference of opinion on the actual content of the concept. Hence brief look into the historical background of the development of this concept in our country. 378. It is well-known that the concept of judicial independence in this country owes its origin to the development of this concept in England. In England for centuries the Monarch was the repository of all powers and the courts set up by him were accountable to none except him, he being an integral part of the system of administration of justice. This as a purely executive arrangement. However, during the 17th centruy things began to change following a clash between the Monarch and the Parliament, each vying for supermacy. In this tussle for supremacy both sought cover under law which brought the judiciary into sharp focus since it alone was competent to demarcate the functional boundaries between the privileges of the Crown and those of the Parliament. It is this situation which gave birth to the doctrine of judicial independence. Both the Crown and the Parliament realised the significance and the value of an independent judiciary. Yet the English Parliament was not prepared to loosen its grip over the judiciary and it fell to the lot of Chief Justice Coke to assert the functional freedom of the judiciary. When Parliament realised that the Crown was able to assert because of the pleasure doctrine, it enacted the Settlement Act of 1700 whereby security of tenure was provided by making it subject to good behaviour and removal upon address by both Houses of Parliament. Judges' salaries were to be ascertained and established. Thus the judiciary in England became independent of the Crown as well as the Parliament. But the situation was different in British colonies. Even though the English judiciary secured independence, neither the Crown nor the Parliament was prepared to concede it to the colonies. In 1759 when the Pennsylvania Assembly enacted a law requiring an address of the Assembly for removal of a Judge, the Privy Council disapproved of the measure as an attempt to make the judiciary dependent on the Colonial Assembly. Since the British Parliament was supreme and could enact a law concerning colonies which would not be subject

to court scrutiny, the unrepresented Americal colonists suspected British intentions. Hence when they attained freedom they favoured total separation of all the three branches of government so that each would operate as a check on the exercise of power by the other. The American concept of judicial independence, therefore, differs somewhat from the British concept. Our founding fathers were aware of these developments and, as we shall presently show, they steered a middle course. 379. Before we deal with our constitutional scheme regarding appointments to the superior judiciary, it would be advantageous to bear in mind the practice followed in Britain and other Common Law Systems as well as the United States. In Britain the Lord Chancellor enjoys a unique position of three-in-one. He is at once the head of the judiciary, Presiding Officer (Speaker) of the House of Lords and a member of the cabinet. This unique position enjoins that he ensure separation of powers and independence of the judiciary. One of his responsibilities is to select and appoint judges and other judicial officers. To ensure that the appointees are of the highest professional calibre, integrity and judicial quality, certain guidelines laid down by Lord Chancellor's office are followed. Appointments to the High Court and above being by invitation, the principle of wide consultation is followed. The views thus obtained are collated and recorded and after considering the same the proposal is put forward for appointment. Lord Justice of Appeal and Judges of the Supreme Court of England and Wales are appointed by the Queen on the Prime Minister's recommendation. It will thus be seen that the process of appointment is essentially an executive one yet no one says that the England Judiciary is not independent, in fact it is recognised as fiercely independent. 380. Under the American system many state judges are elected; of those that are not, their appointments are subject to legislative concurrence. However, in the case of Supreme Court judges, the President makes the nomination. While the requirements of merit, expertise, independence and public confidence are universal it is conceded that other factors, such as, ideology, political compatibility, etc., also figure prominently in the selection process. During the 1984 Presidential Campaign when judicial appointments were debated, Mr. Justice William Rehnquist is reported to have said: " there is no reason in the world why a President should not... appoint people... who are sympathetic to his political or philosophical principles" and buttressed it by nothing that the President is the "one official who is elected by the entire nation" and, therefore, the public has "something to say about the membership of the court". (Washington Post, October 20, 1984 P.6). Besides political and ideological compatibility, "representativeness" based on race, gender, etc., plays a measurable role in the choice of candidates. The ultimate aim, it would seem, is to make the court reflective of America's heterogeneity and thereby foster legitimacy

and credibility for the institution in the eyes of the people. It is obvious, therefore, that in selecting the candidate for nomination to the Supreme Court, political and ideological views of the candidate are considered relevant and an attempt is made to give the Court a representative look so that the Court derives legitimacy in the eyes of the people. The nomination made by the President must of course be confirmed by the Senate. The Senate too in the course of its deliberations tries to ascertain the nominee's ideological and political compatibility, his merit, competence, experience and suitability before approving or disapproving the nomination. It will thus be seen that the process of selecting a candidate for appointment to the U.S. Supreme Court is solely an executive function which has the backing of the Senate. Surely, it cannot be argued that and was indeed not argued, the people of America who were jealous in enforcing the doctrine of separation of powers with a view to ensuring the total independence of the judiciary were at the same time willing to dilute it? Their concept of judicial independence is clearly of post-appointment application. Once the nomination is complete and the candidate enters the judiciary family he must enjoy complete independence, both institutional and individual, and there should be no interference from any source, whatsoever, in the discharge of his judicial functions. 381. In Australia, judges are appointed by the executive in accordance with the statute. Appointment to the High Courts and other federal courts is by the federal government whereas appointment to the state courts is by the state governments. The appointments are made in the name of the Governor-General, or the Governor, in council. In reality they are dependent on cabinet decisions. Once appointed they are independent of the executive. Thus the Australian method of appointments contrasts with the system prevalent in the United Kingdom and the United States. 382. In Canada, appointments of judges of the Superior, District and County Courts in each province, except two, are made by the Governor-General. In addition, each of the ten provinces has its own process of appointment of provincial judges to provincial courts. There is no uniformity but the appointments essentially are by the executive. 383. In New Zealand, the role of the judiciary in the selection of judges is quite active. The Chief Justice of New Zealand is appointed by the Governor-General on the recommendation of the Prime Minister who ordinarily discusses the matter with the Attorney General. The latter seeks the opinion of the President of the Court of Appeal and, informally, of some other judges. Where appointments to the High Court are in the offing, the Chief Justice prepares a list after consulting the other judges and makes a recommendation which the attorney General scrutinises. After making his own inquiries he consults the New Zealand Law Society and in receipt of a positive response sounds the candidate and on his

or her agreeing the Cabinet is apprised. The Cabinet then makes a formal recommendation to the Governor-General who makes the appointment. 384. In India after the advent of the British, the judicial system underwent changes. The Courts set up by the East India Company were exclusively executive. Thereafter a new judicial system comprising three types of courts came to be introduced in the Presidency towns of Bombay, Calcutta and Madras. The courts so constituted were replaced by the establishment of Supreme Courts in the said three Presidency towns. The Chief Justice and other Judges held office during the pleasure of the Crown although their salaries were ascertained. On the enactment of the High Courts Act, 1861, these courts were replaced in 1862 by High Courts. Under the Government of India Acts, 1919 and 1935 the power of appointment was exclusively with the Crown, but under the latter Act the age of superannuation was fixed at 60 years subject to the Crown's power to remove a judge for misbehaviour or mental or physical infirmity on the report of the Judicial Committee of the Privy Council. Thus judges enjoyed independence from the executive but continued to serve under the Crown's pleasure. However, on account of the British culture of judicial independence, the judges of the High Court functioned without any executive interference or fear of interference. The Federal Court later strengthened this great tradition of judicial independence. The purpose of setting out this abridged historical background is to point out how the pendulum swung from total executive control to near total judicial independence except for the limited scope of the pleasure doctrine. Our founding fathers were aware of these developments in England, America and British India when they undertook the task of drafting the Constitution for free India. It will be noticed that even then the power of appointment was totally with the executive. 385. Our Constitution envisages a threetier judiciary with the subordinate courts at the floor level, the High Court at the State level and the Supreme Court at the Union level. The provisions in regard to Union Judiciary, i.e. the Supreme Court, are to be found in Chapter IV, those regarding the High Courts in the States in Chapter V and subordinate courts in Chapter VI of Part VI of the Constitution. We may first deal with the provisions relating to the subordinate courts which comprise Articles 233 to 237. Article 233 provides for the appointment of 'District Judges', an expression defined in Article 236(a). Article 233(1) provides that appointments of persons to be and the posting and promotion of, District Judges in any State shall be made by the Governor of the State is consultation with the High Court exercising jurisdiction in relation to such State. It may be noticed that consultation is with the entire body of judges constituting the High Court and not with a single individual like the Chief Justice of the High Court. Article 233(2) says that a person not already in service

of the Union or the State shall be eligible to be appointed District Judge if he has a standing of not less than seven years at the Bar and is 'recommended' by the High Court for appointment. Under Article 235 the control over district Courts and courts subordinate thereto including the posting and promotion of and the grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge shall be vested in the High Court. Article 237 empowers the Governor to direct that the provisions of this Chapter and any rules made thereunder shall apply in relation to any class or classes of Magistrates in the State as the may apply in relation to persons appointed in the judicial service of the State subject to such exceptions and modifications as may be specified. The expression "judicial service" is defined under Article 236(b) to mean a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. On a plain reading of Article 233 it becomes clear that the power to appoint District Judges is vested in the Governor of the State which he must exercise in consultation with or on the recommendation of the concerned High Court. Thus consultation with and recommendation of the High Court is a condition precedent to the exercise of power by the Governor of the State. 386. We now move on to the provisions in regard to High Courts in the States. Article 214 ordains that there shall be a High Court for each State. Under Article 216 every High Court must consist of a Chief Justice and such other Judges as the President may, from time to time, deem it necessary to appoint. We may at this stage point out that the number of judges to be appointed in each High Court is 'as the President may from time to time deem it necessary to appoint.' A duty is, therefore, cast by this provision on the President to review the judge strength from time to time if he deems it necessary to appoint more judges in the High Court he must ensure an increase in the Judges-strength. Article 217(1) is of importance and may be reproduced : 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 Judges 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. The qualifications for appointment as a Judge of the High Court have been specified in Clause (2) of Article 217. It provides that the candidate must have held for atleast 10 years a judicial office in the territory of India or he must have been an Advocate of a High Court or two or more such courts in succession for at least 10 years. The provision which was introduced in Clause (c) by the Constitution 42nd Amendment placing a distinguished jurist in the zone of consideration for appointment came to be omitted by the Constitution 44th Amendment. Thus under Article 217(2) a person who does not possess the qualifications set out in Clause (a) or (b) will be eligible for appointment. Clause (3) was inserted by the Constitution 15th Amendment with retrospective effect. It says that 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. It becomes abundantly clear on a plain reading of Article 217(1) that the power to appoint a judge of the High Court is vested in the President and must be exercised by a warrant to be issued in that behalf under his hand and seal. This power, however, has to be exercised 'after' consultation with (i) the Chief Justice of India(ii) the Governor of the State and (iii) in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court. Once the consultation process contemplated under this Article is completed, the power to appoint a judge of a High Court is conferred on the President. Once appointed he will hold office until he attains the age of 62 years and as provided by Articles 121 and 211 his conduct in the discharge of his duties shall not be discussed in Parliament or any State legislature, except on a motion for his removal. He can be removed from his office only in the manner provided by Article 124(4) of the Constitution for the removal of a Supreme Court Judge. However, he shall vacate office on his being appointed by the President to be a Judge of the Supreme Court or on his being transferred by the President to any other High Court within the territory of India under Article 222(1) of the Constitution. Article 219 provides that every person appointed to be a Judge of a High Court shall, before he enters upon his office make and subscribe before the Governor of the State or some person appointed in that behalf by him an oath or affirmation according to Form VIII in the Third Schedule meant for High Court judges. It reads as under : 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 solemnly affirm 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. Article 221 lays down the salary to be paid to High Court judges. The salary is specified in the Second Schedule at Item 10. Article 221(2) next provides that every judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may, from time to time, be determined by or under law made by Parliament and until so determined to such allowances and rights as are specified in the Second Schedule. The proviso says that neither the allowances of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment. It is clear from this provision that the judge's salary is protected by the Constitution and the allowances and pension and other benefits conferred on him by the High Court Judges (Conditions of Service) Act, 1954 are also protected by the proviso, in that, they cannot be varied to his disadvantage after his appointment. By virtue of Article 202(3)(d) the expenditure in respect of the salaries and allowances of judges of the High Court is charged on the Consolidated Fund of each State. Then come to Article 222(1) which reads as under: 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. Sub-clause (2) of that Article provides for payment of compensatory allowance to a transferred Judge. Thus the power to transfer a judge from one High Court to any other High Court is conferred on the President which he must exercise only after consultation with the Chief Justice of India. There is no dispute that the consultation must be effective, meaningful and purposive. Article 224 provides for the appointment of additional and acting judges and Article 224-A permits appointment of retired judges. The power to appoint additional and acting judges is conferred on the President. However, the power to requisition the services of retired judges has to be exercised by the Chief Justice of the High Court with the 'previous consent' of the President. Under Article 229 the power of appointment of officers and servants of a High Court is vested in the Chief Justice of the Court or such other judge or officer of the Court as he may direct. It will be seen from these provisions in the Constitution that the power of appointment is vested in the President and has to be exercised in the manner set out in the various provisions adverted to hereinbefore. Throughout, the entire scheme is that the power is to be exercised by the President or where the power is conferred on the Chief Justice, he has to exercised it with the President's consent. The scheme of this chapter reveals that under Article 217(1) the appointment to be made by the President must be after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a judge, the Chief Justice of the High Court. But if any question arises as to the age of a judge of the High Court, the President is empowered to decide it after consultation with the Chief Justice of India. Here there is no requirement to consult the Governor of the State or the Chief Justice of the High Court. When it comes to appointment of additional or acting judges, Article 224 empowers the President to make the appointment

without the requirement of consultation. But appointment of retired judges can be made under Article 224-A by the Chief Justice of the High Court with the consent of the President. So both the expressions 'consultation' and 'consent' are used in this chapter. 387. We may now notice the provision concerning the Union Judiciary. Article 124(1) provides that there shall be a Supreme Court consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number of not more than twenty-five other judges. Article 124(2) which is relevant for our purpose may be reproduced at this stage : 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 Judge 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. The second proviso to that clause says that a judge may resign his office or be removed from his office in the manner provided in Clauses 4. Clause 2A was inserted by the Constitution 15th Amendment to provide that 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. Clause 3 of Article 124 sets out the qualifications for appointment as a judge of the Supreme Court. Besides being a citizen of India he must have been at least 5 years a judge of the High Court or of two or more such courts in succession or for at least 10 years an Advocate of a High Court or of two or more such courts in succession or is in the opinion of the President a distinguished jurist. Article 124(4) provides that 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 2/3rd members of that House present voting on the ground of proved misbehaviour or incapacity. Every person appointed a judge of the Supreme Court is required to make and subscribe before the President or his appointee an oath or affirmation according to Form IV in the Third Schedule which reads as under : 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 solemnly affirm 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. No person who has held the office as a judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India, see Clause (7) of Article 124. Just as in the case of High Court judges, so also in the case Supreme Court judges the salaries, allowances, pensions, etc., are protected and charged on the Consolidated Fund of India (Article 112(3)(d)). No discussion can take place in regard to his conduct in the discharge of his duties in any state legislature (Article 211) or Parliament (Article 121), except on a motion for his removal under Article 124(4). Articles

127 and 128 provide for appointment of adhoc judges and attendance of retired judges with the 'previous consent' of the President. Article 146 provides that the appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other judge of officer of the court as he may direct. It will thus be seen that even under this chapter the power of the President to make an appointment is circumscribed or limited by the requirement of prior consultation. The power conferred on the Chief Justice of India by Articles 127 and 128 is circumscribed by the requirement of previous consent of the President. 388. The anxiety of our Constitution makers to ensure that justice promised in the Preamble of the Constitution is pure and is not any manner polluted by executive or political interference is writ large on the face of the Constitution. Extraordinary powers have been conferred on the Supreme Court and the High Courts under Articles 32 and 226, respectively, manifesting the confidence of the people in the courts' ability to do justice. By Article 50 a direction is given to take steps to separate the judiciary from the executive in the public services of the State. The offices of the Attorney General and Advocates General have been given constitutional status with a view to making quality legal advice available to the Union and the States so that they function consistently with the rule of law and safeguard public interest. The role of the Public Prosecutor and the Government Pleader is also to act with fairness to ensure that justice is delivered according to law. Then recruitment to the judiciary at the level below the district judges is either through the independent agency of the State Public Service Commission or through an entrance test organised by the High Court. Insofar as appointments at the level of district judges is concerned, we have noticed that under Article 233 the Governor has to make the appointment. Article 233 is in two parts, the first part provides for appointment of a person in the service of the Union or the State to be made by the Governor in consultation with the High Court and the second part provides for the appointment of an advocate or pleader or seven years standing on the recommendation of the High Court. The Governor's power of appointment is conditioned by the obligation to consult the High Court and such consultation must be meaningful and purposive and cannot be reduced to an empty formality. Consultation cannot be complete, purposive and effective unless the High Court which is best suited to adjudge the merits and suitability of the candidate is consulted and its view obtained before the appointment is made. See Chandremouleshwar Prasad v. Patna High Court and Ors. 1970 (2) SCR 666 : AIR 1970 SC 370. Once the appointment is made by the Governor after consultation with the High Court or on its recommendation and the appointee enters the cadre of district judges he falls within the High Court's control under Article 235 of the Constitution. His independence is then secure because it is settled law that the High Court's control under Article 235 extends to transfer as well as disciplinary matters. See State of West Bengal v. Nripendra Nath 1966 (1) SCR 771 : AIR 1966 SC 447 and State of Assam v. Ranga Mahammad and Ors. 1967 (1) SCR 454 : AIR 1967 SC 903. It is only in case of dismissal or removal or reduction in rank to a lower cadre that the High Court has to seek the Governor's order,

he being appointing authority, but it is settled law that ordinarily he must act on the recommendation of the High Court. 389. So far as appointment to the High Court is concerned Article 217(1) extracted earlier clearly obliges the President to make the appointment only 'after' he has consulted the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. The article does not provide any hierarchy amongst the three consultees although according to the procedure the proposal ordinarily emanates from the Chief Justice of the State and thereafter goes to the executive. It is only after the Governor has cleared it that the Chief Justice of India is consulted. Therefore, before the Chief Justice of India opines on the proposal he has an opportunity to sieve the material on the file and to appreciate the view point of the other consultees. The situation that may arise can be fourfold, namely, (i) all the three consultees agree on the proposal; (ii) the Chief Justice of the High Court and the Governor do not agree and the Chief Justice of India agrees with the former; (iii) the Chief Justice of the High Court and the Governor do not agree and the Chief Justice of India agrees with the latter; and, (iv) the Chief Justice of the High Court and the Governor agree but the Chief Justice of India does not agree. In the first situation is the President agrees there can be no problem whatsoever but how should the President react in the other three situations? Is he bound to accept the opinion of the Chief Justice of India in all the three situation? Is that what is meant when primacy is sought to be accorded to the views of the Chief Justice of India? 390. Let us now move on to Article 124(2) which provides for the appointment of a Supreme Court Judge. We have extracted the article earlier. It empowers the President to appoint a judge to the Supreme Court 'after' consultation with such of the Judges of the Supreme Court and of the High Courts in the States as he may deem necessary for the purpose. The zone of consultation is very wide, he may consult one or more of the Supreme Court judges and any number of the numerous High Court judges in the country. The proviso then says that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India 'shall always be consulted'. There was some argument on the question whether consultation with anyone or more of the consultees specified therein is a 'must' and the word 'may' grants an option only in regard to the choice from amongst the consultees or whether the said clause is optional in its entirety. But there was no controversy that the proviso mandates consultation with the Chief Justice of India. We will deal with this question at the appropriate time when we examine the content of Clause (2) of Article 124 of the Constitution but at this stage it would suffice to point out that according to Bhagwati, J in S.P. Gupta's case at page 547 the practice has throughout been of consulting the Chief Justice of India alone. That practice may be on the presumption that consultation with the Chief Justice of India satisfies the requirement of Clause (2) as well as the proviso thereto. Be that as it may, the possible situations which can emerge are : (i) the President consults the Chief Justice of India alone; (ii) the President consults the Chief Justice of India an one or two or more judges of the Supreme Court and their views do not tally; (iii) the President consults the Chief Justice of India and

three Chief Justices of the States and their views do not tally; and, (iv) the President consults the Chief Justice of India and one or more consultees, and all of them have identical views. If the President agrees with situations (i) and (iv) then there is no difficulty but what is the President does not agree with those views? Even then is he bound by the views of the Chief Justice of India? But how should he react in situations (ii) and (iii)? Is he bound by the views of the Chief Justice of India? Is that what is understood by the primacy principle? If the view of the Chief Justice of India is treated as binding will it render the provision in regard to consultation in Clause (2) of Article 124 nugatory? Again, if the view is taken as binding on the primacy doctrine, will not the President be forced to abide by that advice even if it runs counter to the views of others consulted under Clause (2)? If such a situation arises will or will not the President have the option to go by the advice of other consultees if he finds it more sound and acceptable? It will thus be seen that the question of according primacy to the views of the Chief Justice of India throws up many situations which must be kept in view while interpreting the Constitution. 391. From the foregoing discussion it becomes evident that in India judiciary plays a more active role in selecting judges at all levels than in other countries. The appointments to the subordinate judiciary must be made by the Governor in consultation with or on the recommendation of the High Court as provided by Article 233 of the Constitution. Article 233 is a self-contained provision for appointment as district judge and is in two parts; the first clause provides for the appointment of a person who is already in the service of the Union or the State in consultation with the High Court while the second clause provides for the appointment of a persons who has been for not less than seven years an advocate or a pleader on the recommendation of the High Court. The requirement of consultation with or recommendation by the High Court is a must and the decision has to be taken by the entire body of judges constituting the High Court. In the case of appointment of persons to the judicial service other than as district judges, Article 234 requires that their appointments shall be made in accordance with rules made by the Governor in that behalf in consultation with the State Public Service Commission and with the High Court. Therefore, even though the ultimate appointment of a person to be a district judge rests with the Governor, he cannot make the appointment unless there has been an effective and meaningful consultation with the High Court or the High Court has, as the case may be, recommended the appointment. Consultation would not be complete, meaningful and effective unless there has been an exchange of views and in the event of disagreement the executive has indicated the reasons for its disagreement to the High Court and has disclosed the material on which the disagreement is based. Therefore, the obligation to consult the High Court is so integrated with the exercise of power by the Governor that the power must be exercised in the manner provided by Article 233(1) or not at all. In order that the requirement of consultation does no end up as an empty formality or is not reduced to a mere mockery it is essential that in the difference of opinion there is an effective interchange of view-points between the two functionaries so that is able to appreciate the views of the

other and there is a genuine attempt to iron out the creases before a final decision is taken. In cases governed by Article 233(2), normally as a matter of rule, the High Court's recommendation must be accepted unless there exist 'good and weightly reason' in which case the executive should communicate its views to the High Court and give the latter an o10pportunity to react to the same. See State of Kerala v. A. Lakshmikutty (1986) 4 SCC 632. Once the Governor makes the appointment and the appointee becomes a part of the judicial family, he is under the protective umberalla of the High Court under Article 235 and none except the High Court can taken disciplinary action against him. See State of West Bengal v. Nripendra Nath Bagchi 1966 (1) SCR 771 : AIR 1966 SC 447. The ultimate order of dismissal or removal may be passed by the Governor on the recommendation made by the High Court based on the outcome of the domestic enquiry. A lesser punishment, that is, a punishment other than dismissal, removal or reduction in rank, can be imposed by the High Court itself but if the punishment recommended is the one falling under Article 311, the order must be made by the Governor. This position is made clear in the case of Tej Pal Singh v. State of U.P. 1986 (3) SCC 604 : AIR 1986 SC 1814. It is, therefore, obvious that in the matter of selection of district judges, it is the High Court which plays a dominant rule for the reason that lot of weight is attached to the views of the entire body of judges constituting the High Court. It is, therefore, natural that departure from the opinion of this informed body, which the Constitution requires to be consulted, can be a rare event and that too for very strong, cogent and compelling reasons. Even such an eventuality there must be an effective, purposive and meaningful dialogue with the High Court before a final decision is taken by the executive. It is necessary to realise that the framer of the Constitution have deliberately provided for consultation with the entire body of judges constituting the High Court and it is their collective wisdom which adds weight to the opinion transmitted to the executive and hence it is not surprising that except in rare cases where they may have gone wrong for want of some material that the executive may take a different approach and invite the High Court to revise its opinion in the light of that material, e.g. I.B. Report or the like. It is significant to note that consultation is not limited to the Chief Justice of the High Court presumably because it was not though wise to limit the consultation with one single individual. The Constitution makers have chosen to rely on the collective wisdom of the High Courts as a body and not any single individual, howsoever high he may be placed. 392. Insofar as appointment to the High Court is concerned, the same is governed by Article 217(1). We have reproduced the text of this Article earlier. The appointment has to made by the President by warrant under his hand and seal. But it must be preceded by 'consultation' with the Chief Justice of India, the Chief Justice of the State and the Governor of the State. Consultation with these three functionaries is a condition precedent and a sine qua non to appointment. It is common knowledge that the proposal ordinarily emanates from the Chief Justice of the High Court who forwards it to the Chief Minister. The Chief Minister scrutinises the proposal and if he needs any clarification he

must interact with the Chief Justice. If he or the Governor has any suggestion to make or names to propose they may do so and forward the same to the Chief Justice who may examine the suggestions and send his response. The Chief Minister must then forward the proposal, with the comments of the Chief Justice, if any, in consultation with the Governor to the Minister of Law & Justice in the Central Government. The Minister of Law and justice would then consult the Chief Justice of India and Prime Minister and then forward the papers with the advice to the President who will thereupon issue the warrant of appointment. On a plain reading of Article 217(1) it becomes clear that the President is empowered to make the appointment 'after' consultation with the three constitutional functionaries. The Article does no give any indication of any hierarchy among the three consultees. These three functionaries are those who are consulted, they have a consultative role to play in the appointment of a High Court judge but the ultimate power of appointment rests in the President who must act in accordance with Article 74(1) of the Constitution. The power conferred on the President is not an absolute or arbitrary power but the same is checked, circumscribed and conditioned by the requirement of prior consultation with the three Constitutional functionaries. The consultation must be complete, purposive and meaningful and cannot be treated as a mere idle formality. If the consultation is found to be a mere empty formality without effective exchange of views, the appointment would be vitiated and the whole exercise may ultimately turn out to be loves labour lost. Each of the three constitutional functionaries holds a high constitutional position and it is difficult to see how, in the absence of express word, it can be said that there is a hierarchy envisaged by the said provision. It must be remembered that the Chief Justice of the High Court must be attributed intimate knowledge regarding the quality of legal acumen of the members of the Bar chosen by him for appointment. Since he has the opportunity to watch the performance of members of the Bar at close quarters, he is best suited to assess the worth of the candidate relating to his legal knowledge, acumen and similar other qualities, including his willingness to work hard his temperament to discharge judicial functions. From that point of view great weight must be attached to the opinion of the Chief Justice of the High Court. On other matters, such as, the antecedents of the individual, his political affiliations, if any, his other interests in life, his associations, etc., the executive alone may provide the information. Similarly, the executive would be able to collect information regarding the honesty and integrity of individual and certain other relating matters which may have a bearing on his appointment. Thus the opinion of the executive in this area would be equally important. From both these opinions would emerge the personality of the candidate proposed for appointment. The Chief Justice of India being 'pater familias' as the judiciary in India would have the advantage of the views of both these consultees and, where necessary, he may also be able to interact with the Chief Justice of the High Court as well as colleagues on the Supreme Court Bench from that court, if any, before formulating his view finally in the matter. His view, thus formulated would certainly be entitled to greater weight since he had the benefit of filtering the

views of the other two consultees on the question of suitability on the proposed candidate, but can it mean that his view totally eclipse the view of the others forbidding the executive to evaluate it before formulating its advice to be tendered to the President? We will leave this as a poser for the present and proceed to consider the process of appointment under Article 124(2) of the Constitution. 393. We have extracted Article 124(2) earlier. Clause (1) of that Article provides for the Constitution of a Supreme Court of India consisting of a Chief Justice of India and no more than twenty-five other judges. Clause (2) provides that every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal. The mode of appointment is the same as in the case of a High Court judge i.e. by warrant under his hand and seal. But here again the exercise of power is controlled, checked and circumscribed by the need for prior consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary. Reference to the expression 'such of the judges' must include the Chief Justice of India in the case of the former and the Chief Justices of the High Courts in the case of the latter. If such a construction is not placed it would lead to the absurd situation of the Chief Justices of various High Courts being excluded from the zone of consultation. The Chief Justice of India would, in any case, have to be consulted by virtue of the proviso to that clause because it mandates that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India 'shall always' be consulted. It is, therefore, obvious that while the proviso obligates consultation with the Chief Justice of India, the text of Clause (2) stretches out the zone of consultees and leaves it to the President to consult one or more from amongst that broad band of consultees. But consult he must before he makes the appointment. In actual practice whenever a permanent vacancy is expected or arises in the Supreme Court, the Chief Justice of India will intimate that fact to the Minister of Law and Justice and simultaneously forward his recommendation to fill up the vacancy likely to arise or which has already arisen. On receipt of the recommendation the same may be immediately accepted in which case the President may be requested to make the appointment or there may be consultation with one or more of the judges from among those falling within the zone of consultation under Article 124(2) of the Constitution. If after such consultation, the Minister considers it desirable to bring any matter emerging from consultation to the notice of the Chief Justice of India or to suggest the claim of any other person recommended by the latter, he may convey his views/suggestions to the Chief Justice of India. On obtaining the view of the Chief Justice of India finally, the Minister is expected to apprise the Prime Minister and with his concurrence advice the President of the selection. The President will act on that advice and issue the warrant of appointment. This practice which is hitherto followed reveals that the Central Government's understanding of Article 124(2) is that it is not incumbent on the Government to consult any Judge of the Supreme Court or the High Court including any Chief Justice of the High Court if consultation with the Chief Justice of India is considered sufficient and no further consultation is deemed necessary. If

primacy is to be accorded to the views of the Chief Justice of India, the views of the other consultees would become redundant and will at best serve the purpose of persuading the Chief Justice of India to change his views but if he does not the views of the other consultees will be rendered nugatory. Is this the constitutional intendment? 394. Before we proceed to deal with the question of primacy, we may first refer to an attendant circumstance which was used by the learned Counsel for the petitioners and allies to buttress their submission that even the Government of India has construed the provision as conferring primacy on the Chief Justice of India. This circumstance is the fact that in the last over a decade, out of a total of 547 appointments made from 1st January, 1983 to 10th April, 1993 to different Courts, only 7 appointment s (5 in 1983, 1 in 1985 and 1 in 1991) were made contrary to the views of the Chief Justice of India which, contend counsel, is speaking evidence of the executive having conceded primacy to the opinion of the Chief Justice of India. It was submitted that frequent utterances of the Union Ministers, both within and outside the Parliament, have given the impression that the Central Government had been following the policy of not making appointments to the superior courts without the concurrence of the Chief Justice of India. Counsel submitted that notwithstanding the majority decision on the question on primacy in S.P. Gupta's case, in actual practice the Central Government always thought that the concurrence of the Chief Justice of India was essential for making the appointment. Therefore, if the practice followed throughout is borne in mind, there is no difficulty in holding that the majority views in S.P. Gupta's case calls for reconsideration. In our view this line of reasoning is wholly unsustainable. It must be remembered that in the process of selection of candidates for appointment to the superior judiciary of the country every effort must be made both by the executive wing as well as the judicial wing to arrive at a consensus i.e. a common understanding and in the majority of cases there is no reason why it should not be possible. The executive and the judiciary do not work at cross purposes, in fact their objective is common and, therefore, it would really be surprising if there is lack of understanding in a wide range of cases between them. The executive and the judiciary are not adversaries, they are. not supposed to work at cross purposes, then what is so surprising if in a vast majority of cases barring seven they have reached an agreement on the selection of the candidates for appointment And what is the justification in believing in the absence of statistical information, that in all these cases it was the executive which yielded to the view of the Chief Justice of India? Could it not be that in some cases the executive was able to convince the Chief Justice of India to its point of view and in some others the Chief Justice of India was able to persuade of the executive to his point of view? If the attitude of the executive has been to arrive at a consensus to minimise differences of opinion, it is in fact a healthy attitude which need not be read as yielding to the primacy concept. In fact, if the differences were too many one would be led to believe that there was a break-down of the constitutional mechanism of selecting judges for the superior judiciary. In fact the difference in seven cases, a negligible percentage no doubt, is speaking evidence of the denial of

the primacy concept. On the contrary it shows that the executive acts with restraint and due deference to the views of the Chief Justice of India. It would be unfair to read the attitude of accommodation as one of total submission. In fact the seven instances of departure from the views of the Chief Justice of India are cases of assertion which negate the inference of submission to the theory of primacy. And mind you these all are post-S.P. Gupta instances which individually and collectively provide evidence of assertion of executive's right to make an appointment departing from the views expressed by the Chief Justice of India and denial of the concept of primacy to be attached to the views of the latter. That being so it is difficult to appreciate the submission that the executive had conceded primacy to the views of the Chief Justice of India by making 540 of the 547 appointments with the concurrence of the Chief Justice of India. Even otherwise to rely on such a tenuous circumstance for interpreting and understanding constitutional questions great significance would seem to be a desperate attempt like clutching at a straw. 395. From the relevant provisions of the Constitution concerning the judiciary which we have referred to and reproduced hereinbefore, it is evident that the Constitution has used different expressions to meet with different situations. The word 'consultation' is used in Articles 124(2), 217(1) and (3) and 233(1), the expression 'previous consent' is used in Articles 127, 128 and 224-A, the word 'recommended' is used in Article 233(2), and the word 'approval' is used in Article 145 and proviso to 229(2) of the Constitution. Reference to theses provisions is illustrative and not exhaustive. It would, therefore, seem from the above that in the matter of appointment to the superior judiciary, the President can exercised his power of appointment only after he has completed the process of consulting certain constitutional functionaries, in the process of appointment of ad hoc judges or retired judges to sit on the Bench, the power can be exercised with the 'previous consent' of the President, in the case of making of rules the 'approval' of the President/Governor is necessary and in the case of appointment to the post of district judge recommendation of the High Court is envisaged. So also in the case of transfer of determination of age, consultation with the Chief Justice of India is a must. It will thus be seen that different expressions are used to convey different meanings. We have already pointed out earlier that the plain language of Articles 124(2) and 217(1) do not convey that the process of consultation means concurrence with the views of the Chief Justice of India. However, counsel for the petitioners and their allies submitted that the said expression must be given a meaning which is consistent with the constitutional philosophy of independence of the judiciary as enshrined in Article 50 and the discharge of the fundamental duty of abiding by the Constitution and respect for its ideals and institutions (Article 51A(a)). According to them consultation, in the context of safeguarding judicial independence, with the head of the Indian judiciary cannot merely seeing his views but must be understood to mean that his word in the matter of appointment to the superior judiciary will be final and the advise which the Prime Minister must give must be in accordance with the opinion of the Chief Justice of India so that the President may act on that advice as required by Article 74(1) of the Constitution. The

view of the Chief Justice of India of India cannot be wished away at the sweet will of the executive. It is, therefore, necessary that the expression should not be given a narrow or literal meaning but must in the context be understood to mean 'consent' or 'concurrence'. Counsel emphasised that both Articles 124(2) and 217(1) contemplate plurality of consultation and this can be achieved by the Chief Justice of India consulting two or more of his senior colleagues before expressing his view which view would reflect the collective view of the judiciary. The choice of the candidate for appointment would thus be based on the collective wisdom of the Chief Justice of India and his colleagues and the opinion expressed would be participatory in character and would in the final analysis subserve the object of the Independence of the judiciary and selecting a person of the right stamp. Thus the opinion of the judiciary would be symbolised in the opinion of the Chief Justice of India and it is, therefore, essential that such a view should have primacy. Lastly it was said that in any event the executive cannot be allowed to appoint a person whose selection is considered 'unsuitable' by the Chief Justice of India. Counsel, therefore, submitted that between the two views canvassed before this Court, the view which safeguards judicial independence and enables choice of persons of the right stamp for the superior judiciary should commend itself to the Court. 396. We have pointed out earlier that in the United Kingdom and other common law jurisdictions, say Australia, Canada and the New Zealand as well as the United States, the appointments to the superior judiciary are exclusively by the executive with varying degree of control. In the United Kingdom the appointments are made on the recommendations of the Lord Chancellor or the Prime Minister depending on the level at which the appointment is made. In Australia, the appointments are made by the executive in the name of the Governor-General or Governor, in council depending on whether the appointments are to the High Courts or other federal courts or at the State-levels. In Canada the appointments are essentially by the executive whereas in New Zealand the judiciary plays an active role but the appointment is made on the recommendation of the Cabinet by the Governor-General. In the United States the appointment to the Supreme Court is made on the nomination by the President subject to confirmation by the Senate. It will thus be seen that in these developed countries whose people are no less jealous of preserving judicial independence, the initial appointment at the entry stage is by the executive. 397. In British India, under the Government of India Act, 1915, Sections 101 and 102, appointment of the Chief Justice and Judges of the High Court was in the absolute discretion of the Crown and their tenure was governed by the pleasure doctrine. Under the Government of India Act, 1935, Sections 200 and 220, the appointments to the Federal Court and the High Court continued to be an executive privilege but their removal was dependent on a report from the Judicial Committee of the Privy council to the Crown. We have pointed out the development of the concept of judicial independence in British India earlier and see no reason to repeat the same. Since our Constitution makers were alive to the need to insulate the judiciary from external pressures they introduced the concept of consultation with the

Judiciary Wing to limit and check the absolute discretion of the executive in the matter of appointments to the superior judiciary. They achieved this by introducing the concept of compulsory consultation with the judiciary before the appointments are made to the superior judiciary. That is why Articles 124(2) and 217(1) provide that the appointments under the said provisions shall be made 'after consultation' with the Chief Justice of India and others. But it is difficult to say that the Constitution makers intended to denude the executive of all its power of appointment by providing for consultation with the Chief Justice of India and other. We do not think, as we will presently show, that such a view is permissible on the plain language of the Constitution even if the word 'consultation' is understood in the backdrop of the need to strengthen the concept of judicial independence. 398. Before we proceed to deal with the relevant Articles we may state that of the two questions formulated in Subhash Sharma's case extracted earlier, it may be mentioned that the concept of primacy referred to therein his three elements, namely (i) primacy of the Chief Justice of India as 'pater familias' of the Indian Judiciary (ii) primacy to be accorded to his views amongst the consultees referred to in Articles 124(2) and 217(i) and (iii) primacy in the sense of Chief Justice of India's view being binding on the President i.e. the executive. We may at the outset deal with the first aspect of primacy. 399. Article 124(1) speaks of the Constitution of the Supreme Court of India consisting of the Chief Justice of India and such number of judges as may be prescribed from to time. The position of the Chief Justice of India under the Constitution is unique; on the judicial side he is primus inter pares, on the administrative side the responsibility of managing the business of the Court is exclusively his, it is privilege to constitute benches and allocate judicial work to them. He also decides on who will work as vacation judges. Apart from the fact that the draws a salary slightly higher than his colleagues, he is empowered by Articles 127 and 128 to appoint adhoc judges or retired judges with the previous consent of the president to discharge judicial functions whereas Article 130 empowers him with the approval of the President to hold sittings of the Supreme Court at any place outside Delhi. He is empowered by Article 146(1) to make appointments of officers and servants of the Supreme Court. He also chairs the meetings of the judges of his court and presides over the Chief Justices' Conference and leads delegations when required. His position is like that of 'patria protestas' under the Roman Law. These responsibilities are symbolised in the official title, 'Chief Justice of India', and to that limited extent he is accorded primacy. See Lawrance Baum on 'The Supreme Court' (4th Ed.) at page 16. 400. Undoubtedly the office of the Chief Justice of India is given a special recognition under Articles 124(2), 217(1), 217(3) and 222(1), in that, consultation with him is a must before any decision contemplated under those provisions is finalised. Since the expression of opinion in regard to appointments to be made to the superior judiciary is a non-judicial function, in fact it is a function in aid of the executive function of the President i.e. the executive, to select candidates for appointment to the superior judiciary, the Constitution mandates consultation with him and others mentioned in Article 217(1) of the Constitution. This is matter which touches

the other two aspects of primacy on which we will elaborate at once. 401. The scheme of 'consultation' under the Constitution varies. Under Article 233, consultation with the High Court, i.e., the entire body of Judges of the High Court. Then under Article 217(1) consultation is with three constitutional functionaries, namely, the Chief Justice of India, the Governor and the Chief Justice of the Concerned High Court. Under Article 124(2), the Judges of the Supreme Court and the High Court besides the Chief Justice of India fall within the zone of consultation. Then there are provisions which contemplate consultation with the Chief Justice of India alone, e.g. Articles 217(3), 222(1) etc. Provisions are also found where the Chief Justice of India can act with the 'previous consent' of the President, Articles 127-128 - and Article 224-A for the High Courts. The word 'consult' as understood in ordinary parlance means to ask or seek advice or the views of a person on any given subject i.e. to take counsel from another, but it does not convey that the consultant is bound by the advice. In certain situations an expert in the field may be consulted but it is only to help the consultant to take a final decision. By consulting even an expert the consultant does not mortgage his decision, the advice given is only in-put among the various factors which enter decision making. He may consult one or more experts and he may accept the advise he considers most acceptable or rational but he is always free to reach his own conclusion. It is ultimately his responsibility to reach a sound decision and he is accountable for the same. Consultation would require at least two persons, they consult each there by correspondence or by sitting across the table. A may consult B on a given subject, obtain the opinion of B and act on it or he may, if not satisfied, discuss then issue with him or convey his doubts in writing, seek his clarification and if satisfied accept the advise or depart therefrom. In Fletcher v. Minister of Town Planning (1947) 2 All England Reporter 496, the Minister's order designating an area of land as the site for the proposed new township was questioned on the ground that the requirements of the law were infringed inasmuch as there was no 'consultation' within the meaning of Section 1(1) of the New Towns Act, 1946. The learned Judge observed : The word 'consultation' is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular from of consultation. If a complaint if made of failure to consult it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one. In deciding whether consultation has taken place, regard must, in my judgment, be paid to the substance of the events.... This passage was relied upon by Subba Rao, J. (as he then was) in R. Pushpam v. The State of Madras AIR 1953 Madras 392. The learned judge after reproducing the passage proceeded to observe : It is clear from the aforesaid observations that the Court will have to scrutinise in each case whether the requisite consultation has taken place having regard to the substance of the events. 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. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions. The consultation must enable the consultor to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject matter of the consultation. A consultation may be between an uninformed person and an expert or between two experts. A patient consults a doctor; a client consults his lawyer; two lawyers or two doctors may hold consultation between themselves. In either case the final decision is with the consultor, but he will not generally ignore the advice except for good reasons. So too in the case of a public authority. Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not and cannot be a performance of duty if no consultation is made and even if made, is only is formal compliance with the provisions. In either case the order is not made in compliance with the previsions of the Act. The view expressed in Fletcher's case on the content of consultation was affirmed in Rollo and Anr. v. Minister of Town & Country Planning (1948) All England Reporter 13. In Port Louis Corporation v. Attorney General, Mauritius (1965) Appeal Cases 1111 the Judicial Committee of the Privy Council observed; "consultation" connotes an exchange of ideas, information and views, in which each side has a full opportunity of contributing to such an exchange; it is not a one way process but a two way process. According to their Lordships it is essential for the executive to advise with an open mind, that is, open to persuasion and open to appreciate the advice tendered and if one may add eschew his own point of view if satisfied about its weakness. The requirement of consultation is never to be taken perfunctorily of as a mere formality. Again in R. v. Secretary of State for Social Services, exparte Association of Metropolitan Authorities (1986) 1 All England Reporter 164, Webster, J. observed at page 167 as follows : There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice.... By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might

have relevant information or advice to offer. 402. It is well settled that a Constitution is an ever evolving organic document which cannot be read in a narrow, pedantic or syllogistic way but must receive a broad interpretation. Constitution being a growing document its provisions can never remain static and the Court's endeavour should he to interpret its phraseology broadly so that it may be able to meet the requirements of an ever-changing society. But while it may be permissible to give an enlarged or expanded meaning to the phraseology used by the Constitution makers, while it may be permissible to mould the provisions to serve the needs of the society, while it may even be permissible in certain extreme situations to stretch the meaning and, if necessary, bend it forward, it would certainly be impermissible to break it or in the guise of interpretation to replace the provisions or re- write them. Giving the widest connotation to the word 'consultation', stretching it almost to the breaking point, it is not possible, in the constitutional context and having regard to the constitutional scheme and in the light of what we have discussed hereinbefore, to attribute to it the meaning of 'concurrence' or 'consent'. If any indication is needed reference may be made to Article 320(3) read with Article 323; by the former provision is made for consulting the Public Service Commission on the matters enumerated at items (a) to (e) thereof and the later provision envisages what procedure will be followed in the event the advice of the Commission is not accepted. Thus the Constitution itself recognises the possibility of the consultant not following the advice of the consultee i.e., the Commission. In that event all that Article 323 requires is that the annual report of the Commission shall be placed before the Parliament together with a memorandum explaining why the advice of he Commission was not accepted. In fact in the case of State of U.P. v. Mandodhan Lal Srivastava (1958) SCR 533, a Constitution Bench of this Court held that 'the requirement of the consultation with the Commission does not extend to making the advice of the Commission on those matters, binding on the Government'. It was, therefore, held that while consultation with the Commission is with a view to getting proper assistance and is not a mere formality, nonetheless it is not of a binding character. It is, therefore, difficult to hold that the advice tendered by the Chief Justice, of India was intended to be of a binding character and the executive had no choice but to follow it; to so hold would be to bestow a right of veto on the Chief Justice of India which does not fit in with the constitutional scheme. It was said that the object of providing for consultation was clearly to control and limit the discretion vested in the President, that is, in effect the executive, in the matter of appointments to the superior judiciary but that cannot mean that the Constitution makers desired to transfer the power of appointment to the Chief Justice of India. If it was so nothing would have been simpler than using the expression 'concurrence' or 'consent', which expressions have been deliberately not employed because the Constitution makers did not intend to vest the final say in the Chief Justice of India. This view gets reinforced if we recall to mind the fact that Mr. B. Pocker Sahib had moved amendments to introduce the requirement of the 'concurrence' of Chief Justice of India in the matter of appointments to the Supreme Court and the High Courts which were

rejected by the Constituent Assembly This factual history also lends support to the view that the Constitution makers had debated and consciously negatived the amendments. 403. It may also be mentioned that while deeding the question regarding the scope and ambit of Article 222(1) of the Constitution in Union of India v. Sankal Chand Himatlal Sheth and Anr. 1978 (1) SCR 423 : AIR 1977 SC 2328 the learned Judges comprising the Constitution Bench wen divided in their view on the question whether a High Court Judge could a could not be transferred without his consent, but there was no differenct of opinion in regard to the nature of consultation with the Chief Justice of India. All the learned Judges were in agreement that the consultation must be substantial and effective based on full and proper disclosure of material but none of the learned Judges went so far as to say that the concurrence of the Chief Justice of India was a must for effecting the transfer. All that their Lordships said was that the transfer must be in public interest. While Bhagwati & Untwalia, JJ. were of the view that the ccnsent of the Judge proposed to be transferred was essential for maintaining judicial independence, the other three learned Judges were of the view that considerations of public interest would be a sufficient safeguard against any abuse of power. It would thus be seen that learned Judges who were quite conscious of preserving the independence of the judiciary were not prepared to go to the length of construing 'consultation' to mean 'concurrence' of the Chief Justice of India. in fact Justice Krishna Iyer sounded a note of caution when he said at page 501 : His consent in such situation can never be a guide to control the clear intendment of the article reflected in its unambiguous terms. To re-write the Constitution by the art of construction, Passionately impelled by contemporary events, is unwittingly to distort the judicature scheme our founders planned with thoughtful care and to wish into words that plain English and plainer context cannot sustain. Ample as judicial powers are, they must be exercised with the sobering thought Jus dicere et mm jus dare (to declare the law, not to make it). In In Re the Special Courts Bill, 1978 (1979) 2 SCR 476 a Seven-judge Constitution Bench of this Court pointed out that the process of consultation has its own limitations which are well known and observed that as a matter of convention, it is the rarest of rare cases that the advice tendered by the Chief Justice of India is not accepted by the Government. But it is significant to note that their Lordships did not favour the introduction of the concept of concurrence of the Chief Justice of India. Even in the subsequent decision in S.P. Sampath Kumar etc. v. Union of India and Ors. 1987 (1) SCR 435 : AIR 1987 SC 386, the suggestion made was to provide for 'consultation' with the Chief Justice of India or his nominee and not concurrence. It is, therefore, manifest that this Court has shown restraint in interfering with the judicature mosaic so carefully designed in our Constitution. Bill No. 93 of 1990 was introduced in the Lok Sabha on 18th May, 1990 as the Constitution 67th Amendment Act to provide for the Constitution of the National Judicial Commission for appointments to be made to the superior judiciary. The statement of objects and reason of the Bill would show that the change was proposed to obviate the criticism of arbitrariness on the part of the executive in the appointment of Judges of the Supreme Court

and the High Courts and transfer of Judges of the High Courts and also to make such appointments without delay. The Bill envisaged the Constitution of the National Judicial Commission for recommending appointments to the Supreme Court and the High Courts. The Constitution of Commission for the former was to comprise of the Chief Justice of India as its Chairman plus two of his seniormost colleagues. For recommending appointments to the High Court the Commission was to consist of Chief Justice of India as its Chairman, the State Chief Justice Minister, one other seniormost Supreme Court Judge, the Chief Justice of the High Court and one other seniormost Judges of the High Court. It will thus be seen that even under this Bill last word in the matter of choice for appointment to the Supreme Court or the High Court was not left with the Chief Justice of India. On the contrary the proposed proviso to Article 124(2) of the Constitution contemplated non-acceptance of the recommendation of the National Judicial Commission. Even under this Bill, therefore, the last word in the matter of appointment to the High Court was not left with the Judicial Wing. Even the appointment of a Judge of the Supreme Court chosen by the Chief Justice of India and his two seniormost colleagues may not be accepted under the proposed proviso to Article 124(2) and hence to that extent the executive retained control. Therefore, even these subsequent developments do not support the proposition that the Chief Justice of India should have primacy in the matter of appointments to the superior judiciary of the country. 404. Judges being the central figures where administration of justice is concerned there can be no doubt that great care must be taken in the choice of personnel for judgeship. The method of judicial appointments would have a great deal of bearing on the quality of the judiciary and its composition. The method of appointment must ensure that the most qualified candidate secures appointment. We have indicated earlier the models of judicial selection employed by different countries. In all these models the executive has a pre- eminent role to play. We have adopted a mixed method whereunder both the executive and the judiciary play their respective roles. Our Constitution being of checks and balances, the absolute power of the executive in the choice of members of the superior judiciary is controlled by the need for prior consultation with the judicial wing. But as pointed out earlier the plain language of the relevant Articles of the Constitution does not support the theory of a veto in the Chief Justice of India, i.e., there are no indications to support the argument that the Chief Justice of India should have the last word in the matter of selection of a candidate for appointment or rejection of a candidate suggested by the other constitutional functionaries-consultees. It must be realised that the concept of 'primacy' so vigorously canvassed before us has, in the context, two aspects, namely (i) primacy in the sense of the opinion of the Chief Justice of India being the last word binding on the consultation and (ii) primacy in the sense that the opinion of the Chief Justice of India would prevail over the views of the other consultees if they are conflicting. We have already considered the first element in detail and have rejected it. So far as the second element is concerned we have set out the different facets thereof in detail hereinbefore and have pointed out the various situations which may confront

us. In the first place the plain language of Articles 124(2) and 217(1) does not support the contention. There is no warrant in the constitutional scheme to hold that any hierarchy was intended amongst the consultees. For example, as pointed out earlier, in the operation of the process under Article 124(2), four situations arise. Take situation (ii) where the President has consulted the Chief Justice of India and two or more judges of the Supreme Court and their views do not tally. Can it be said that the collective weight of the opinion of other judges would be set at naught merely because the Chief Justice of India does not agree? The Chief Justice of India is undoubtedly 'pater familias' of the Indian judiciary but the Constitution nowhere confers on him the power to eclipse the views of his co- equals. If such a views is taken the provision of consultation with others mentioned in Article 124(2) will be rendered nugatory since under the proviso the Chief Justice of India has always to be consulted. Take again situation (iii) where the President consults three Chief Justices of the States and their collective opinion differs from that of the Chief Justice of India. If the opinion of the three Chief Justice is to be shelved why consult them at all? In relation to the High Courts also, Article 217(1) provides for consultation with the three functionaries. As pointed out earlier the Chief Justice of the State, being in intimate touch with the members of the profession, would be better suited to opine on the quality of the candidate chosen by him. But a distinction exists between the legal acumen of a lawyer and qualities which go to make a good judge. In relation to the first the Chief Justice of the State would be better suited to opine but in relation to the second the executive will certainly have a role to play. It is the blending of these two roles which brings out the full personality of the candidate. It is true that in both cases the Chief Justice of India has an opportunity to filter the material before expressing an opinion and, therefore, his view is indeed entitled to greater weight but that is altogether different from saying that his view will render the views of the other consultees non-est. There being no hierarchy contemplated by Article 217(1) each consultee has a definite contribution to make which need not be ignored. The opinions of the consultees both under Article 124(2) and 217(1) are intended to act as checks on the exercise pf discretion by the executive which will be accountable to the people. It would be in exceptional cases that the executive would depart from the collective uniform advice of all the consultees. Take even a case where the Chief Justice of India expresses an opinion after consulting two of his colleagues. What if the opinion of his colleagues differs? Still his opinion will prevail Then the President consults a few judges of the Supreme Court and the High Courts and their uniform opinion conflicts with that of the Chief Justice of India. It would be unfair if the opinion of the other consultees is rendered redundant because it does not concur with the opinion of the Chief Justice of India. It is one thing to say that great weight should be attached to the opinion of the Chief Justice of India and another thing to say that amongst the consultee his word will be final. We, therefore, find it difficult to hold that the opinion of the entire judiciary is symbolised in the view of the Chief Justice of India and the President is bound to act in accordance therewith under Article 74(1) of the Constitution. Such a

view may tend to make the Chief Justice of India insensitive to the views of the other consultees and may embroil him in avoidable litigation. 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 command acceptance. We think, such an interpretation of the constitutional provisions would tantamount to re-writing the Constitution under the guise of interpretation which distort the judicature fabric found woven into the Constitution. Therefore, however convincing it may sound to the ideal of judicial independence that the views of the Chief Justice of India must have primacy as his views expressed after consulting his two seniormost colleagues would be symbolic of the views of the entire judiciary, the submission cannot be accepted unless the Constitution is amended. As the constitutional provisions presently stand, the submission based on this line of reasoning is unacceptable. For the foregoing reasons, but subject to the qualifications in the concluding paragraph, we do not think the majority view in S.P. Gupta's case articulated in the judgments of Bhagwati, Fazal Ali, Desai and Venkataramiah, JJ. requires reconsideration on this aspect of the matter.
405. In the view we take on an interpretation of Articles 124(2) and 217(1), the submission of Mr. Shanti Bhushan and Mr. Jethmalini loses significance. Even otherwise, we do not see any merit in the submission. The governmental powers are ordinarily divided into (i) executive (ii) legislative and (iii) judicial. The power to appoint judges to the superior courts is an executive function. By virtue of Article 53 the executive power is undoubtedly vested in the President which he must exercise 'in accordance with this Constitution. Similarly under Article 154 the executive power of the State vests in the Governor which his must exercise in accordance with the Constitution. Articles 73/162 provide that subject to the provisions of the Constitution, the executive power of the Union/State shall extend to matters with respect to which Parliament/State Legislature has power to make laws, Counsel submitted that since neither List I nor List III in the Seventh Schedule empowers the making of any law regarding appointments to the superior judiciary it must be presumed that the power exercised by the President is not one which would attract Article 74(1) of the Constitution. But here counsel overlooks Article 248 and the residuary entry 97 in List (by which exclusive power is conferred on Parliament to make laws even in respect of subjects not specifically covered. Under the Constitutional scheme the States can make laws in respect of the subjects enumerated in List II in the Seventh Schedule. But that does not mean that the executive power is confined to matters falling within the legislative entries only. It must be remembered that both the President and Governor are formal heads and the executive power of the Union/State has to be exercised in the name of the respective heads. The President as well the Governor exercise power conferred by the Constitution on the aid and advice from the respective Council of Ministers, except where the Governor is required by or under the Constitution to exercise his functions in his discretion. The precise language

of Article 163(1) uses the words "except in so far as he is 'by or under' this Constitution required to exercise his functions or any of them in his discretion". It may be noticed that the words carving out the exception are not to be found in Article 74(1). That is way in Shamsher Singh v. State of Punjab 1975 (1) SCR 814 : AIR 1974 SC 2192 it was held at page 835 that only those executive functions which by or under the Constitution are required to be performed by the Governor in his discretion can be performed without the aid and advice of the Council of Ministers and none else. This Court enumerated instances of constitutional requirements where the Governor must act in his discretion. Since Article 217(1) does not say that the said function the Governor must perform in his discretion it is obvious that in the matter or appointments to the superior judiciary the Governor must act according to the aid and advice received from his Council of Ministers. Similarly by virtue of Article 74(1) the President is obliged to act on the advise of the Council of Ministers. It must also be realised that under Articles 75(3) and 164(2) the Council of Ministers are collectively responsible to the House of the People in the case of the Union and the Legislative Assembly in the case of the State. If the President or Governor refuse to act on the advice of their Council of Ministers, it would result in a constitutional crisis. We have, therefore, no doubt in our minds that in the form of parliamentary democracy which we have adopted, the President and the Governors are symbolic heads and so long as their Council of Ministers exist they must abide by their advice except where the Governor is required by or under the Constitution to act in his discretion. We, therefore, reject this contention. 406. Before we proceed to the next topic two offshoots which surfaced during the hearing may be mentioned. The first concerned the transfer of judges and the second related to the mode of selection of personnel for appointment. By the referring judgment in Subhash Sharma's case these aspects have not been referred for consideration by the largest bench and, therefore, the contesting parties have not entered their pleadings on the points and perhaps even the learned Counsel were not fully prepared to deal with them. The various aspects of the transfer policy have been discussed at length in two decisions of this Court, viz, in Sankal Chand Sheth's case and S.P. Gupta's case. It had been clearly held that the transfer must be in public interest to subserve the needs of administration of justice. Article 222(1) enjoins prior consultation with the Chief Justice of India alone and hence his view would not reflect the views of the judiciary as the plurality concept is absent. The learned Attorney General rightly pointed out that after a candidate is chosen as a judge, greater care must be shown in dealing with him, a member of the judiciary, to ensure that the power of transfer is no viewed as an instrument to subvert the judiciary. Since here the only person to be consulted is the Chief Justice of India, a heavy responsibility lies on his shoulders to ensure that the transfer is in public interest and in the interest of judicial administration. The language of Article 222(1) does not convey that once a judge is transferred from one High Court to another, qua him the power of transfer gets exhausted and a second transfer is not permissible without his consent. It goes without saying that unless there are very pressing reasons, the

Chief Justice of India will not consent to a second transfer. And since this is a post-appointment stage, the view of the Chief Justice of India will have a greater say in the matter because exercise of the power to transfer a member of the judiciary by the executive is likely to be misunderstood as executive's effort to undermine the independence of the judiciary. The weight to be attached of the views of the Chief Justice of India in this field would be much more than what his opinion would carry at the pre-entry stage. Since the transfer can be effected in public interest only that requirement or limitation would safeguard judicial independence. A transfer effected in public interest cannot be punitive but care must at all times be taken to ensure that in the guise of public interest a High Court judges is not being actually penalised. When a puisne judge is transferred to take over as a Chief Justice elsewhere such a transfer would never be construed as penal because of the elevation involved in it but where the transfer is a second one qua the individual it is likely to be so interpreted and hence a far greater responsibility is cast on the Chief Justice of India during the consultation process to take every precaution to see that it is not so. Once this care is taken there is nothing in Article 222(1) to limit the power to only one transfer without the concerned judge's consent and thereafter only with his consent. 407. On the second point, namely, the mode of selection for appointment to the Supreme Court, there was hardly any discussion at the Bar and except for general platitudinous exchanges there was hardly any concrete suggestion emerging from the discussion. In the points formulated by learned Counsel in the course of their address no one had made any mention of guidelines to be followed by the Chief Justice of India in the matter of choice of candidates for appointment to the Supreme Court. So also none of the counsel formulated any specific points for laying down any guidelines to be followed by the Chief Justice of High Courts for appointments to be made to the High Court. In these circumstances, we think it would be hazardous to lay down any guideline in this behalf. This bench was constituted to consider the two points specifically mentioned in Subhash Sharma's case to which the pleadings are restricted and no question was specifically formulated even at the hearing of the reference on the procedure to be followed in the matter of appointments to the superior judiciary. In the absence of proper assistance from Bar we deem it unwise to express any opinion in this behalf. As Desai, J. would say : 'It is a well recognised pithet of constitutional wisdom that in constitutional matters the courts do not decide what is not brought before it nor would it proffer advice except in a reference under Article 143, on the wisdom or validity of a future action'. We are, therefore, of the opinion that it would be wise not to attempt laying down guidelines on one's own impressions about the working of the selection process. Despite this demurer we feel that since our leaned brothers have chosen to lay down certain guidelines or norms in regard to appointments, which in our view would be obiter dicta only, and which, we are afraid, may, for want of an intense debate at the Bar, create more problems rather than solve existing ones and may also embroil the Chief Justice of India into avoidable litigation and embarrassment, we must clearly express ourselves lest our silence is construed as consent. It must be remembered that entry

into the superior judiciary is by invitation and judges constituting the superior judiciary are not stricto- sensu civil servants. The functions to be performed by those constituting the superior judiciary are totally different from those performed by the district judges. Similarly the nature of duties and functions undertaken by judges of the apex court are different from those at the High Court level. Therefore, to say that in the matter of appointment to the apex court inter-se seniority in the concerned High Court and at the combined seniority at the all-India level should be given due weight unless there be strong cogent reasons to justify a departure would, to say the least, create a host of problems. Take for example, the first four judges in the all-India seniority are from a single High Court. If you appoint all of them the 'representative' character of the Court will be disturbed. Take for example the senior most judge of High Court X is at serial No. 50 in the all-India seniority and there is no judge in the apex court from that High Court which is one of the major High Courts. The Chief Justice of India will find it difficult to nominate him for appointment and if he does there is every possibility of his seniors questioning the decision of the Chief Justice of India in Court. In order to maintain the representative character of the High Courts and the Supreme Court so that people of all hues have confidence in the institution, the rule of seniority, which may be valid for Civil Services (even in Civil Services the higher posts are filled on merit), can have no application to constitutional functionaries. So also the 'legitimate expectation' doctrine can have no relevance in determining the suitability of the appointee. The seniority principle and the legitimate expectation doctrine are incapable of realistic application as they would destroy the representative character of the superior judiciary, which is absolutely essential for every segment of society to have confidence in the system. The seniority principle and the legitimate expectation doctrine would only push merit to the second place. Appointments to the superior judiciary should be solely on merit and other suitability factors and not on the basis of inter se seniority in the High Court or placement in the combined all-India seniority list. There can be no room for the legitimate expectation doctrine in cases where appointments are on merit and by invitation. We must hasten to add that where both the candidates under consideration are of equal merit, inter se seniority may have a role to play, subject to other requirements for maintaining the representative character, etc., being satisfied. We cannot help voicing our fear that the application of those help principles in the matter of choice of candidates for the superior judiciary is fraught with dangers. Nowhere in the world have these two principles been considered valid for appointments to the superior judiciary, except perhaps in france where the judiciary service is a career service, quite different from common law jurisdictions. As the issue does not arise from the referring judgment and was not put into direct focus, and as there was hardly any meaningful dialogue at the Bar, we too do not desire to go into the various facets of the matter as it is generally inadvisable to express opinions in the nature of obiter dicta on constitutional issues of great significance but we have said a few word lest our silence may be misunderstood to be concurrence with the observations made in the judgment of our learned

colleagues. 408. That takes us to the second question whether the issue regarding the fixation of judge-strength under Article 216 of the Constitution is justiciable. There is no doubt that every High Court with the exception of one or two has swollen dockets. The backlog is substantial in these High Courts. Justice, social, economic and political is our constitutional goal. When members of a civilised society agree to have their disputes settled through an independent and impartial mechanism offered by the State, with a set of laws and rules governing the same, we think, there is an implied promise that the mechanism so offered will deliver the goods within a reasonable time. Human race has always remained conscious of the sense of justice and, therefore, justice has always been the first virtue of any civilised society. There can, therefore, be no doubt that all those concerned with the judicial system in this country must be alive to the fact that because of diverse reasons, but entirely of the making of the judiciary, the judicial system has not been able to keep its implied promise to dispense justice within a reasonable time. This is essentially on account of the fact that not sufficient attention has been paid to modernise our judicial system, cooperation from those connected with the system has been grudging and the members of the profession too have contributed by frequent adjournments and strikes. The executive too has not been able to contain its litigation docket and a tendency is clearly discernible that even high ranking officers are not prepared to take responsibility and find it easy to rest the responsibility on the judiciary. Politico-legal issues are also diverted to courts which consume a lot of judicial time. There has been an environmental degradation which has also affected the work culture of the judiciary. The service conditions of judges are no more attractive, they take no notice of the earnings of an average lawyer, with the result that recruitment from the Bar of persons of the right stamp is difficult which slows down the disposal of cases and increases appellate and revisional work. It is, therefore, essential that we realise that judge-strength is only a small contributing factor. Here also we cannot lose sight of the fact that there is always an optimum strength beyond which it would be a mere surplusage because it is common knowledge that in every District Court or the High Court work is concentrated in the hands of a few lawyers and their non-availability on account of they being engaged before another judge may render the other judges idle. It would, therefore, be wrong to think that the increase in the judge-strength alone will solve the problem or arrears; it may, if scientifically worked out, certainly ease the same. What is really necessary is to effectively manage the dockets. Take for example a case where the apex court lays down the law n any subject. Now all cases down the line which depend on this decision must be disposed of in terms of the law laid down by the apex court. But for want of management no one knows how many such case are pending in all courts. As a result they remain dormant on the court registers and are disposed of only after they appear on the daily board in their own turn. It in the meaning complications have occurred even the disposal will be delayed. This is merely to highlight that increase in the judge-strength by itself will not make a very substantial impact unless the entire system is modernised with the help of computers etc., and a virtual crusade

is undertaken with the help of the members of the profession, the executive and the judiciary to combat law' delays. 409. As stated earlier, increase in the judge -strength may somewhat ease the problem of delay in the disposal of cases. Article 216 provides that every High Court shall consist of the Chief Justice of such other judges as the President may from time to time deem it necessary to appoint. The Article clearly casts a duty on the President, i.e. the executive, to decide from time to lime on the number of judges necessary to be appointed in every High Court. The words 'deem it necessary to appoint' when read with 'from time to time' leave nothing to doubt that the Article envisages periodical assessment of the judge- strength by the executive in respect of each High Court. This is undoubtedly a constitutional obligation which must be performed in time and without delay. It may be noticed that this provision does not provide for consultation with the judicial wing but normally the Chief Justice of the High Court initiates a move for increase in the judge- strength because he is better suited to know his requirements. Since the fixation of judge- strength depends on a variety of factors no uniform rule of general application can be evolved as the situation in each High Court cannot be identical. Local factors differ and they cannot be wished away. It cannot be so simple as dividing the pending backlog by the disposal norm fixed for each judge to arrive at the number of judges required. Take a case where the number of judges is adequate but cases have piled up on account of frequent stoppages - we are not on the justification for the stoppage of work but on the factum. Can a demand for upward revision of judge-strength be justified? Even if additional judges are appointed but the scenario of stoppage of work continues, will the increase in the judge-strength make any significant impact on the disposals? Unfortunately, there are very few High Courts and courts subordinate thereto which do not face this problem. Similarly take the situation where because of the high disparity ratio between average earnings at the Bar and the service conditions offered to judges, candidates of the right stamp are not available, would it make any significant impact on the disposals if less than average ability candidates are appointed to fill the increase posts. The entire problem is a complex one and eludes a workable solution. That is way in S.P. Gupta's case Bhagwati, J. said that since many complex policy considerations are involved, in the absence of 'judicially manageable standards', it is not possible to lay down any guideline of general application. Bhagwati, J., therefore, thought that it would not be possible for the judiciary, in the absence of judicially manageable standards, to issue any directive to the executive and, therefore, the matter must essentially remain within the discretion of the executive and if the latter does not appoint sufficient number of judges, the appeal must be to the legislature and not to the court. Tulzapurkar, J. on a consideration of Articles 216 and 224(1) came to the conclusion that thought a mandatory obligation is cast on the President to provide adequate strength of permanent judges in each High Court, it would not be 'proper' of the Supreme Court to give directions or reliefs by way of issuing a mandamus to make additional judges permanent by increasing the permanent strength of the High Court. He further stated that appointing judges is purely an executive function

entrusted by the Constitution to the executive and it would not be 'proper' for the Supreme Court to usurp that function to itself or issue a directive in that behalf 'unless forced by glaring circumstances', Desai, J. endorsed the view of Bhagwati, J. and observed : 'Failure to perform duty of appointing adequate number of judges in the High Courts cast on the President by Article 216 would make him answerable to the Parliament and not to the Court'. Pathak, J. while reiterating that Article 216 mandates a periodic review of the judge-strength in every High Court held that it is a purely executive function and 'the court cannot by judicial verdict decide how many permanent judges are required for the High Court. Venkataramiah, J. struck a different note when he observed : the power conferred on the President by Article 216 of the Constitution to appoint sufficient number of Judges is a power coupled with a duty and is not merely a political function. In the instant case ordinarily the court would have been reluctant to issue any mandamus to the Government to comply with the duty of determination of the strength of Judges of High Courts. But having regard to the undisputed total in adequacy of the strength of Judges in many High Courts, it appears to be inevitable that the Union Government should be directed to determine within a reasonable time the strength of permanent Judges required for the disposal of cases instituted in them and to take steps to fill up the vacancies after making such determination. He then went on to give a directive to the Union Government to review the strength of permanent judges in very High Court, to fix the number of permanent judges that should be appointed on the basis of work-load and to fill up the vacancies. He directed a writ in the above terms to issue. 410. From the above it is clear that three of the learned judges, namely, Bhagwati, Desai and Pathak, JJ. were clearly of the opinion that the question of fixation of judge-strength under Article 216 was essentially an executive function and not justiciable in court. They held that judiciary cannot issue a writ or a directive if the executive fails to perform its duty under Article 216 and the remedy lies in the legislature. Tulzapurkar, J., however, felt it would not be 'proper' for the court to give directions or issue a writ because appointing judges being a purely executive function it would be wrong to usurp that function 'unless forced by glaring circumstances'. He, therefore, put it on the ground of propriety but qualified it by the words 'unless forced by glaring circumstances' which imply that if glaring circumstances exist the power can be exercised by the Court. It is, therefore, necessary to bear the distinction in mind between absence of power and jurisdiction and refusal to exercise power on the ground of propriety although the court has inherent jurisdiction. Therefore, the first three learned judges have ruled that the court lacked the power and jurisdiction to issue writ or directive while the fourth leaned judge- says it would not be 'proper' to exercise that power unless glaring circumstances exist. Venkataramiah, J., however, held the issue to be justiciable to the limited extent of directing the Union to review the judge-strength periodically on the basis of workload. But as pointed out earlier fixation of judge-strength solely on the basis of workload may not be correct because accumulation of workload may be for diverse reasons. 411. The question of judicial manpower planning engaged

the attention of the law Commission of India. Lamenting on the neglect of this important aspect notwithstanding laws' delay, the Commission pointed out the low judge-population ratio, 10.5 judges per million people in India, as compared to other countries where it varied from 41.6 judges per million population in Australia to 107 judges per million population in the USA and realised it was difficult to envisage a five-fold increase in the judge-strength within a short span. But the Commission conceded : The Commission has a feeling that absence of hard technical information and analysis has reinforced, if not generated, a tacit indifference to the situation by all concerned including the judicial administration. The Commission itself is in no position, given the fact of its present structure, to provide this kind of technical analysis only on which sound programme of change can be envisaged, of course, the Commission has done the next best thing and elicited extensive opinion of those knowledgeable in the field and general public. But we must admit that, all said and done, this is a very poor substitute for sound scientific analysis. (emphasis supplied) The was the first interim report (120th Report) of the Commission. The Commission recommended increasing the ratio of judges per million of population from 10.5 to 50 i.e. a fivefold increase. This was followed by a comprehensive report (121st Report) on "A New Forum Judicial Appointments". The 127th Report dealt with the proble ms of improvement in the infrastructure for the judiciary. It will be seen from the observation of the Commission extracted from the 120th Report, that even the Law Commission which had the time and opportunity to undertake a technical analysis on which a sound and durable formula could be evolved expressed its inability to do so and fell back on what it considered 'the next best thing' and 'a very poor substitute' for sound scientific analysis. The purpose of mentioning this is to point out that a scientific method on the fixation of judge-strength is no easy task. If it was difficult for a body like the Law Commission which had expert advice and time available to itself it would be virtually impossible for the courts to undertake svach an exercise. 412. In the above background the question must still be answered on legal principle whether the issue is or is not justiciable i.e. is it beyond the purview of the court or is it merely not proper to give any direction or issue a writ, though justiciable. This in essence raises the question of the ambit of judicial review. Under this doctrine High Courts and the Apex Court exercise supervisory jurisdiction over persons who are charged with the performance of public acts and duties. This jurisdiction was derived by courts though common law and was exercised by the issuance of an appropriate writ. What is generally reviewed is not the merits of the action but the decision making process itself. The court's duty normally is to confine itself to question of legality i.e. has the authority exceeded its powers or abused them, did it act in violation of the principles of natural justice or has it acted in a irrational, unreasonable, and arbitrary manner or the like. Broadly speaking, administrative action is subject to judicial review on three grounds, namely (i) illegality (ii) irrationality and (iii) processual impropriety. But this may be true of cases where the public authority has performed its public duty and the action is questioned. But where the allegation is that the

public authority is guilty of non-performance of its public duty and it is shown that it has failed to perform its constitutional or statutory duty, can it be said that there is no remedy available through court and a mandamus cannot issue? In order, however, for a mandamus to issue to compel performance of a duty, it must clearly appear from the language of the statute that a duty is imposed, the performance or non- performance of which is not a matter of mere discretion. But even in cases where the duty is discretionary, as distinct from a statutory obligation, a limited mandamus could issue directing the public authority to exercise its discretion within a reasonable time on sound legal principles and not merely on whim. Therefore, if the executive which is charged with a duty under the Constitution to undertake a periodical review of the Judges-strength fails in the performance of that duty, an order of mandamus can lie to compel performance within a reasonable time. Therefore, in principle, it is not possible to say that the issue is wholly outside the Court's purview and the remedy is merely to knock the doors of the legislature. Albeit, a proper foundation must be laid because the Court will be extremely slow in exercising its extraordinary powers to issue a writ of mandamus compelling performance of a certain duty unless it is fully satisfied that the executive has totally omitted to pay attention to its constitutional obligation and needs to be awakened from its slumber. But in the guise of exercising the power of judicial review care must be taken to ensure, as pointed out by Tulzapurkar, J., that the judiciary does not usurp this executive function to itself. But as Tulzapurkar, J. warns no directive would be possible unless forced by glaring and compelling circumstances which would be possible only if full, complete and correct assessment of the requisite strength of each High Court is available and the court feels that the executive has been oblivious to the said facts. In the absence of judicially manageable standards this may not be possible, in which case the exercise of power would be in vain and normally a court does not act in vain. We are, therefore, of the opinion that if there is a wilful and deliberate failure on the part of the executive to perform its duty under Article 216, a writ can issue to the limited extent of merely directing the executive to perform its part but the court cannot usurp the function itself and direct the executive to raise the judge-strength to any particular level. 413. The need for periodical revision of the judge-strength is essentially to ensure early disposal of court cases; the entire exercise would be meaningless if the existing vacancies and the new ones created by increase in the judge-strength are not filled in promptly. This has been emphasised time and again and even though a time bound programme for dealing with the proposals has been provided, delays continue on account of the functionaries involved in the process not abiding by the same. The process, particularly in the case of appointments to the High Courts, is time consuming as tae proposal has to pass through as many as six consultees but that is all the more reason why each functionary must show a sense of urgency to see that the proposal is not delayed unnecessarily. With the experience of working the system over more than four decades it would not be difficult for the Minister of Law and Justice in the Central Government to revise the guidelines, fix the maximum time each consultee must take on

the proposal having regard to the role he is expected to play and ensure strict compliance at the executive level. This will help expedite the movement of the proposal and if it its found to be unreasonably withheld, the functionary may be compelled through a writ to perform his public duty within the time allowed by the court. We are sure that if the functionaries involved in the decision-making process realise their duty and obligation to society particularly to the consumers of justice, the need to move the court will not arise. We, therefore, hold that the issue is justiciable only to the limited extent indicated above and as manifested by the limited writ issued by Venkataramiah, J. in S.P. Gupta's case and that too in the rarest of rare cases where glaring and compelling circumstances force the court to act. 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. (ii) The method of selecting a judge for the Supreme Court and the High Court is outlined in Articles 124(2) and 217(1) of the Constitution. While in the United States, the United Kingdom, Australis and Canada appointments to the superior judiciary are exclusively by the executive, our Constitution has charted a middle course by providing for 'prior consultation' with the judiciary before the President, i.e. the executive, makes the appointment to the Supreme Court or the High Courts. Therefore, however convincing it may sound to the ideal of judicial independence that the views of the Chief Justice of India must have primacy as his views expressed after consulting his two seniormost colleagues would he symbolic of the views of the entire judiciary, the submission cannot be accepted unless the Constitution is amended. As the constitutional provisions presently stand, the submission based on this line of reasoning is unacceptable. (iii) Under our constitutional scheme prior consultation with the Chief Justice of India is a must under Articles 124(2), 217(1), 217(3) and 222(1) but the weight to be attached to the views of the Chief Justice of India would depend on whether it is at the pre-appointment stage or the post- appointment stage and whether he is one of the consultees or the sole consultee. (iv) The concept of primacy to be accorded to the views of the Chief Justice of India has three elements, namely, (a) primacy as 'pater familias' of Indian Judiciary, (b) primacy to be accorded to his views amongst the consultees mentioned in Articles 124(2), 217(1) and (c) primacy in the sense that the opinion of the Chief Justice of India would be binding on the President, i.e., the executive. The position of the Chief Justice of India under the Constitution is unique, in that, on the judicial side he is primus inter pares, i.e., first among equals, while on the administrative side he enjoys limited primacy in regard to managing of the court business. As regards primacy to be accorded to his views vis-a-vis the President, i.e. the executive, although his views may be entitled to great weight he does not enjoy a right of veto, in the sense that the President is not bound to act according to his views. However, his views would be of higher value vis-a-vis the views of his colleagues, more so if he has expressed them after assessing the views of his colleagues but his view will not eclipse the views of his colleagues forbidding the President, i.e. the executive, from relying of them.

The weight to be attached to his views would be much greater as compared to the weight to be accorded to the views of the other consultees under Article 217(1) since he has had the advantage of filtering their views and ordinarily his views should prevail except for strong and cogent reasons to the contrary but that does not mean that the views of the other consultees would be rendered irrelevant or non-est forbidding the President, i.e. executive, from noticing or relying on them. The views of the Chief Justice of India would be entitled to even greater weight when he is the sole consultee under the constitution, e.g. Article 222(1), more so when it concerns a member of the judicial family and ordinarily his view should be accepted and acted upon by the President, i.e. the executive, unless there are compelling reasons to act otherwise to be recorded in writing so that the apprehension of the executive having acted in a manner tantamounting to interference with judicial independence is dispelled. Thus graded weight has to be attached to the views of the Chief Justice of India as indicated hereinabove. (v) There is nothing in the language of Article 222(1) to rule out a second transfer of a once transferred judge without his consent but ordinarily the same must be avoided unless there exist pressing circumstances making it unavoidanble. Ordinarily a transfer effected in public interest may not be punitive but all the same the Chief Justice of India must take great care to ensure that in the guise of public interest the judge is not being penalised. (vi) The question of fixation of judge-strength under Article 216 is justiciable, in that, a limited mandamus can issue to the executive to perform its constitutional duty within a reasonable time in the manner and to the extent indicated in the direction given by Venkataramiah, J. S.P. Gupta's case. But this would be in the rarest of rare cases where there exist glaring and compelling circumstance which would force the hands of the Court. (vii) We respectfully do not agree with the observations made in the judgment of Brother Verma, J. in regard to the application of the principle of seniority and legitimate expectation, etc. for reasons stated hereinbefore. 414. Before we say adieu we owe debt of gratitude to the learned Attorney General who appeared in response to our notice and to the leaned counsel who appeared on either side. This styles of presentation of their view points differed but they brought to bear, with telling effect, their knowledge of constitutional law. Forensic art was at its best and we are deeply grateful for their able assistance which has made our task of decision-making relatively easy. With these words we say adieu to this reference. Reference disposed of accordingly. Kuldip Singh, J. 415. The President of India is the Appointing Authority for the Judges of the High Courts and of the Supreme Court. He is to make the appointments - under Articles 217(1) and 124(2) of the Constitution of India - after consultation with the Chief Justice of India and other functionaries drawn from Judiciary as well Executive. In the exercise of his functions the President of India is bound to act in accordance with the advice tendered by the Council of ministers. The core question for our consideration is whether the Judiciary headed by the Chief Justice of India or the Council of Ministers headed by the Prime Minister has a primal say in the matter of appointment of Judges of the High Courts and of the Supreme Court. The other question before us is whether the

judiciary can interfere and force appointments adequate in number to carry on the judicial work of the country. 416. These questions are not res-integra. A Seven Judge Bench of this Court in S.P. Gupta and Ors. etc. etc. v. Union of India and Ors. etc. etc. 1982 (2) SCR 365 : AIR 1982 SC 149 has held that the Central Government can override the opinion given by the constitutional functionaries and can arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court. In other words the Executive has the primacy in the matter of appointment of Judges and it can ignore the opinion rendered by the Chief Justice of India and other judicial functionaries in the process of consultation. The second question was also answered in the negative. We are called upon to pronounce upon the correctness or otherwise of the law laid down by this Court in S.P. Gupta's case on the above two question. 417. Eminent lawyers assisted us at the hearing. Mr. F.S. Nariman, Mr. Kapil Sibal, Mr. Shanti Bhushan, Mr. Ram Jethmalani, Mr. P.P. Rao, Mr. R.K. Garg and Mr. S.P. Gupta canvassed before us - interpreting the relevant constitutional provisions from different angles - that the judgment of this Court in S.P. Gupta's case needs re-consideration. Mr. K. Parasaran represented the view point of the Union of India. Mr. Milon Banerjee, learned Attorney General rendered valuable assistance. Advocate-General Karnataka, Advocate-General Madhya Pradesh and Advocate-General Sikkim were also heard by us. The arguments were advanced by the learned Counsel on both sides in a non-contentious atmosphere. We place on record our appreciation for the learned Counsel. But for their assistance it would not have been possible for us appreciate the complicated and delicate issue involved in this case. 418. From the arguments of the learned Counsel - oral and written - we cull-out the following issues for adjudication : 1. Stare decises - Is it a bar to re-consider S.P. Gupta's case? 2. Interpretation of constitutional - What are the rules? provisions 3. Independence of Judiciary - Broader version of the 'concept 4. Constitutional conventions - Scope and field of operation. Do we have an established convention giving primacy to the Judiciary in the matter of appointment of Judges to the Superior Courts? 5. After consultation with - Can the expression be read to mean that the Executive is bound by the advice rendered by the Chief Justice of India as head of the judiciary? 6. The Chief Justice of India - Whether acts in his individual (Articles 124(2) and 217(1) capacity or as head of the Judiciary? 7. Chief Justice of India - The office to be filled by selection on merit or by mere seniority? 8. Other issues - a) Appointments to Supreme Court; - b) Transfers (Article 222); - c) Fixation of Judges-strength. Stare decisis 419. Mr. K. Parasaran, learned senior advocate, appearing for the union of India has contended that the doctrine of stare decisis being the corner stone of our legal system, we should not interfere with the ratio of this Court in S.P. Gupta's case which has stood the test of time. 420. 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 over-ruled 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." Interpretation of constitutional provisions 421. The Framers of the Constitution planted in India a living tree capable of growth and expansion within its natural limits. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people. Constitutional law cannot be static if it is to meet the needs of men. New situations continually arise. Changes in conditions may require a new-look at the existing legal concepts. It is not enough merely to interpret the constitutional text. It must be interpreted so as to advance the policy and purpose underlying its provisions. A purposeful meaning, which may have become necessary by passage of time and process of experience, has to be given. The Courts must face the facts and meet the needs and aspirations of the times. 422. Interpretation of the Constitution is a continual-process. The institutions created thereunder, the concepts propounded by the framers and the words, which are beads in the constitutional-rosary, may keep on changing their hue in the process of trial and error, with the passage of time. 423. When the words in the Constitution - defining institutions and their functioning - were drafted, the Framers could not have foreseen as to what would be the development in the coming future. In R.C. Poudyal v. Union of India (1993) 3 Scale 486 at 508, M.N. Venkatachaliah, J. (as the learned Chief Justice then was) observed as under : 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 change of concept themselves is vital solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth 424. The case before us must be considered in the light of our entire experience and not merely in that of what was said by the Framers of the Constitution. While deciding the questions posed before us we must consider what is the Judiciary today and not what it was fifty years back. The Constitution has not only to be read in the light of contemporary circumstances and values, it has to be read in such a way that the circumstances and values of the present generation are given expression in its provisions. An eminent jurist observed that "Constitutional interpretation is as much a process of creation as one of discovery". 425. It would be useful to quote hereunder a paragraph from the judgment of Supreme Court of Canada in Hunter v. Southam INC (1984) 2 SCR 145 at 156 : It is clear that the meaning of 'unreasonable' cannot be determined by recouse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a Constitution is crucially different from that of construing

a statute. A Statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when jointed by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American Courts 'not to read the provisions of the Constitution like a last will and testament lest it become one. 426. The constitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution. In Minister of Home Affairs v. Fisher (1980) A.C. 319 dealing with Bermudian Constitution, Lord Wilberforce reiterated that a Constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its character". 427. In S.P. Gupta's case the 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. The Court did not keep in view the well established rules of constitutional-interpretation. We are, therefore, justified in re-opening and reconsidering the questions already determined by this this Court in S.P. Gupta's case. Independence of Judiciary 428. The Constitution of India which we have given to ourselves is the fundamental law of the land. The Judiciary, under the Constitution, is designed to be an intermediary body between the people on the one side and the Executive on the other. It belongs to the Judiciary to ascertain the meaning of the constitutional provisions and the laws enacted by the Legislature. In order to keep the Executive/Legislature within the limits assigned to their authority under the Constitution, the interpretation of laws is the proper and peculiar province of the Judiciary. Constitution is the "will" of the people whereas the statutory laws are the creation of the legislators who are the elected representatives of the people. Where the will of the legislature - declared in the statutes - stands in opposition to that of the people - declared in the Constitution - the will of the people must prevail. The Constitution of India provides for an elected President. House of people is elected. The State Legislators are elected. Supreme Court Judges are not elected, they are appointed under the Constitution. So are other High Court Judges. Yet the Constitution gives unelected Judges a power - called judicial review under

which they nullify unconstitutional acts of the Executive and of the elected representatives of the people assembled in the Parliament and the State Legislatures. This conclusion does not suppose that the Judiciary is superior to the Legislature. It only supposes that the power of the people - embodied in the Constitution - is superior to both. 429. The role of the Judiciary under the Constitution is a pious trust reposed by the people. The Constitution and the democratic-polity thereunder shall not survive, the day Judiciary fails to justify the said trust. If the Judiciary fails, the Constitution fails and the people might opt for some other alternative. 430. In view of the role of the Judiciary in the context of the Constitution it is fallacious to say that the Legislators alone are answerable to the people regarding the functioning of the Judiciary. It is rather the Judiciary which screens the functioning of the Executive and the Legislatures through the process of judicial review. This Court, therefore, was not justified when in S.P. Gupta's case, it gave primacy to the Executive on the ground that the Executive through the Legislators was answerable to the people regarding the functioning of the Judiciary. 431. Independence of Judiciary is the sine qua non of democracy. So long as the Judiciary remains truly distinct from both the Legislature and the Executive, the general power of the people can never be endangered from any quarters. Montesquieu in his book "Spirit of Laws" observed "there is no liberty, if the power of judging be not separated from the legislative and the Executive powers". The framers of the Constitution made it known in an emphatic-voice that separation on Judiciary from Executive, which is the life-line of 'independent Judiciary', is a basic feature of the Constitution. Dr. B.R. Ambedkar in his speech in the Constitution Assembly on June 7, 1949 observed as under : I do not think there is any dispute that there should be separation between the executive and the judiciary and in fact all the articles relating to the High Court as well as the Supreme Court have prominently kept that object in mind. 432. To safeguard the 'will' of the people - enshrined in the Constitution - it is necessary to keep the Judiciary truly distinct from both the Legislature and Executive. This is what Framers of our Constitution have done. It was, however, contend at the bar that the independence of the Judiciary has been secured by providing security of tenure and other conditions of service of individual Judges. This may be so but in recent times, with the expanded horizon of judicial review, the concept of judicial independence has achieved new heights. The Supreme Court of Canada in The Queen v. Beauregard (1987) LRC 180 propounded the broader concept of judicial independence as under : Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases the come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle. Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The ability

of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle. Today, however, the principle is far broader. In the words of a leading academic authority on judicial independence, Professor Shimon shetreet : "The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional along with other institutions in shaping the life of its community.... There is, therefore, both an individual and a collective or institutional aspect to judicial independence. As stated by Le Dain, J. in Valente v. The Queen (1985) 2 SCR 673, at pp. 685 and 687 : (Judicial independence) connotes not merely a State of mind or attitude in the actual exercise of judicial functions, but a status or relationship to other, particularly to the executive branch of government, that rests on objective conditions or guarantees. ... ... It is generally agree 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. The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it rule of law, fundamental justice, equality, preservation of the democratic process to name perhaps the most important. In other words, judicial independence is essential judicial for fair and just dispute-resolution in individual cases. It is also the life blood of Constitutionalism in democratic societies. Deckson C.J. who spoke for the Court, further observed as under : The role of the Courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function form all other participants in the justice system. 433. We respectfully agree with the concept of judicial independence as enunciated by the Supreme Court of Canada in the above quote judgment. It is not the security of tenure provided to an individual judge which alone is the source of independence of judiciary but there has to be an independent judiciary as an institution. The judiciary in India has to act as an impartial umpire to resolve disputes between the Government and the private individuals as well as between the Government inter se. It has also to protect the fundamental rights of the individuals guaranteed under Part III of the Constitution. The courts in this country have already expanded the scope of judicial review by bringing in its ambit social, economic and political justice. Keeping in view the expending horizon of judicial review it is the paramount need of the time that not only the independence of an individual Judges is to be secured but the independence of Judiciary as an institution has also to be achieved. 434. 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 inextricable 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 from 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's 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 the broader facets of the two concepts - 'independence of Judiciary' and 'judicial review' -which are inter-linked. Constitutional conventions 435. The Constitution of India is an elaborate document consisting of 395 Articles and ten Schedules. Despite that there are Constitutional provisions - operative in various fields - which are nowhere to be found in the written test of the Constitution. For instance it is a fundamental requirement of the Constitution that if the opposition obtains the majority at the Polls, the Government must tender its resignation forthwith. Fundamental as it is, this does not form part of the written law of the Constitution. It is also a constitutional requirement that the person who is appointed Prime Minister by the President and who is the effective Head of the Government should have the support of the House of People. The other Ministers who are appointed by the President on the advice of the Prime Minister, must continuously have the confidence of the House of People, individually and collectively. The powers of the President are exercised by him on the advice of the Prime Minister and the Council of Ministers which means that the said powers are effectively exercised by the the Council of Ministers headed by the Prime Minister. None of these and many other essential rules of the Constitution are found in the Constitution of India as framed by the Constituent Assembly. It was A.V. Decey who for the first time, in the year 1885, identified these unwritten rules and called them"The Conventions of the Constitution". What Decey described under these terms are the rules of responsible Government which regulate relations between the Crown, the Prime Minister, the Cabinet and the two Houses of Parliament. These rules developed in Great Britain by way of precedents during 19th Century and were inherited by the British colonies as were granted self government and independence. This phenomenon is not limited to Britain and is true of constitutions in general. Conventions are found in all established constitutions and soon developed even in the newest. 436. Two sets of principles, thus, make up the rules of constitutional law. One set of rules is contained in the written Constitution of a country and the other set is referred to as the"conventions of the constitution". Conventions are a means of bringing about constitutional

development without formal changes in the law. K.C. Where in his book"The Statute of Westminster and Dominion Status" (Fourth Edition) defines the conventions as under : The definition of 'conventions' may thus the amplified saying that their purpose is to define the use of constitutional discretion. To put this in slightly different words, it may be said that conventions are non-legal rules regulating the way in which legal rules shall be applied. 437. The conventions grow up, around and upon principles of the written constitutions. Necessary conventional rules spring up to regulate working of the various parts of the Constitution, their relation to one another to the subject. Sir W. Ivor Jennings, in his book "Law and the Constitution" (Fifth edition) refers to the constitutional conventions in the following words : Thus within the framework of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with government must follow. These rules Mill referred to as "the unwritten maxims of the constitution". Twenty years later Decey called them 'the conventions of the constitution", while Anson referred to t hem as"the custom of the constitution". The short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal Constitution work; they keep it in touch with the growth of ideas. A Constitution does not work itself; it has to be worked by men. It is an instrument of national cooperative, and the spirit of cooperation is as necessary as the instrument. The constitutional conventions ar the rules elaborated for effecting that cooperation. Also, the effects of the Constitution must change with the changing circumstances of national life. New needs demands a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate. 438. The conventions enable a rigid legal framework - laws tend to be rigid - to be kept up with changing social needs and changing political ideas. The conventions enable the men, who govern, to work the machines. Dicey in his book"Introduction to the study of the law of the Constitution" refers to the conventions in the following words : They are multifarious, differing, as it might at first sight appear, from each other not only in importance but in general character and scope. They will be found however, on careful examination, to possess one common quality or property; they are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised: and this characteristic will be found on examination to be the trait common not only to all the rules already enumerated, but to by far the greater part (though not quite to the whole) of the conventions of the constitutions of the constitution. The written constitutions cannot provide for every eventuality. Constitutional institutions are often created by the provisions which are generally worded. Such provisions are interpreted with the help of conventions which grow by the passage of time. Conventions are vital in so far as they fill-up the gaps in the Constitution itself, help solve problems of interpretation, and allow for the future development of the constitutional frame work. Whatever the nature

of the constitution, a great deal may be left unsaid in legal rules allowing enormous discretion to the constitutional functionaries. Conventions regulated the exercise of that discretion. A power which, jurisdically, is conferred upon a person or body of person may be transferred, guided or canalised by the operation of the conventional rule. K.C. Wheare in his book 'Modern Constitution' (1967 edition) elaborates such a rule as under: What often happens is that powers granted in a Constitution are indeed exercised but that, while they are in law exercised by those to whom they are granted, they are in practice exercised by some other person or body of persons. Convention, in short, transfers powers granted in a Constitution from one person to another. 439. The primary role of conventions is to regulate the exercise of discretion - presumably to guard against the irresponsible abuse of powers. Colin R. Munro in his book "Studies in Constitutional Law" (1987 edition) has summed up the field of operation of the conventions in the following words: Some of the most important conventions, therefore, are, as Dicey said, concerned with 'the discretionary powers of the Crown' and how they should be exercised. But it is not only in connection with executive government and legislature-executive relations that we find such rules and practices in operation. They may be found in other spheres of constitutional activity too; for example, in relations between the Houses of Parliament and in the workings of each House, in the legislative process, in judicial administration and judicial behaviour, in the Civil Service, in local government, and in the relations with other members of the Commonwealth. 440. In England exercise of (he royal prerogative, the functions of the Cabinet system, the Lords and the Commons, and the judiciary are primarily functioning on the basis of established conventions. To illustrate some of the conventions considered biniing by the Judiciary are as under : 1. Lay peers ought not to seek to hear appeals before the judicial body of the House of Lords. 2. The Lords of Appeal in Ordinary ought to include at least two Scots lawyers. 3. The conduct of the judiciary ought not to be questioned in Parliament other than on a motion seeking dismissal of a member of the judiciary. 4. A judge must sever political links on appointment to the Bench. 441. If we take the last example, a Scottish Judge, Lord Avondale, agreed in 1968 to serve on a Conservative opposition Committee, but quickly resigned when faced with public criticism and a statement by the Lord Advocate that conventional rules had been breached. Another example was the embarrassment caused by the disclosure in 1984 that the Master of the Rolls had advised the government in respect of its policy on trade unions. In R. v. H.M. Treasury, exp. Smedley (1985) Q.B. 657 at 666, Sir John Donaldson M.R. referred to the relationship between Parliament and the Judiciary in terms of conventions : Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature. 442. K.C. Wheare in his book "Modern Constitutions" gives at least two source of conventions. A course of conduct may be persisted in over a long period of time and gradually attain first persuasive and then obligatory force. According to him a convention may

arise much more quickly than this. There may be an agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct. This rule is immediately binding and it is a convention. Sir Ivor Jennings puts it as under : The laws provide only a framework; those who put the laws into operation give the framework a meaning and fill in the interstices. Those who take decisions create precedents which others tend to follow and when they have been followed long enough they acquire the sanctity and the respectability of age. They not only are followed but they have to be followed. 443. Every act by a constitutional authority is a "precedent" in the sense of an example which may or may not be followed in subsequent similar cases, but a long series of precedents all pointing in the same direction is very good evidence of convention. 444. The requirements for establishing the existence of a convention have been succinctly laid down by Sir W. Ivor Jennings in 'The Law and the Constitution', 5th Edition (1959) as under : We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it. 445. We may at this stage refer to the judgment of the Supreme Court of Canada in Re Amendment of the Constitution of Canada, 125 DLR (3d) 1. In 1980, the Trudeau Government in Canada proposed a scheme to end the power of Westminster to legislate for Canada, to create a new Charter of Rights binding on both provincial and federal legislatures and to establish complex formula for constitutional amendment. When eight of the ten provinces opposed the Scheme, the crucial question arose whether federal authorities were entitled to request Westminster to enact the scheme, against so much provincial opposition. The matter was taken to the Supreme Court of Canada. 446. On the issue of constitutional convention, by majority of 6 to 3, the Court held that the proposed request to Westminster infringed the convention that the legislation affecting provincial rights must have provincial support. In deciding that the convention existed, the Court adopted the test laid down by Sir Ivor Jennings (quoted above). The majority concluded that it would be unconstitutional (i.e. in breach of convention) if the Trudeau scheme went forward. The judgment dealt separately with the issues of law and convention. On the second question, the Court by majority of 7 to 2 held that it was lawful for the Trudeau scheme to be submitted to Westminster without provincial agreement. The majority held that there was no legal rule which limited the power of the Canadian Parliament to adopt resolutions seeking amendment. It was further held "What is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute". There was no process by which constitutional conventions "crystalised law". 447. The decision apparently sounds paradoxical. The court following the tests laid down by Sir Ivor Jennings, found as a fact that the convention existed. It also held that the proposed legislation infringed the convention. The court even went to the extent of concluding that infringing

the established convention would be unconstitutional. Having gone that far, the logical conclusion could only be that the convention being part of the constitutional law of the land it had the binding effect and not authority could have infringed the same. While holding that the constitutional conventions can never crystallised into law the court was primarily influenced by the concept of a convention as propounded by A.V. Dicey. Dicey provides a simple working test by which laws and conventions may be distinguished. According to him laws are enforced by the courts whereas the conventions are not. His distinguishing between laws and conventions has been criticised. Unless the distinction is abandoned according to Geoffrey Wilson "it is impossible to present constitutional law as a coherent subject or relate it in a meaningful way to the functions it has to fulfil or the social and political context in which it has to operate". (Cases and Materials on Constitutional and Administrative Law 1966 Edition). Sir Ivor Jennings did not agree with Dicey. According to Jennings (Law and Constitution, Fifth edition) there was "no distinction of substance or nature" between the laws and the conventions. He pointed out that there was similarity or inter-action between the two. Both sorts of rule rested upon general acquiescence, he suggested, and the major conventions were as firmly fixed and might be stated with almost as much accuracy as principles of common law. Professor J.D.B. Mitchell in his work (Constitutional Law) (Second Edition, 1968) built up further argument of this sort : Conventions cannot be regarded as less important than rules of law. Often the legal rule is the less important. In relation to subject matter the two types of rule overlap: in form they are often not clearly distinguishable... very many conventions are capable of being expressed with the precision of a rule of law, or of being incorporated into law. Precedent is as operative in the formation of convention as it in that of law. It cannot be said that a rule of law is necessarily more certain than is convention. It may therefore be asked whether it is right to distinguish law from convention.... 448. Even Dicey acknowledges that there is enough sanction behind the conventions and they are binding. In this book "Introduction to Study of the law of Constitution" he stated as under : The ascertain that they have nearly the force of law is not without meaning. Some few of the conventions of the Constitution are rigorously obeyed.... But the sanction which constrains the boldest political adventurer to obey the fundamental principles of the Constitution and the conventions in which these principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the courts and the law of the land. 449. It is not necessary for us to delve into this subject any more. We agree a convention while it is a convention is to be distinguished from the law. But this does not mean that what was formerly a convention cannot later become law. When customary rules are recognised and enforced by courts as law, there is no reason why a convention cannot be crystallised into a law and become enforceable. "Conventions cab become law also by judicial recognition stated K.C. Where"Modern Constitution" (1966 Edition). It is no doubt correct that the existence of a particular convention is to be established by evidence on the basis of historical events and expert

factual submissions. But once it is established in the court of law that a particular convention exists and the constitutional functionaries are following the same as a binding precedent then there is no justification to deny such as convention the status of law. 450. There is abundant authority to show that the Courts have recognised the existence of conventions and have relied upon them as an aid to statutory interpretation. In Ryder v. Foley (1906) 4 C.L.R. 422, the High Court of Australia held that as a conventional practice it was the minister who was acting on behalf of the government. Similarly in Commercial Cable Company v. Govt. of Newfoundland (1916) A.C. 610, the Judicial Committee of Privy Council interpreted the word "government" to mean as minister incharge on the basis of an established convention. In British Coal Corporation v. The King (1935) A.C. 500, the Judicial Committee of Privy Council noticed the convention that His Majesty in Council was bound to give effect to the report of the judicial Committee. In this respect we may also refer to Robinsor v. Minister of Town and Country Planning (1947) K.I. 702, Liversidge v. Anderson (1942) A.C. 206, Copyright Owners Reproduction Society Limited v. E.M.I. (Australia) Pvt. Limited (1958) 100 C.L.R. 597, Adegbenro v. Akintola (1963) A.C. 614, Attorney-General v. Jonathan Cape Limited, (Crossman Diaries case) (1976) Q.B. 754, R. v. Secretary of State for Home Department, Ex. P. Hosenball (1977) 1 W.L.R. 766 and R. Amendment of the Constitution of Canada, 125 D.L.R. (3rd) 1. 451. We are of the view that there is no distinction between the "constitutional law" and an established "constitutional convention" and both are binding in the field of their operation. Once it is established to the satisfaction of the court that a particular convention exists and is operating then the convention becomes a part of the "constitutional law" of the land and can be enforced in the like manner. 452. The Constitution of India has borrowed the British form of government, making the Cabinet collectively responsible to the House of People. The machinery of government is essentially on the British pattern and the whole collection of British Constitutional Conventions has either been incorporated in the Constitution or are being followed as unwritten constitutional conventions. While framing the Constitution of India, the Constituent Assembly debated whether to have a written code based on British practice, but eventually it was decided to leave the Cabinet system of government to be governed mainly by the unwritten conventions of the Constitution. Needless to say that the conventions necessary to govern the Cabinet system, based on British pattern, are befng strictly followed in this country. Dr. Rajendra Prashad in his speech, as President of the Constitution Assembly while moving for adoption of the Constitution of India observed as under : Many things which cannot be written in a Contitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions. 453. In U.N.R. Rao v. Smt. Indira Gandhi (1971) Supp. SCR 46, the question before this Court was whether under the Constitution, as soon as the House of People is dissolved, the Council of Ministers i.e. the Prime Minister and other Ministers, cease to hold office. Recognising the existence of a convention, this Court answered the question in the negative. Chief Justice S.M. Sikri speaking for the Court

observed as under : - We are grateful to the learned Attorney General and the appellant for having supplied to us compilations containing extracts from various books on Constitutional Law and extracts from the debates in the Constituent Assembly. We need not burden this judgment with them. But on the whole we receive assurance form the learned authors and the speeches that the view we have taken is the right one, and is in accordance with conventions followed not only in the United Kingdom but in other countries following a similar system of responsible Government. 454. In Shamsher Singh and Anr. v. State of Punjab 1975 (1) SCR 814 : AIR 1974 SC 2192, the question before this Court was whether the executive power of the Union vested in the President of India in his personal capacity or he was bound by the advice tendered by the Council of Ministers. This Court went into detailed consideration of the British Parliamentary form of Government borrowed by our Constitution and came to the conclusion that the well established constitutional convention makes it obligatory for the President to act on the advice of the Council of Ministers headed by the Prime Minister. 455. We now proceed to consider whether an established constitutional convention can be read in Articles 124(2) and 217(1) of the Constitution of India to the effect that in the matter of appointment on the Judges of the High Courts and Supreme Court, the opinion of the Judiciary expressed through the Chief Justice of India is primal and binding. For that purpose we adopt the test for the existence of a convention, laid down by Sir Ivor Jennings, based on three question: (a) What are the precedents? (b) Did the actors in the precedents believe that they were bound by a rule? and (c) Is there reason for the rule? 456. Articles 124(2) and 217(1) of the Constitution only identify the constitutional authorities required to be consulted for appointment of Judges to the Supreme Court and the High Courts. These provisions do not provide for the procedure to be followed in finalising the consultative process culminating in the issuance of a warrant of appointment by the President of India. Neither Article 124(2) nor Article 217 of the Constitution indicates that any of the constitutional authorities named therein has primacy in the process of making appointments to the superior judiciary. These are the types of gaps which are generally found in almost all the constitutions. They are filled by the conventions which develop with the passage of time. While examining the scope of Article 124(2) and 217(1) of the Constitution, the precise question which comes up for our consideration, hereafter, is whether a smooth interpretation can be given to these articles with the aid of established conventions operating in this field of constitutional - functioning. 457. Prior to coming into force of the Constitution of India the appointments of Federal Court Judges and Judges of the High Courts were made under Sections 200 and 220, respectively, of the Government of India Act, 1935. The appointments were in the absolute discretion of the Crown. In other words, the executive, by itself, with no provision at all for consultation with the Chief Justice of India or with the judiciary in the any other manner, was the authority to make appointments to the superior judiciary. We have, however, contemporaneous evidence to show that under the Government of India Act, 1935 the said appointments were invariably made

with the concurrence of the Chief Justice of India. 458. Copies of the Draft Constitution of India were circulated to the Federal Court and the High Courts for eliciting views of the Judges. Keeping in view the fundamental importance of the document a conference of the Judges of the Federal Court and the Chief Justices of High Courts was convened to discuss the provisions in the draft Constitution relating to the judiciary. The conference was accordingly held on March 26 and 27. 1948. Finally a memorandum representing the views of the superior judiciary was submitted to the Home Minister and to the Constituent Assembly. It was specifically stressed in the memorandum that under the British - Raj the judiciary had, in the main, been independent, but certain tendencies to encroach upon its independence was becoming apparent. It was also highlighted that no appointment was ever made without referring the matter to the Chief Justice of India and obtaining his concurrence. We refer to the following paragraph from the memorandum : 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 Framing of India's Constitution, Select Documents by Shiva Rao Vol. IV, page 196) (emphasis supplied) 459. The apex judiciary thus, mentioned in clear term that "a convention now exists that such appointments should be made after and obtaining his concurrence." The Ministry of Home Affairs in its memorandum relating to the judiciary, the deliberations of the Drafting Committee and the joint meeting of the Union and Provincial Constitution Committees have no where denied the above quoted assertion made by the apex judiciary in its memorandum dated March 1948. 460. It is in the above background that the provisions regarding collective consultation was enacted under Articles 124(2) and 217(1) of the Constitution of India relating to the appointment of Judges to the Supreme Court and the High Courts. After about a decade of the functioning of the Constitution of India the provisions regarding judiciary came before the Parliament in the course of the debates on the 14th Report of the Law Commission. 461. Shri J.N. Kaushal, who later became Union Law Minister, speaking in the Rajya Sabha on November 23, 1959 stated as under : People feel that the executive does not work properly. It is the judiciary that works properly. That feeling is still there. We should respect such a feeling. Let the Chief Justice of the State and the Chief Justice of India make the appointment. Why should there be a hand of the executive in the appointment of High Court Judges? What is the meaning of it? If the Chief Justice of a State does not know his subordinate judiciary or the members of the Bar, then it is a misfortune. But we cannot avoid it. I assure you that, if the Chief Justice makes an appointment, people are always happy. They are sure that no other consideration has weighed with the High Court - at least

no political consideration, no extraneous consideration weighs with judges. 462. Mr. P.N. Sapru, speaking in Rajya Sabha on November 23, 1959 depicted the correct position as under : The correct position in this matter should be that the highest importance and the highest weight should be attached to the recommendation of the Chief Justice of the Court concerned particularly if it is backed by the opinion of the Court and normally except for some reason known to the Ministry and communicated to the Chief Justice, there should be no interference with the recommendation of the Chief Justice. 463. Mr. D.P. Singh speaking in the Rajya Sabha on November 24, 1959 stated as under : I agree entirely with what Dr. Kunzru has said in respect of appointments to the Supreme Court and the High Courts. I believe strongly that in the appointment of High Court Judges and Supreme Court Judges the hand of the executive should not be there at all. 464. Mr. S.K. Basu, Speaking in the Rajya Sabha on November 24, 1959 referred to the facts and figures given by the Home Minister in support of the contention that the recommendations of the judiciary have always been accepted, stated as under : Sir, that has been the position with regard to the appointments in the Supreme Court. All the appointments have been made on the recommendations of the Chief Justice of India. So far as the States are concerned, as many as 90 per cent of the appointments have been made in that way. In the remaining 14 or 15 cases the Chief Justice's opinion has been accepted by the Home Ministry except in one case where, before the present Home Minister came into office the recommendation of the State Chief Justice was accepted in preference to that of the Chief Justice of India. Therefore, Sir, it is a most dignified record on the part of the Home Ministry, namely, the opinion of the Chief Justice of India has prevailed in every case. The Home Ministry has, alter all, got to make a selection on some recommendation or the other, and which is the authority most competent to make the recommendation according to the Home Ministry? It is the Chief Justice of India. I ask, Sir, where is the room for any complaint on the facts factually on record? In this connection 1 may also point out that the principle of acceptance of the opinion of the Chief Justice of India has been carried to such a length by the Home Ministry that when the Government of Kerala recently - the Communist Government set aside the recommendation of the local Chief Justice sent their own recommendations, the Home Ministry accepted those recommendations because the Chief Justice of India had accepted them. Therefore, you will find how consistent has been the position of Home Ministry in accepting and honouring the recommendations of the Chief Justice of India. 465. Finally, Mr. Gobind Ballabh Pant, Ministery for Home Affairs (Appointment of Judges was dealt with by the Home Ministry) replying to the debate on the 14th Report of the Law Commission in the Rajya Sabha on November 224, 1959, stated 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 on, i.e., 210 out of 211 were made on the advice, with the consent and concurrence of the Chief Justice of India.... I have listened to some of the speeches that were made and also gone though the record of the speeches, which unfortunately I could not myself personally listen to. It was suggested that the Chief Justice of India might make these appointments. Well, I do not know if that would improve matters because virtually they have been made by the Chief Justice of India Only the orders were issued by us, and in any case the orders would have to be issued by the executive authority. (emphasis supplied) 466. The Home Ministry was categorical in his statement that form 1950 onwards all the appointments to the Supreme Court and 210 out of 211 to the High Courts were made with the consent and concurrence of the Chief Justice of India. The Home Minister even to the extent that the appointments of judges were virtually being made by the Chief Justice of India and the executive was only the order-issuing authority. In other words, the Home Minister acknowledged that existence of a convention to the effect that the opinion and the recommendation of the Chief Justice of India were taken to be final by the executive. Mr. Ashok Sen, the Law Minister speaking in the Rajya Sabha on November 25, 1959 reiterated the stand taken by the Home Minister. 467. 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 1.1.1983 to 10.4.1993, there have been only seven such cases, five of these were in 1983, (2 January 1983, 2 July, 1983, 1 August 1983) one in September 1985 and one in March 1991, out of a total of 547 appointments made during this period. 468. 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 been invariably accepted. 469. From the above discussion the factual position which emerges is as under : (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 Judges 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. 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. 470. We may now apply the three tests laid down by Sir Ivor Jennings -Adopted by us - to the facts of the present case. 471. The first test is What are the precedents? Under the Government of India Act 1935, which remained operative till 1950, all appointments of Judges to the Federal Court and the High Courts were made with the concurrence of the Chief Justice of India. The apex Judiciary in its memorandum dated March 1948 recorded in writing that the appointments of Judges were made under the British - Raj with the concurrence of the Chief Justice of India on the basis of an established convention. We have the precedents for the period from 1950 to 1959 and from January 1, 1983 to April 10, 1993. Almost all the appointments during said period were made with the concurrence of the Chief Justice of India. The precedents thus clearly indicate the existence of the convention and, as such, the first question, according to us, is complied with. 472. We now come to the second test. Did the actors in the precedents believe that they were bound by a rule? The actors in the precedents are more than vocal on the issue. As back as 1959, the Home Minister of the stature of Gobind Ballabh Pant declared on the floor of the Rajya Sabha that "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" and consequently felt bound to tollow the recommendations of the Chief Justice of India in the matter of appointments of Judges. The Home Minister in clear terms conceded primacy to the Chief Justice of India on justifiable grounds. A day later, the Law Minister also made a similar declaration in the Rajya Sabha. We have quoted the speech of Mr. Jagannath Kaushal made on the floor of Rajya Sabha in November 1959. He held the office of the Union Law Minister during the period 1980 to 1983 and, as such, was also one of the actors in the precedents who firmly believed that the Executive was bound by the recommendations made by the Judiciary. During the course of arguments before us the stand of the Executive was consistent to the extent that they have almost invariably accepted the recommendations of the Judiciary in the matter of appointment of Judges. We have, therefore, no hesitation in holding that the second test laid down by Sir Ivor Jennings is also satisfied. 473. "Is There a reason the rule"? Is the third test? there are two primary reasons in support of the convention that the primacy rests with the judiciary. There is no dispute that independence of judiciary is the basic feature of the Constitution. We have already dealt with in detail the concept of independence of judiciary and we have come to the conclusion that the exclusion of the final say of the executive in the matter of appointment of Judges is the only way to maintain the independence of judiciary. If that be so then there cannot be a better reason for reading such

a convention while interpreting Articles 124(2) and 217(1) of the Constitution. The second and the more important reason for giving weight to the opinion of the judiciary is that the appointments are made to the "superior judiciary" and to find out the suitable persons for such appointments the expertise for that purpose is only available with the judiciary. It is difficult rather impossible to accept the submission that all the consulting functionaries must be regarded as of coordinating authority because on various aspects like integrity, capacity, character, merit, efficiency and fitness which are relevant for the purpose of judging the suitability of a person, the executive authorities would be the least informed and will have nothing to say. On the other hand the Chief Justice of the High Court and the Chief Justice of India, being best informed, are well equipped to express their views and tender advice on he suitability of the person. All the constitutional functionaries being very high authorities in their respective spheres there may not ordinarily be any conflict in their assessment of a person regarding his suitability for appointment of a judge but in the event of any difference the advice tendered by the judiciary being in the nature of an "expert advice" has to be preferred. 474. Having answered the three tests laid down by Sir Ivor Jennings in the affirmative we hold that the convention, to the effect that the opinion and the recommendation of the Chief Justice of India in the matter of appointment of judges is binding on the executive, is firmly established and is to be read in Articles 124(2) and 217(1) of the Constitution of India. After consultation with 475. The expression "after consultation with", in Articles 124(2) and 217(1) of the Constitution, has three angles to its interpretation. What does "consultation" mean? Is the process of consultation mandatory? And, three which of the consultees - Executive or the Judiciary - has a primal say in the matter? This Court has authoritatively settle the first two questions. The requirement of consultation is mandatory and there is no dispute regarding the meaning of the word "consultation" as defined by this Court in various judgments. The crucial and meaningful question to be determined is whether the words "after consultation with" can be interpreted to mean the the Executive is bound by the advice given - in the process of consultation - by the Chief Justice of India as the head of the Judiciary. 476. Mr. F.S. Nariman has taken us through the articles of the Constitution wherein presidential appointments to various (non- elective) constitutional offices are provided. The President appoints by warrant under his hand and seal Judges of the Supreme Court and Judges of the High Courts (Articles 124(2) and 217(1)), Comptroller and Auditor General (Article 148), Governor of a State (Article 155) and Chair-person, National Commission for Scheduled Castes and Schedule Tribes (Article 338(3)). 477. The President appoints by a Presidential order the Chairman and other members of the Finance Commission (Article 180(1)), Chairman and other members of the Union Public Service Commission (Article 316(1), Chief Election Commissioner (Article 324(2)), Chairman of the Official Languages Commission (Article 344(1)) and Special Officer for Linguistic Minorities (Article 350(b)). 478. In the entire range of the presidential appointments, mentioned above, it is only in the case of judicial offices - District Judges, High Court Judges and Supreme Court Judges - that the appointments

are made after consultation with the constitutional functionaries named in the relevant provisions. According to Mr. Nariman the obvious purpose for this is that "they know better". Mr. Nariman further contended that the words "after consult with" must be interpreted and conditioned only by the true nature and object of such consultation. Relying upon Shamsher Singh and Anr. v. State of Punjab 1975 (1) SCR 814 and Union of India v. S.C.H. Sheth and Anr. (1978) 1 S.C.R. 423, Mr. Nariman contended that the interpretation given by this Court to the words "after consultation with" in S.P. Gupta's case is not correct. We see considerable force in the contentions of Mr. Nariman. 479. As noticed above no consultation is provided for with regard to the constitutional offices - except judicial offices - yet no appointment to the offices of high constitutional functionaries such as the Comptroller and Auditor General, the Chief Election Commissioner and others, can be made by the executive without going through some sort of consultative process to adjudge the suitability of eligibility of the person concerned. The specific provisions for consultation with regard to the judicial offices under the Constitution, clearly indicate that the said consultation is different in nature and meaning than the consultation as ordinarily understood. The powers and functioning of the three wings of the Government have been precisely defined and demarcated under the constitution. Independence of Judiciary is the basic feature of the constitution. The Judiciary is separate and the Executive has no concern with the day to day functioning of the judiciary. The persons to be selected for appointment to judiciary offices are only those who are functioning within the judicial sphere and are known to the Judges of the Superior Courts. The executive can have no knowledge about their legal acumen and suitability for appointment to the high judicial offices. In the process of consultation the expertise, to pick-out the right person for appointment, is only with the Judiciary. The "consultation", therefore, is between a layman (the Executive) and a specialist (the Judiciary). It goes without saying that the advice of the specialist has binding effect. If the true purpose of consulting the judiciary is to enable the appointments to be made of persons not merely qualified to be Judges, but also those who would be the most appropriate to be appointed, then the said purpose would be defeated if the appointing authority is left free to take its "own final" decision by ignoring the advice of the judiciary. 480. Subba Rao, J. (later Chief Justice of India) in R. Pushpam and Anr. v. The State of Madras AIR 1953 Madras 392 observed as under: A person consults another to be elucidated on the subject matter of consultation. A consultation may be between an uninformed person and an expert or between two experts. A patient consults a doctor; a client consults his lawyer; two lawyers or two doctors may hold consultations between themselves. In either case the final decision is with the consultor, but he will not generally ignore the advice except for good reasons. 481. While holding that "President means, for all practical purpose, the Minister or the Council of Ministers as the case may be", this Court, in Shamsher Singh's case (supra), specifically noticed the constitutional provisions regarding consultation with the Judiciary and came to the conclusion that the Government of India was bound by the counsel given by the Chief Justice of India. The observations

of V.R. Krishna Iyer, J. in this respect are 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 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. 482. The above quoted observations of Krishna Iyer, J. were reaffirmed by this Court in S.C.H. Sheth's case (supra) where Chandrachud, J. (as he then was) observed as under : 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 had now been restored, the difference, 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. 483. This Court has, therefore, authoritatively laid down that in the process of consultation, under the Constitution, the last word must belong to the Chief Justice of India. 484. We agree with Mr. Nariman that the link between consultation, the advice given as a result thereof, and the ultimate appointment of the person about whom there is consultation, is inextricable, making the entire process of appointment of Judges under the Constitution as an integrated one. The necessary consequence is that the executive is not free to make an appointment which has not been recommended by the Judiciary. Mr. Nariman invited our attention to the judgment in Colyar v. Wheeler 75 S.W. 1089 (Supreme Court of Tennessee) where in the words "upon consultation and getting advice from. . . " were treated as equivalent to "consent". In the said case a post-nupited settlement was the subject-matter of interpretation before the Court. It would be useful to quote the operative part of the judgment.

The language is that the trustee may hold the legal title for the sole and separate use, with the absolute right of disposition as she may choose, upon "Consultation and getting advice from the trustee." We are of opinion there can be no exercise of this power of disposition unless it appears that the conveyance was made upon consultation with and advice of the trustee. In our opinion, these words are equivalent to "consent of the trustee," and his consent must be attested by his signature to the instrument. These trusts are create for the protection of married women, who are incapable of protecting themselves against the domination and improvidence of their husbands. The words of the trust will be strictly construed, and given such meaning as will accomplish the purpose for which it was created. The construction given this instrument by the chancellor and Court of Chancery Appeals destroys its entire efficacy, and renders it nugatory. 485. The Framers of the Constitution placed a limitation on the power of Executive in the matter of appointment of Judges to the Supreme Court and the High Courts. The requirement of prior "consultation" with the superior Judiciary is a logical consequence of having an "independent Judiciary" as basic feature of the Constitution. If the Executive is left to ignore the advice tendered by the Chief Justice of India in the process of consultation, the very purpose and object of providing consultation with the Judicatory is defeated. We have, therefore, no doubt in our mind that the Executive is bound by the advice/recommendation of the Chief Justice of India in the process of consultation under Articles 124(2) and 217(1) of the Constitution. 486. Before going to the next topic we wish to add that the above discussion on issues (i) to (v) and the conclusions reached as a result thereof, are to supplement the reasoning on these an connected issues given by Verma J. in his judgment. Chief Justice of India - represents the Court 487. Having held that the primacy in the matter of appointment of Judges to the superior courts vests with the Judiciary, the crucial question which aries 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. 488. The consultation-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 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 the 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. 489. 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 concern States) 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 stated as under : With regard to the question of the concurrence of the Chief Justice, it seem 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." 490. 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 than it is the Judiciary as a collectivity which has the primal say and and not any individual, not even the Chief Justice of India. If we interpret the expression "the Chief Justice of India" 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 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. 491. Then, who are the other puisne Judges to be consulted by the Chief Justice of India and the Chief Justices of the High Courts while making recommendations for appointments to their respective Courts? It is neither possible nor the requirement under the Constitution to consult all the puisne Judges. We can legitimately assume that there is a practice that the senior colleagues are always consulted by the Chief Justice of India in the matter of appointment of Judges to the superior Courts. The Law Commission (under the Chairmanship of Mr. Justice H.R. Khanna) in its Eightieth Report submitted on August 10, 1979 in paras 6.5 and 7.6 recommended as under : When making the recommendation for appointment of a judge of the High Court, the Chief Justice, in our opinion, should also consult his tow senior most colleagues. It the letter containing the recommendation for the appointment, the Chief Justice should state that he has consulted his two seniormost colleagues and also indicate the views of each of those

colleagues in respect of the person being recommended.... As in the case of the High Court Court Judges appointment, so in the matter of appointment of a Judge of the Supreme Court, we feel that the Chief Justice of India, while making a recommendation, should also consult his seniormost colleagues. The number of colleagues to be consulted for this purpose should be three. The Chief Justice of India in the communication incorporating his recommendation should specify that he has consulted his three seniormost colleagues and also reproduce the view of each of them regarding his recommendation. The Law Commission in para 6.13 further recommended as under : At this stage, we should like to reiterate what we have mentioned earlier about the evolution of a convention that a recommendation made by the Chief Justice with which both his seniormost colleagues agree should normally be accepted. 492. The provisions regarding Judiciary in the Constitution were discussed in the Rajya Sabha in the course of debates on the 14th Report of the Law Commission. We have already quoted some of the speeches made by the Members. Mr. M.P. Bhargava, speaking on November 23, 1959 stated as under : a convention should be developed that names from the bar are recommended by the Chief Justice after consultation individually or collectively with his fellow judges in the High Court. 493. There are positive indications to show that the Chief Justice of India had been consulting his senior colleagues in the matter of appointment of Judges to the superior courts. We are, therefore, of the views that the opinion of the Chief Justice of India in the process of consultation for appointments to the superior courts must be formed in consultation with two of his seniormost colleagues. Apart from that the Chief Justice of India must also consult the seniormost Judge who comes from the same state (the State from where the candidate is being considered). This process of consultation shall also be followed while transferring any Judge/Chief Justice from one State to another. 494. On the same parity the opinion of the Chief Justice of the High Court must be formed after consulting two seniormost Judges of the High Court. 495. The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court must be in writing and form part of the final recommendation Chief Justice of India - Appointment by selection on Merits 496. Senior-most puisne Judge of the Supreme Court - barring on two occasions - has been appointed to fill the office of the Chief Justice of India. There is, however, to known method of appointment to the said office. No objective criteria has either been laid down or established by convention. The appointment to the highest judicial office in the country has been, more or less, at the discretion of the Executive. The only consistency in the said process, we are told, is the practice that the outgoing Chief Justice of India makes a recommendation, to the Executive, naming his successor-in-office. There are instance where the recommendee of the Chief Justice of India was not the seniormost puisne Judge of the Supreme Court. The very fact, that the recommendation the outgoing Chief Justice of India has come to stay as a standing practice, goes to show that there is no existing convention of appointing the seniormost puisne Judge as the Chief Justice of India. 497. Seniority alone or selection on merit, is the question. The seniority

rule stagnates the system due to lack of enterprise : merit on the other hand does justice to the selected and brings vigour to the system. In any case, to follow "seniority alone" rule, there has to be some objective basis for reckoning seniority. Method of appointment and seniority are inextricably-linked. Often, High Court Judges with lower seniority in the same High Court are selected for appointment to the Supreme Court. Many a time appointment is of a High Court Judge, to the Supreme Court, who is much lower in all India seniority. There are many instances where a junior High Court Judge was elevated earlier and some time later the senior from the same High Court was also brought to the Supreme Court. When Judges are appointed to the Supreme Court from two sources, and they take oath the same day, no one knows how the inter-se seniority is fixed. On an earlier occasion appointee from the Bar was placed senior but on a later occasion the process was reversed. These instances are not by way of criticism but only as a pointer with a view to straighten the exercise of discretion in the future. It may be that the High Court Judges, lower in seniority, are preferred on the basis of their merit in the process of selection. Even on that premises there is no justification to apply "seniority alone" rule to the office of the Chief Justice of India. Needless to say that the duties and responsibilities of the office of the Chief Justice of India are much more onerous than that of a Judges of the Supreme Court. The responsibility of toning-up the Judiciary in the country rests on the shoulders of the Chief Justice of India. He is to make the appointments of Judges in the High Courts and in the Supreme Court. He has to select the Chief Justices of the High Courts. He is responsible for the transfer of Chief Justices and Judges of the High Courts. Apart from controlling the judicial and administrative functioning of the Supreme Court, the responsibility for the satisfactory administration of justice all over India lies on him. As the head of the Judiciary, he would lay down the principles and practices to be followed in the administration of justice all over the country. It is thus obvious that with these manifold duties, functions and responsibilities attached to the high and prestigious office of the Chief Justice of India, the appointment to the said office must be by selection based on objective standards and not by mere seniority. If proper emphasis has to be given to initiative, dynamism and speedy action, the criterion of seniority which relies only on the quality of the person at the time of his recruitment, will unhesitatingly have to be pushed to the background. 498. The Law Commission of India headed by as eminent a person as M.C. Setalvad, in its Fourteenth Report given on September 26, 1958 recommended as under : This leads us to a related point upon which we have bestowed anxious consideration. It has been the practice till now for the seniormost puisne judge to be promoted to be the Chief Justice on the occurrence of a vacancy. It would appear that such a promotion has become almost a matter of course. We have referred to the high and important duties which the Chief Justice of India is called upon to perform. It is obvious that succession to an office of this character cannot be regulated by mere seniority. For the performance of the duties of Chief Justice of India, there is indeed, not only a judge of ability and experience, but also a competent administrator capable of handling complex matters that may

arise from time to time, a shrewd judge of men and personalities and above all, a person of sturdy independence and towering personality who would, on the occasion arising, be a watch-dog of the independence of the judiciary. It is well-accepted that the qualifications needed for a successful Chief Justice are very different from the qualifications which go to make an erudite and able judge. The considerations which must, therefore, prevail in making the selection to this office must be basically different from those that would govern the appointment of other judges of the Supreme Court. In our view, therefore, the filling of a vacancy in the office of the Chief Justice of India should be approached with paramount regard to the considerations we have mentioned above. It may be that the seniormost puisne judge fulfils these requirements. If so, there could be no objection to his being appointed to fill the office. But very often that will not be so. It is, therefore, necessary to set a healthy convention that appointment to the office of the Chief Justice rests on special considerations and does not as a matter of course go to the seniormost puisne Judge. If such a convention were established, it would be no reflection on the senior-most puisne Judge if he be not appointed to the office of the Chief Justice. We are in another place suggesting, that such a convention should be established even in the case of appointment of Chief Justice of the High Court. Once such a convention is established, it will be the duty of those responsible for the appointment, to choose a suitable person for that high office, if necessary, from among persons outside the Court. Chief Justices of the High Courts, puisne Judges of High Courts of outstanding merit and distinguished senior members of the Bar should provide an ample recruiting ground. 499. A Constitution Bench of this Court in Sant Ram Sharma v. State of Rajasthan 1968 SCR 111 : 1967 AIR SC 1910 observed, at 122 and 123, as under : It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to takes any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided how does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem therefore is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able men? In other words, the question is how to find a correct balance between seniority and merit in a proper promotion-policy. In this connection Leonard D. White has stated as follows : ...Employees often prefer the rule of seniority, by which the eligible longest in service is automatically awarded the promotion. Within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism of the suspicion thereof; and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As

employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is as dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true“. (Introduction to the Study of Public Administration, 4th Edn., pp.380, 382). 500. The only criticism against the method of selection on merit may be that in an atmosphere where correct appraisal is not available and the objectivity becomes a casualty, the method fails. The criticism has been proved wrong by the satisfactory operation, over a period of four decades, of the promotion rules pertaining to the All India Services. In any case this criticism is wholly irrelevant in the context of Judiciary. There is enough understanding of the proper values regarding the efficient functioning of the Judiciary in the country. 501. Reversing S.P. Gupta's case we have held that primacy, in the matter of appointment of Judges to the superior Courts, vests with the Judiciary. This being the present state of law, it is the Chief Justice of India and his consultees in the superior Judiciary who are to select in consultation with the executive - the next Chief Justice of India. They have to lay down the standards of objectivity and rules of appraisal. We can safely bid good-bye to the"seniority alone" rule and hold that the selection of the Chief Justice of India be made on the basis of merit alone. Other Issues 502. What should be the criteria for appointment to the Supreme Court? Verma, J. has dealt with this question and we entirely agree with him. Ahmadi, J. has observed “there was hardly any discussion at the Bar”, no specific point was formulated during the arguments and as such “it would be hazardous to lay down any guidelines in this behalf. With this caution Ahmadi, J. has not found favour with the 'legitimate expectation' principle adverted to by Verma, J. 503. The issue regarding the appointment of Judges to the superior Courts, the incidental issues thereunder and all the connected question arising therefrom are wide open before, us. We are called upon to interpret the constitutional provisions regarding the functioning of an institution called Judiciary. We cannot leave the work halt-way. We must find out the intentions of the framers of the Constitution and lay down a complete functional - scheme to enable the institution to operate smoothly. 504. Whether the elevation of a person to the Supreme Court is an appointment or an invitation is not a matter of substance. The question for consideration is how to select 26 persons out of a collectivity of more than four hundred? it is an important link in the process of appointment/invitation and cannot be left in uncertainty. There can be no doubt that appointment to the Supreme Court is by way of selection on merit and"seniority alone" has never been and cannot be the basis. liven otherwise appointment to such a high office under the Constitution cannot be on the sole criterion of seniority. Undoubtedly, the selection has to be on the basis of merit but the limited role played by seniority in the said process cannot be ignored. The length of service in the High Court or in the All India hierarchy is the only basis for bringing the Judges of the High Courts within the pale of consideration. There are instances where a junior Judge from the High Court was elevated and some time later the senior Judges from the same Court was

appointed to the Supreme Court. Is there any logic for such an arbitrary process? There are plenty of instances where Judges far below in seniority were appointed to the Supreme Court without considering their seniors in the same High Court. It was only with this background that Verma, J. has observed that seniority of a Judge in his own High Court and his legitimate expectations and aspirations have to be taken into consideration. Though there is plenty to say, we do not wish to delve into this subject any more. We agree with Verma, J. and hold that appointments to the Supreme Court are to be made on the basis of "selection on merit", but in the process of selection the senior Judge in the same Court is entitled to be considered in preference to the junior one. We reiterate that the merit shall always be the out-weighing factor in the selection of Judges to the Supreme Court of India. 505. So far as the interpretation of Article 222 of the Constitution regarding transfer of a Judge from one High Court to another, we entirely agree with the reasoning and the conclusions reached by Verma, J. We reiterate that the power vested under Article 222 can only be exercised in "public interest". It is only the Chief Justice of India who can examine the circumstances in a given case and reach a conclusion as to whether it is in public interest to transfer or re-transfer a Judge from one court to another. Concept of "public interest" when read in Article 222 makes it obligatory that the views of the Chief Justice of India are accepted by the Executive. We also agree with Verma, J. that a transfer made in public interest on the recommendation of the Chief Justice of India is not justiciable. 506. We entirely agree with the judgment propose by Verma, J. on the issue pertaining to Judge-strength. We only wish to add that the Law Commission headed by Mr. M.C. Setalvad in its 14th Report forwarded on September 26, 1958 in chapter 6, para 82 recommended as under : Any proposal made by the Chief Justice of a State for increasing the strength of the High Court, if it has the concurrence of the Chief Justice of India, should be accepted without demur or delay. 507. We, therefore, fully agree with Verma, J. that apart from justiciability even if a proposal on the administrative side is made by the Chief Justice of a State which has the concurrence of the Chief Justice of India then the Executive is bound to accept the same. It is not necessary in that situation to get an adjudication from the court. 508. Before concluding we must notice the main argument advanced by Mr. Shanti Bhushan, supported by Mr. Ram Jethmalani and Mr. S.P. Gupta. According to Mr. Shanti Bhushan the appointment of Judges to the superior courts is a matter which does not fall within the Executive power of the Union or the State. It is outside the Executive sphere. According to him the appointment of Judges is an independent constitutional process beyond the legislative competence and as such cannot be a part of the Executive power of the Union or the State. The argument in substance is that Article 74 of the Constitution of India has no application to the matter of appointment of Judges to the superior courts and as such the President is bound by the opinion of the Chief Justice of India rendered during the process of consultation. The argument is attractive but the view we have taken in the matter it is not necessary to go into the same. 509. On the basis of the reasoning and discussion on various issues, we conclude and

hold as under : 1. Article 124(2) and 217(1) of the Constitution of India impose a mandate on the highest functionaries drawn from the Executive and the Judiciary to perform the constitutional obligation - of making appointments of Judges to the Supreme Court and the High Courts - collectively in consultation with each other. In the event of disagreement in the process of consultation, the viewpoint of Judiciary being primal, has to be preferred. 2. The majority view in S.P. Gupta's case (supra) - giving primacy to the Central Government in the matter of appointment of Judges to the superior courts - does not lay down correct law and is over-ruled to that extent. 3. The expression "President" in Articles 124(2) and 217(1) when read with Article 74(1) makes the President to act on the advice of the Council of Ministers with the Prime Minister as the head. The Prime Minister and the Council of Ministers are bound to tender the advice in accordance with the interpretation given by this Court to Articles 124(2) and 217(1) of the Constitution of India. 4. The Process of consultation under Article 124(2) means consultation with the Chief Justice of India as head of the Judiciary. The opinion of the Chief Justice of India is not his individual but formed collectively by a body of men at the apex level of the Judiciary. Such collectivity shall consist of the Chief Justice of India, two senior-most Judges of the Supreme Court and the senior Supreme Court Judge who comes from the State. 5. The Process of appointment under Article 217(1) is to begin with the recommendation of the Chief Justice of the High Court. He must ascertain the views of the two senior-most Judges of the High Court and incorporate the same in his recommendation. The Chief Justice of India while examining the recommendation must take into account the views of two senior-most Judges of the Supreme Court and also the opinion of the senior Judge conversant with the affairs of the concerned High Court. 6. The opinion of the Chief Justice of India, forwarded in the manner indicated above, shall be primal. No appointment can be made by the President under Articles 124(2) and 217(1) of the Constitution unless it is in conformity with the opinion of the Chief Justice of India. 7. The Chief Justice of India shall be appointed on the basis of "selection by merit" and "seniority alone" rule shall not be applicable. 8. The appointment to the Supreme Court shall be by "selection on merit". Inter-se seniority amongst Judges in their respective High Courts has to be kept in view while considering the Judges for elevation to the Supreme Court. The combined seniority on all India basis shall be relevant in the process of consideration. The outweighing factor of merit would justify the elevation of a junior Judge from the same High Court. 9. The Executive may not appoint a recommendee of the Judiciary if considered unsuitable for good reasons based on the material available on record and placed before-the Chief Justice of India. However, if after due consideration the recommendation is reiterated by the Chief Justice of India with the unanimous agreement of other judicial consultees then the Executive is bound by the recommendation. 10. A Chief Justice/Justice may be transferred from one High Court to another - Article 222 - in public interest. A transferred Chief Justice/Judge can he transferred again and the power is not exhausted after the first transfer. The consent of the Chief Justice/Judge concerned is not required under the Constitution. S.P.

Gupta's case stands overruled to the extent. 11. A proposal for transfer of a Chief Justice/Judge under Article 222 has to be initiated by the Chief Justice Justice of India and the ultimate recommendation in that respect is binding on the Executive. 12. The transfer of a Chief Justice/Judge is not justiciable in the court of law except on the ground that the transfer was made without the recommendation of the Chief Justice of India. 13. Fixation of Judge - Strength in the High courts is justiciable. The proposal made by the Chief Justice of a State for increasing the strength of the High Court, if it has the concurrence of the Chief Justice of India, is binding on the Executive. S.P. Gupta's case overruled to the extent. 510. Before parting with the judgment it would be appropriate to say that the opinion circulated by Verma, J. was based on elaborate discussion amongst the Brother Judges who were available and participated in the discussion. Although Verma, J. incorporated various suggestions in his original draft but a feeling left lurking in my mind that I have something more to say in support of the conclusions reached by Verma, J. and that is how I ventured to embark upon writing a separate opinion. 511. The questions referred are, thus, answered and these matters are disposed of. (Kuldip Singh) 512. I gratefully acknowledge the opinion of Brother Kuldip Singh, J. as a forceful concurrence on practically every point with my opinion and a further elaboration thereof with more reasons to support the conclusion. (J.S. Verma) 513. I respectfully agree with the additional reasons given by Brother Kuldip Singh, J. on issues 1 to 5 in support of the conclusion contained in the opinion expressed on our behalf by Brother Verma, J. On other issues I regret my inability to concur. (Yogeshwar Dayal) 514. I respectfully agree with the additional reasons indicated by Brother Kuldip Singh, J. in respect of issues 1 to 5 in support of the conclusion contained in the judgment of Brother Verma, J. on he behalf and also on behalf of myself and three other learned Brothers. In respect of other issues I regret my inability to concur. (G.N. Ray) 515. I respectfully agree with the additional reasons given by Brother Kuldip Singh, J. on issues 1 to 5 in support of the conclusion contained in the opinion expressed on our behalf by Brother Verma, J. On the other issues I regret my inability to concur. (Dr. A.S. Anand) 516. I respectfully say that I stand by the judgment written on my behalf and that of Brothers Dayal, Ray and Anand by Brother Verma. I may, however, say that I am very gratified that Brother Kuldip Singh, J. has broadly, agreed with us and supported our conclusions by his learning and eloquence. (S.P. Bharucha) M.M. Punchhi, J. 517. This opinion is in the nature of an epilogue, though not in stricto sensu. Much has already been written on the two topics under reference to this Bench, and on other as well without reference. I on my part would have liked to avoid making any addition thereto but it seems the turn of events leave me no choice. I feel it would be a dereliction to withhold contributing and leave unsaid what needs to be said. 518. This nine-Judge Bench sat from April 7, 1993, to hear this momentous matter concluding its hearing on May 11, 1993, close to the onset of the summer vacation. I entertained the belief that we all, after July 12.1993, on the re-opening of the Court, if not earlier, would sit together and hold some meaningful meetings, having a free and frank discussion on each and

every topic which had engaged our attention, striving for a unanimous decision in this historic matter concerning mainly the institution of the Chief Justice of India, relatable to this Court. I was indeed overtaken when I received the draft opinion dated June 14, 1993 authored by my learned, brother J.S. Verma, J. for himself and on behalf of my learned brethren Yogeshwar Dayal, G.N. Ray, Dr. A.S.Anand and S.P. Bharucha, JJ. The fait accompli appeared a stark reality; the majority opinion an accomplishment. The hopes I entertained of a free and frank discussion vanished. But then came the opinion dated August 24, 1993 of my learned brother Ahmadi, J. like a pebble of hope hewn out of a mountain of despair, followed by the opinions of my learned brethren Kuldip Singh and Pandian, JJ, dated September 7, 1993 and September 9, 1993 respectively. No meaningful meeting thereafter was possible as the views by that time seemed to have been polarized. So now the firm opinions of the eight brethren, as communicated are known to me. Loaded with these opinions I set out to express my own, more as a duty to the venture embarked upon, for I owe it immesurably, for being party to the referal. 519. At the outset, I must remove a misgiving pertaining to the contents and thrust of the order of referal re correctness of S.P. Gupta and Ors. v. Union of India, (1990) Supp. 2 SCR 433, the opinion of which was authored by the then Chief Justice of India, Shri Ranganath Mishra and concurred to by the present Chief Justice of India Shri M.N. Venkatachaliah (then as a Puisne Judge) and by me. We had referred only two questions to a bench of nine-Judges, namely, to test the correctness of the opinion of the majority in S.P. Gupta's case relating to the status and importance of consultation and the primacy of the position of the Chief Justice of India, and whether fixation of judge strength was not justiciable, clarifying in the ultimate paragraph that apart from the two questions afore- indicated all other aspects dealt with were intended to be final by the said order. As I view it, due to the rigidity of its terms, except for the two questions specifically referred, no other matter was open to canvass as has seemingly been done. And whatever had been by us to support or justify the referal, were views which by no means could be termed as final and settled and were plainly open. Rather, when in terms thereof, a nine-Judge Bench, presided over by M.N. Venkatachaliah, J. (as my Lord the Chief Justice then was) sat to schedule hearing in the: matter, it fell clearly and in unmistakable terms from His Lordship speaking for himself and on my behalf that though we were parties to the referal order, the views expressed therein were tentative, and more in the nature of expression of doubts, and we were otherwise open to conviction con cerning the two questions. Apart from that, this, is it seems to me, is other wise the correct position in law. No Judge can sit on a matter committed, let alone the subject of judicial discipline. On re Constitution of the Bench in the present combination the position could not have altered. In the opinion, at places, avoidably though, it has been assumed that the order of referal contained final statements of exponence of law and that we were in accord with the setting up of the National Judicial Commission through a Constitutional amendment. The record in this regard needs to be straightened. 520. It was viewed by the referring Bench that somewhere down the lane,

on account of the majority opinion in S.P. Gupta's case, the special and priviledged position of the Institution of the Chief Justice of India, or in other words the 'primacy' of the Chief Justice was lost. This necessitated of putting to job a larger bench, to examine whether his primacy could be retrieved and restored back to him institutionally, in the context of appointment of Judges to the higher judiciary. Along side this thought, but on a different pedestal, was a doubt expressed that could it, under certain circumstances, be said in the first instance, that the Central Government is not bound to appoint a Judge so recommended by the Chief Justice of India, and in the second could a power be contemplated in the executive to appoint a person despite his being, disapproved or not recommended by the Chief Justice of the State High Court and the Chief Justice of India, and would that not be wholly inappropriate constituting an arbitrary exercise of power? 521. Now primacy of the Chief Justice of India, as I conceive could have two facets; one, institutional but personal to the Chief Justice of India and the other constitutional. For the institutional primacy a little historical background would not be out of place. It appears that statutory recognition to the status, rank and precedence of the Chief Justice of a High Court was first put in words by the Government of India Act 191.5-19. A part of its preamble is worth reproduction. It reads as under : Whereas it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development of self-governing institutions, with a view to the progressive realisation of responsible government in British India as an integral part of the empire: And whereas progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps in this direction should now be taken: And whereas the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples: And whereas the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility: ... ... Section 101 of the afore said Act provided that each High Court shall consist of a Chief Justice and as many other Judges as his Majesty may think fit to appoint. Section 103 provided that the Chief Justice of a High Court shall have rank and precedence before the other Judges of the same Court, and all other Judges of a High Court shall have rank and precedence according to seniority of their appointment, unless otherwise provided in their patents. The experimental measure of Indian participation, in so far as the judiciary was concerned, augured well, and true to the hopes raised a standard was attained in establishing the independence of judiciary. This was so even while the appointing authority was the Governor General in Council and not a political government, as we now have, answerable to its electorate. Thus, a large measure of confidence and trust got developed on the judiciary's sense of responsibility. A provision such as Section 103, regarding rank and precedence, was therefore not found to be necessary to be repeated in the Government of India Act, 1935, whereunder Provincial High Courts

were set up, each consisting of a Chief Justice and other Puisne Judges. The understanding of the status, rank and precedence of the Chief Justice of a High Court was so entrenched and well received that its reaffirmance was found not necessary and the same hue has continued ever since, Likewise on such understanding the Federal Court under Section 200 was set up to consist of a Chief Justice of India and a number of other Judges. The Preamble of the Act of 1919 however being an article of faith and policy remained un-repealed and found itself preserved in the proviso to Section 321 of the 1935 Act, on repeal of the 1919 Act: A long road from that point of time led to the independence of India and to the framing and adoption of its Constitution. Thereunder we have a 'Chief Justice of India' as an essential constituent of the Supreme Court under Article 124(1) of the Constitution. In plain words he is an institution by himself. Besides he is also a component of the judicial institution known as the Supreme Court of India. Under Sub-Article (2) of Article 124, as also under Article 217, the Chief Justice of India has been assigned a compulsive consultative role in the matter of appointment of Judges of the Supreme Court as also the Chief Justices and Judges of the High Courts. While framing the Constitution, in a memorandum representing the views of the Federal Court and the Chief Justices representing all the Provincial High Courts of the Union of India, held in March 1948, received and reproduced in B. Shiva Rao's "FRAMING OF INDIAS CONSTITUTION" Vol. 4 at page 194, thanks were offered to the system of administration of justice established by the British in the country and it was noticed that the judiciary until then had, in the main, played an important role in protecting rights of individual citizens against encroachment and invasion by the executive power. But fear was expressed therein that the status and dignity of the judiciary so achieved had become prone to attempts to whittle down its power, rights and authority. The in-built retention of rank and precedence of the Chief Justice in the institutional sense before the other Judges of the same court, be it a High Court of the state or the Supreme Court of India in the post Constitution period, is an accepted herachial norm and hence the source of his Institutional primacy. 522. Interestingly the word 'rank' in common parlance, as also in English diction refers to a position, especially an official one, within a social organisation, of high social order or other standing status. Likewise the word "precedence" denotes the ceremonial order or priority to be observed on formal occasions, or a right to preferential treatment. In. the same strain the word "primacy" denotes the state of being first in rank or being in formal state i.e. the most important state. Thus it would be seen that not only is the word "primacy" inextricably linked up with the words "rank" and "precedence" but conceptually they all are of the same family and breed, block and substance. The Chief Justice of india or the Chief Justice of a High Court, as the case may be, is known to be primus inter-pares i.e. first among equals while functioning judicially, but in matters other than judicial enjoys a unique position of status, rank and precedence by virtue of his office. This distinction is first borne in. mind and then constitutionally kept alive, whenever he is referred to singularly in the Constitution in contrast to the word 'court' wherever occurring. It is on

that basis that his role has an indivisibility of its own having a primal element. 523. Legislative history further tells us that prior to the Constitution and during the British Rule, no law warranted the Executive to consult the Chief Justice of the Federal Court and/or that of the High Court for appointment of Judges in the aforesaid courts. In the Memorandum of the Federal Court and the High Court Chief Justices of March, 1948, above referred to, while suggesting that every Judge of the High Court be appointed by the President on 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, view was expressed that it was not necessary to make any provision in the Constitution to cover the possibility of the Chief Justice of India refusing t.o concur with an appointment proposed by the President, as both were officers of the highest responsibility, and by then, no such case of such refusal had arisen, although a convention existed that such appointment shall be made after referring the matter to the Chief Justice of India in obtaining his concurrence. It was also suggested that 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 be made in that behalf. The suggestion further was that what had been said for the High Court applied mutatis mutandis to the appointment of Judges of the Supreme Court. The Body of Judges further suggested that it was not appreciated why a constitutional obligation 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 being nothing to prevent the President from consulting them whenever he deemed necessary to do so. The Constituent Assembly, fully alive to the suggestions of the Body of higher Judges of the country, went on to build a positive bridge providing a compulsive participatory role to the highest judicial functionary, the Chief Justice of India in recognition of his status and rank, when required to be consulted by the President, before making appointments in terms of Articles 124 or 217 of the Constitution, rather than leaving the appointments to the Executive alone. Dr. B.R. Ambedkar's remarks as quoted by my learned brother Pandian, J. in his opinion are picked up by me to be reproduced : It seems to me, in the circumstance in which we live today, where the sense of responsibility has not grown in the same extent which we find 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 executive wishes to make subject to the concurrence of legislature is also not a very suitable provision. 524. Then again while replying to the demand of concurrence by the Chief Justice of India in the matter of appointments to the higher judiciary as raised by some members of the Constituent Assembly, Dr. B.R. Ambedkar in his winding up debate on the topic said as follows : With regard to the question of 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 this is also a dangerous proposition. (emphasis now supplied) 525. At this juncture, priorly, the wording of the preamble of the Government of India Act 1919 be recalled as to the concept of "sense of responsibility". According to Dr. Ambedkar sense of responsibility had not grown to the extent needed, so as to trust the Executive to be making judicial appointments, as was its predecessor's role under the Crown. He rather termed it dangerous to leave the appointments to be made by the President merely on the advice of the Executive without any kind of reservation or limitation. Perhaps it was thought at that time that the President has some discretion vested in him to turn down an Executive proposal, since Article 74, in the present form, whereunder the advice of Council of Ministers is binding on the President, was not there. Then with regard to the participatory role of the Chief Justice, he viewed that "concurrence" meant veto upon appointment, which sequally meant making the Chief Justice the appointing authority, which absolute power the Constituent Assembly was not prepared even to vest in the President or the Government of the day. The clear understanding thus was that even the President or the Government of the day too, separating for the moment the ministerial act of making the appointment under the hand and seal of the President, was not being given the absolute power to stall an appointment in disregard of the recommendation of the consultee Chief Justice of India by becoming itself a consuree and assuming to itself the power of veto and becoming sequally the effectual Appointing Authority. Suspicion in the Constituent Assembly was thus cast on both the exclusive roles of the participants and hence the concept of plurality was introduced in the exercise at that level and at that level alone. 526. This, as is apparent, resulted in Articles 124 and 217 in the form as they are. Though out of the competing words 'consultation' and 'concurrence', consultation held the field, being conciliatory and courteous word, but it was viewed that the Chief Justice of India could not be allowed to have a veto power upon the appointment of Judges when a requisite proposal was made by the President. Likewise, the emphasised words in Dr. Ambedkar's statement, which have failed to get due attention hither-tofore, suggest the contemporaneous thinking of the time that an identical power of veto was also not vested in the President or the Government of the day. The first extraction is supportive of the view that it was felt 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. This was apparently in the keeping of Article 74 as it then was. The advice of the Council of Ministers is now binding. It means that in so far as the President is concerned the subject of appointment of Judges of the higher lot is left between the Chief Justice of India and the Prime Minister (Law Minister including) and he would go by the advice given. Thus it is at the Prime Minister's level that the search of the

primacy of the Chief Justice needs to be directed; more so when literally the duty to obtain consultation has in judicial channels been viewed to be hardly an effective check, limitation or reservation on the power of the consultor, ordinarily. The alternate proposal to have an appointment proposed by the executive and concurred to by the legislature was also negatived, because the check in the exercise of such power was filling on an other high constitutional dignitary i.e. the Chief Justice of India. 527. We need not feel uneasy to put up with the Constitution as it exists. Ours is a constitution, perhaps the longest in the world, a document written profusely. There is no miserliness employed in the use of words. As an organic whole it has a live model to imagine about; the Westminster model. All problems facing the nation, soluble with the aid of law, must find answers through the language and framework of the Constitution. All new thoughts and solutions to new problems experienced, not envisaged by the Founding Fathers, must translate themselves through the words of the Constitution. Greatest problems of the time are also not solved merely by interpretations made to suit the occasions. There are other legitimate modes available in passing through the tunnel of words employed by the Constitution. Majorities to byepass the words also not the answer. For the problem in hand look to the facts and figures given by the Government of India, where the opinion of the Chief Justice of India was overruled by making appointments of persons disapproved or not recommended by him. The affidavit of Mr. S.K. Bose dated April 2 1993 States that out of a total of 547 appointments made in the last decade, 540 were in accordance with the opinion of the Chief Justice of India and the remaining seven were not in such accord. We have not been provided with the details as to which court they related to except that out of those seven questionable appointment five were made in 1983, one in 1985 and one in 1991. This is the fall out of S.P. Gupta's case. It is left to guess if those were related to the High Courts, and were they, made, at least, in accordance with the opinion of the Chief Justice of the respective High Courts. In any case the affidavit does not state that those appointments were made even against the opinion of the Chief Justice of the High Court besides that of the Chief Justice of India. Otherwise, but for these aberrations, for which the Executive has given out to make amends in various forums, the executive has conceded primacy to the opinion of the Chief Justice of India which is reflective from the factum of 540 appointments going through with his concurrence. Thus from the contemporaneous views of the time when the Constitution was adopted and from its actual working in the years thereafter, the positions which emerges is that the consultee has remained an effective consultee and no one out of the two has the primal power to silence the other. The two high effectual constitutional dignitaries, such as the Prime Minister of India aided by the Law Minister, if any, and the Chief Justice of India are expected to interact in a spirit of mutuality and accommodation, and not act at cross purposes. The speech of Dr. Rajendra Prasad as President of the Constituent Assembly when moving for adoption of the Constitution of India, which stands extracted in detail in the majority opinion is worth reproduction here in part : We have prepared a democratic Constitution but successful working of democratic institutions

requires in those who have to work them willingness to respect the view-points of others, capacity for compromise and accommodation. Many things which cannot be written in the Constitution are done by convention. Let me hope that we shall show those capacities and develop those conventions. 528. This is reflective of the need of the hour. It is by retentivity and practice of such thought that we sustain independence of judiciary ; the democratic way of life, and working of the Constitution in mutuality of concern and respect. It is this idealism which promotes the Rule of law whose workability rests on the cushion of checks and balances. One-upmanship is totally out of tune with the working of our Constitution. Does not civilisation in its march keep searching all the time men who can deliver the goods? Towards that and have not the people of India through the Constitution placed faith in the aforesaid constitutional functionaries enjoining on them, the duty to search and put to use, from amongst them, persons who can deliver the goods, to man the higher echelons of judiciary? That trust has to be discharged by both as a sacred duty without a sense of superiority to either of them. In a parliamentary set up, such as ours, the elected government headed by the Prime Minister is a government of the people. The judiciary too is appointed, though indirectly, by th people, through the joint effort of the constitutional functionaries. The prople's expectations of them can appropriately be depicted from a matrimonial court scene where the child of warring spouses when asked to whom he would prefer to live with expressed his fond desire of living with both of them. The child for its well-being needs both the parents. The plurality thus lies in working together, minimising the areas of conflict ironing out differences, chosing the appropriate time for interaction, shelving controversial proposals and not letting them block other appointments which can by mutual discussion go through to serve the people; the aim being that the Supreme Court and the High Courts shall not remain starved of Judges. 529. Thus S.P. Gupta's 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. 530. Now let us view the relationship of the Chief Justice of India which his puisne Judges. The

Union Judiciary i.e. the Supreme Court of India under Article 124 consists of a Chief Justice of India' and other Judges in terms thereof. The language employed is plain and unambiguous, distinguishing him from other judges of the court. The Chief Justice of India vis-a-vis other Judges of the Supreme Court has a unique position, primal in rank and status. He is not only paid more than the other Judges of the Supreme Court, but hold, unlike them, the responsibility of fixing roster, knitting benches, allocation of work etc. and of doing other administrative functions. Article 146 is also a clear pointer of his administrative role. Thus he stands apart by virtue of his office. There can be no two opinions on that score cither in the context or in the spirit of Article 124. In comparison the matter of appointment of Judges of the Supreme Court is his constitutional function. The Chief Justice of India on the plain language of Article 124(2) is always singularly to he consulted by the President of India before making an appointment, whereas, in contrast, his puisne judges are separately referred to be barely falling in the consultation zone and that too at the option of the President. Obtaining of their opinion is not compulsory. The option resting with the President is of course purely discretionary. The President may overlook all the Judges of the Supreme Court and all the Judges of the High Court and consult instead a High Court Judge junior most in rank from a remote corner of the country. The only limitation set for the purpose is that consultation by the President can only be sought from within the members of the higher judiciary so earmarked. This too demonstrates in contrast the singular position of the Chief Justice of India. The Chief Justice of India is one of the Judges in Supreme Court in the judicial sense. But he is the Chief Justice of India through out the territory of India which encompasses various High Courts and other courts in the hierarchy. No functioning High Court Judge, and others to be appointed later, could have and can escape the touch of his approving wand. In every High Court appointment he has an effective role to play. High Court appointments advisedly are not left to be just a local affair. The Constitution thus has put the Chief Justice of India at a primal position of certification in letting enter by his approval persons to the judicial family of which he is the pater familias. Correspondingly to that right is his duty to oversee performance of Judges in the High Courts as otherwise the power in his hand towards transfer of judges from one High Court to another under Article 222 could meaningfully be not employed. In that sense the Chief Justice of India is administratively knit to the judiciary in the country but this knitting is primarily his and not that of the Supreme Court. 531. The majority opinion, as I have been able to discern and gather, concludes to obliterate this distinction. It follows a path leading to a destination unknown to the Constitution. It is said that Rule of Law is a basic feature of 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. The law whatever be its length or sweep, has some end, wherefrom if human discretion holds the field then that would lead either to justice or injustice, reasonableness or arbitrariness. Now this skepticism, with respect, I do not share in all situations;

lest of all in the case of discretion vested in the Chief Justice of India. His is a unique position of trust reposed in him by the People of India through the Constitution. Entertainment of doubt in this regard is totally impermissible besides being unfounded. Then it is derived that the scope of human discretion (his discretion) should therefore be reduced or wiped out by laying down some guidelines so as to put those guidelines in the realm of law so that they become enforceable as law. As a result the discretion vesting in one individual (the Chief Justice of India) on the suspicion of its being unreasonable and arbitrary need be snatched and handed over fictionally to the country's judiciary of the higher echelons as a body but actually to body of men introducing a new element of plurality in the final decision under the going name of "collective wisdom". In support of this step it is viewed that since the constitutional scheme frowns on vesting of absolute power in one individual, the Chief Justice of india cannot be left to have a singular role to play under Article 124(2) of the Constitution and reference to him in the said Article be read symbolic of his representing the judiciary as a whole. It is also suggested that in actual practice he must be one in a body of men, i.e. he with two of his colleagues in order of seniority, and collectively as an oligarchy, recommending appointment of judges to the Supreme Court, and likewise in a body of more than those two, in the matter of appointment of Chief Justices and other Judges of the High Court. This is the barter which the Chief Justice of India must accept to get back from the Executive his lost primacy. He must forever muzzle his singular voice. The individual voice of the Chief Justice of India shall just be at par with the voices of the afore-referred to men composing that body. All such voice, termed as collective wisdom, in writing would be sent to the Central Government recommending appointment of judges to the higher judiciary. By this collectivity, concievably not always unanimous, assumption is made that it could have the loudest voice reverberating. And such voice would have "greater weight" as compared to other constitutional functionaries who would have "due weight". Further the Executive, time bound, would be required to react an on its failure to do so effectively, it would be obligatory on its part to advise the president on the action proposed by this oligargic group. Lastly it is suggested that since appointments routed through its method would assumptively be with the approval of the judiciary as a class, there shall then be no occasion or scope of judicial review over any appointment except to the limited extent of lack of qualifications of the appointee. And it is by this method, it is said, that the right people would be inducted in the judiciary. Nothing, in my view, could be more violating in letter and spirit of the language and scheme of the Constitution, disturbing equilibrium on which it rests, and hard hit on it basic structure and basic features especially in the denial of judicial review. And on such interpretation the President henceforth cannot solicit consultation with any Judge in the country under Article 124(2) of the Constitution, for the voice of all Judges now is to be found in the symbolized Chief Justice. I respectfully therefore disagree with the majority opinion. I foresee a storm of conflict brewing in its application. If by this method it is thought to prevent the Executive element likely to enter, encroach or trespass into the judicial

portals, then that by itself would not cleanse the quality of judiciary. What is needed is to prevent executive minded persons to get in as Judges. The judiciary need to be saved from men of a pre-dominant executive temperament, men who brew conflict, men who relish and thrive on confrontation, men who would compromise principles to gain their point, men who are not historians of the past and prophets of the future, but believe in short term existences. To quote a Lord Chancellor of England, gentlemen are required in the judiciary and some knowledge of law is an advantage. And gentlemen are found on both sides of the fence. No side can lay claim to gentlemen as their exclusive possession. 532. A centuries old Baconian example given to describe the plight of a litigant coming to a court of law conies 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's 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 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's 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's case, but not effacement. 533. The suggestion that our judiciary is traditionally apolitical and it needs to secure a non-political combination on having a larger say in the appointment of members of the higher judiciary is perhaps overly stated. In the experience of working of the Constitution and the judicial system it becomes manifest that what was traditionally a non-political field, when courts were deciding disputes between citizen X & citizen Y, there grew additions of conflicts between the citizen and the State, enforcement of fundamental rights, redress of human rights violations, public interest litigation, enforcement of policy matters and the like. Any topic under the sky, subject to inherent limitations, is open for judicial review in the higher judiciary. Not only do we strike down in judicial review executive, administrative or quasi-judicial action and dismantle what appears to us to be offensive, still in numerous cases we have gone further to lay guidelines and done affirmative action. In doing so, have we not taken over political fields? Have we not in many an instance guided the functioning of a particular wing of the government and directed it to be run in a particular fashion and monitor its progress? Have

we not sitting on the couch of Article 14 been telling the Executive what is right from our point of view, and had it done our way? Multiplication of examples would hardly be necessary to hammer the point. There is nothing to feel shy in stating that the traditional role of the court of remaining apolitical is a thought of the past. Political thinkers view even the Supreme Court of United States as a political institution. It is thought that the Court is a Policy Maker through interpretation. Its views have significance in policy making of the Government. Judicial activisms in various governmental fields, executive and legislative, could overturn policies. This Court's role is similar to that. Correspondingly there are protagenists for the view for its avoidance by judicial restraint - again a policy. Lawrence Baum in "The Supreme Court" IVth edition at page 2 says : People often speak of courts as if they are, or at least ought to be, "non political". In a literal sense this is impossible.... Popular though this view of the courts may be it is simply inaccurate. The Supreme Court is "political" in a variety of ways. The higher judiciary in this country was never so full with political problems as of today. Their solutions could never be entirely non-political. 534. Referring back to Article 124 and 217, in so far as the role of the Chief Justice of India is concerned, the plain language employed therein suggests that the proposal for an appointment must emanate from the President of India. Conventionally it is just the reverse and for sound practical reasons. The proposal now emanates, and should keep emanating, from the Chief Justice of India, in so far as the Supreme Court appointments are concerned, and from the Chief Justice of the High Court, in so far as the High Court appointments are concerned, to which the Chief Justice of India is a very important consultee. To have developed such convention is pure and sound logic. The qualifications for appointment of Judges to the Supreme Court, as well as to the High Court, have in unmistakable terms been laid in the Constitution, and those being that one has either to be a Judge functioning in the High Court, or the District Court, as the case may be, or a lawyer of a particular standing for both the courts, and a jurist for the Supreme Court. Search would obviously have to be made in areas to which judges and lawyers flock to or function, for they are the dominant contributories to the manning of the Bench Plainly that area is the courts where the High Court, controls or oversees the functioning where the faculties and talent of both Judges and Lawyers are at their fullest display, functioning as they do not public gaze, facilitating to some extent a choice. Strong common sense leaves the act of proposing a name to the Chief Justice of the court concerned, he being the longest tenured and having gained the longest experience in men. Besides knowing about the legal acumen of the person under consideration, the Chief Justice has opportunity to notice his behaviour and court-craft and the fairness with which he deals with the court, client and opposing counsel. The Chief Justice has various means to know about the general reputation of the person under consideration. Yet the search, as said before, traditionally is to look for a gentleman, a man of honesty and integrity for the discovery of which the Chief Justice may not be fully equipped. These attributes are reflected to some extent in the formal atmosphere of the court but most of them outside the

court. The proposal cannot, and should not, fructify on the mere asking of the Chief Justice because his recommendation in the very nature is incomplete and inchoate unless and untill the twain information about the character, honesty, integrity gentlemanliness, and a host of other attributes are supplied by the Executive. The Executive also is in a position to supply the possible impact of the appointment as to whether it would receive acclaim and approval in the society or not. Thus it is evident that as the human being is not dissectible and is assessible as a whole, the qualities and attributes gatherable by the two functionaries should be pooled and churned as a whole so that the appointment surfaces in approval or disapproval of both of them. The information covering areas cannot be divided in water-tight compartments or by allocation of higher or smaller roles or award of less or more marks as do the Public Service Commissions. There are a lot many overlapping areas coverable by the Executive as are areas in which difference of opinion may surface in assessment. Both need to entwine to help emerging appropriate acceptable appointments both to the Chief Justice of India and the Executive. In crystalising their views and conclusions, no window of information can be kept closed. They are entitled to draw and solicit light from all genuine and permissible quarters since there is no bar to that effect under the Constitution. It is left exclusively to the Chief Justice of the Supreme Court or the High Court, as the case may be, to consult any number of Judges on the particular proposal. It is equally within his right not to consult anyone. This is his constitutional primacy and prerogative. A division, artificial on the face of it, cannot tilt in favour of the Chief Justice by assigning to him more knowledgability of a proposed appointment than other functionaries and on that basis a primacy, leaving the opinion of others for due regard. As said before, the whole personality of the person under considerations is to undergo the test of acceptability at a joint level. Knowledge of law alone is not a tilting factor. 535. A statement of Lord Diplock from Duport Steels Ltd. v. Sir and Ors., has been quoted by my learned brother Ahmadi, J. In his opinion. That seems to be wholly apt in guiding what we are handling. There is clearly no principle of consideration which would justify reading into the plain and simple words of Article 124(2) any additional words to suggest that the Chief Justice of India as described therein is only in a symbolic sense, representing the judiciary. It cannot be said that the Chief Justice heads a monastic order, entry of which is regulated by the Order as a class, and its head merely a spokesman. No one denude him of the role to which he is constitutionally entitled. Equally it is difficult for me to agree to a construction of the provision that the proposal initiated by him, or related to a High Court appointment, which passes through him, when approved by the executive goes as affirmance of his primacy. I would rather go by the scriptural thought that when one says and the other agrees, both be known as wise. 536. With regard to the role of the Chief Justice of India vis-a-vis the Chief Justice of the High Court in making appointments to the High Court, I would favour their views to coalesce because on that depends discipline in the judicial family. As said above, the appointments to the High Court are not a local affair or a State subject. At times local affairs

may appear messed up and complicated which cannot be conducive to the emergence of right appointments. As said before, the Chief Justice of India has an over all role in the image and upkeep of the judiciary for he has a hand in the appointment of every High Court Judge and also a hand in the matter of transfers of Judges from one High Court to another. Those transfers need to have a basis. Unless he is obliged under the Constitutional scheme to oversee the functioning of the High Courts, he cannot purposively have a participatory role in the subject of transfers. In that limited hierarchical sense, the voice of the Chief Justice of India, in my view, to the proposal, should there be a difference, unexpected though, be the determining factor. The views of the Chief Justice of the High Court regarding an appointment, being virginal and primary in nature, he being the initiator, would normally be entitled to great accommodation, but should there ever be a difference with the views of the Chief Justice of India, the latter's view should be allowed to take the lead. For it cannot be ever said in the constitutional scheme that there are as many judiciaries in the country as of the High Court; the Supreme Court being just another. As a wing of the political set up, the judiciary is one whole, knitted hierarchically under the Constitution in the manner suggested earlier and in the preceding paragraphs, and by allocation of specific roles. 537. Transfers of Judges from one High Court to another is almost the judiciary's internal affair. The role of the Chief Justice of India in that regard is primal in nature because this being a topic within the judicial family, the Executive cannot have an equal say in the matter. Here the word 'consultation' would shrink in a mini form. Should the Executive have in equal role and be in divergence of many a proposal, germs of indiscipline would grow in the judiciary. For instance take the case of a recommendation made by a Chief Justice of the High Court to which the Chief Justice of India is in dis-agreement, and the Executive preferring the view of the Chief Justice of the High Court makes the appointment and which Judge is recommended to be transferred by the Chief Justice of India to another High Court. In the first place, preferring the opinion of the Chief Justice of the High Court over and above that to the Chief Justice of India erodes the primacy of the Chief Justice of India based on his status, rank and precedence constitutionally noticed, and in the second place, recommendation of transfer of that Judge to another High Court, makes the proposal suspect. This obviously is a breeding ground of indiscipline. So the role of the Chief Justice of India in the matter of appointment of Judges of the High Court and their transferability are connected matters which cannot be divorced on the mere fact of the possibility of their separate happening. The role of the Chief Justice of India in this twin subject has to be viewed from the self angle, i.e. to subserve the independence of judiciary in the interest of the Indian people. 538. Thus on the question of primacy I conclude to say that the role of the Chief Justice of India in the matter of appointments to the Judges of the Supreme Court is unique, singular and primal, but participatory vis-avis the Executive on a level of togetherness and mutuality, and neither he nor the Executive can push through an appointment in derogation of the wishes of the other. S.P. Gupta's case to that extent need be and is hereby

explained away restoring the primacy of the Chief Justice. The roles of the Chief Justice of India and Chief Justice of the High Court in the matter of appointments of Judges of the High Court, is relative to this extent that should the Chief Justice of India be in disagreement with the proposal, the Executive cannot prefer the views of the Chief Justice of the High Court in making the appointment over and above those of the Chief Justice of India. In the matters of transfers of Judges from one High Court to another, the role of the Chief Justice of India is primal in nature and the Executive has a minimal, if not, no say in the matter, for consultation envisaged under Article 222 of the Constitution is used in a shrunk from and more as a courtesy, the subject being one relating to the in- working of the judiciary. 539. I am in dis-agreement, though regretfully but respectfully, with the views of the majority in virtually re-writing the Constitution to assign a role to the Chief Justice of India, in the whole conspectus of the Constitution, as symbolic in character and to his being a mere spokesman representing the supposed vies of entire judiciary. I also dis-agree, likewise, in the creation of and vesting of powers assumed, in the hands of the oligarcy representing the judiciary as a whole created by adding words to the Constitution by interpretative exercise so to silence the singular voice of the Chief Justice of India of ever. I also disagree to the denial of judicial review on the subject on the supposition that it would be the judiciary's act, as that is against the basic structure of the Constitution. Subject to the views afore-expressed, I am, by and large, in respectful agreement with the opinion of my learned brother Ahmadi, J. Necessarily and sequally, save to the views afore-expressed by me, I am in respectful dis-agreement with the view of my learned brethren Pandian and Kuldip Singh, JJ. since they are supportive of the majority view, save and except where their views accord with mine and that of brother Ahmadi, J. 540. Since neither before the referring bench nor in the pleading was any point raised as to the innovation and application of service jurisprudence to the induction into the higher judiciary, or to the concept of reasonable expectations, I do not feel obliged to even touch these questions. It needs also to be added that nothing ever was projected before us on these subjects as indicated. As stated in the outset we did not have the benefit of a discussion inter-se on which the desirability of going into these aspects may have been gone into. The majority has expressed views thereon without alerting counsel appearing and others concerned. A lot can be said against such views of the majority out for the present the comment be kept reserved. I would rather desist conviction on the subject and prefer to remain advised. So, in my view, on this aspect, the opinion is obitor. Consideration on these points was wholly unnecessary on the rigid terms of the reference. For such view I am with respect in disagreement with the majority. 541. On the question of justiciability of the Judge-strength, I have nothing useful to add. 542. While parting with this opinion, I join hands with my learned brethren in recording my sense of gratitude to the galaxy of men who addressed us at the bar in this venture, which could aptly be called a labour of love, and to have enlightened us on the subject with their professional skill, analysis and wisdom. 543. I agree to the disposal of the reference leaving however a note of

skepticism - Was it worth it?