Supreme Court of India
B. S. Yadav And Others Etc vs State Of Haryana And Others Etc on 5 November, 1980
Equivalent citations: 1981 AIR 561, 1981 SCR (1)1024
Author: Y Chandrachud
Bench: Chandrachud, Y.V. ((Cj), Bhagwati, P.N., Krishnaiyer, V.R., Tulzapurkar, V.D., Sen, A.P. (J)

PETITIONER:
B. S. YADAV AND OTHERS ETC.

Vs.

RESPONDENT:
STATE OF HARYANA AND OTHERS ETC.

DATE OF JUDGMENT05/11/1980

BENCH:
CHANDRACHUD, Y.V. ((CJ)
BENCH:
CHANDRACHUD, Y.V. ((CJ)
BHAGWATI, P.N.
KRISHNAIYER, V.R.
TULZAPURKAR, V.D.
SEN, A.P. (J)

CITATION:
1981 AIR 561 1981 SCR (1)1024
1980 SCC Supl. 524
CITATOR INFO :
R 1982 SC1244 (14)
F 1984 SC 161 (52)
R 1984 SC 850 (17)
R 1985 SC1681 (5)
F 1987 SC 415 (16,17)
RF 1987 SC1832 (1)
R 1988 SC 488 (9)
D 1988 SC1153 (2)

ACT:
Constitution of India, 1950-Articles 235 and 309, proviso-scope of- Governor, if could make rules regulating conditions of service of judicial officers-If could retrospectively amend the rules-determination of inter se seniority of judicial officers and declaring that an officer has satisfactorily completed the period of probation, Governor if competent to do-period of probation if could be reduced in individual cases without exceptional circumstances justifying reduction.

Rule of rotation, if could be read into rule of quota of direct recruits and promotees-vacant post for promotees, if could be filled by confirmation of a direct recruit and vice versa.

HEADNOTE:

Exercising power under the proviso to Art. 309 of the Constitution (which empowers the Governor to make rules regulating the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the State) the Governor of Punjab, in consultation with the Punjab High Court, framed the Punjab Superior Judicial Service Rules, 1963. The rules provide for the direct recruitment as well as appointment by promotion from the Punjab Civil Service (Judicial branch). Under rule 8(2), two third of the total number of cadre posts have to be manned by promoted officers and one-third by direct recruits. Under rule 10(1) direct recruits have to remain on probation for two years provided that the Government may, in exceptional circumstances, reduce the period of probation in consultation with the High Court. The period of probation of an officer can be extended by the Governor beyond the period of two years in consultation with the High Court but not so as to exceed a total period of three years. Rule 10(2) empowers the Governor to confirm in consultation with the High Court a direct recruit on a cadre post with effect from a date not earlier than the date on which he completes the period of probation. Rule 12 (now in force in Haryana) provides that the seniority of direct recruits and promoted officers shall be determined with reference to the respective dates of their confirmation.

Under the Punjab Rules as amended retrospectively with effect from April 9, 1976 'cadre post' means a permanent as well as a temporary post in the service. The inter se seniority of the members of the service is to be deter mined by the length of continuous service on a post in the service irrespective of the date of confirmation.

The three petitioners in the Haryana writ petitions were selected for recruitment to the Punjab Civil Service (Judicial Branch) in a competitive examination and after the formation of the State of Haryana, they were promoted in an officiating capacity to the Haryana Superior Judicial Service in 1967 and 1968. Respondent No. 3 who was a direct recruit to the Haryana Superior Judicial Service was appointed as a District and Sessions Judge on July 7,
1025
1970 and was confirmed in that post on July 7, 1972 on the completion of A two year probationary period. The three petitioners were confirmed as District and Sessions Judges with effect from July 8, 1972.

In the case of judicial officers of Punjab, although there were ten vacancies in the quota of promoted officers and an equal number of promoted officers were officiating for more than three years as Additional District and Sessions Judges, the High Court did not confirm the

promotees in those vacancies but confirmed the promotees and the direct recruits by applying the rule of rotational Six direct recruits were given prior dates of confirmation in comparison with the promotees, as a result of which the confirmation of eight promotees was postponed. In the case of some direct recruits confirmation was given within a period of one year and four months though the period of probation was two years.

Rule 12 was amended retrospectively from April 9, 1976 by which seniority was to be determined by the length of continuous service on a post in the service irrespective of the date of confirmation

Rejecting the plea of one of the direct recruits that the rules not only required the application of a rule of quota at the time of appointment but also required the application of a rule of rotation at the time of confirmation, the High Court held that rules 8 and 12 were independent of each other, that rotational system could not be implicitly read in the quota rule provided for by rule 8 and that members of the Superior Judicial Service were entitled to claim seniority strictly in accordance with the provisions of rule 12. The promotees complained that this decision rendered by the High Court in its judicial capacity was not being followed by the High Court in the discharge of its administrative duties and that seniority of the promotees and direct recruits must be fixed without applying the rule of rotation at the time of confirmation. It was also stated that after the amendment of rule 12 in 1976 although two vacancies of District and Sessions Judges arose on each of these occasions the High Court promoted a direct recruit treating the date of his confirmation as the criterion of seniority.

It was contended on behalf of the promotees in Haryana that the control which the High Court exercises under Art. 235 over the subordinate judiciary does not include the power to make rules regulating the condition of service of judicial officers but that since the power conferred on the Governor under the proviso to Art. 309 to make rules is legislative in nature the principle of independence of judiciary is not in any manner violated when the Governor makes the rules. On the other hand it was contended on behalf of the High Court that the control over the subordinate judiciary vested in the High Court by Art. 235 being exclusive in nature, the power to frame rules in regard to the seniority of judicial officers must reside in the High Court and not in the Governor.

It was contended on behalf of the promotees that the quota of 2: 1 provided for by rule 8 is applicable only at the time of initial recruitment and that there was no warrant for extending the application of that rule at the time of confirmation.

Partly allowing the Petitions;

^

HELD: There is no force in the contention that the Governor has no power to make rules of seniority of District and Sessions Judges. [1058B]

1026

On a plain reading of Arts. 235 and 309 of the Constitution it is clear that the power to frame rules regarding seniority of officers in the judicial service of the State is vested in the Governor and not in the High Court. The first part of Art. 235 vests the control over District Courts and courts subordinate thereto in the High Court. But the second part of that Article says that nothing in the article shall be construed as taking away from any person belonging to the judicial service of the State any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law. Thus, Art. 235 itself defines the outer-limits of the High Court's power of control over the District Courts and courts subordinate thereto. In the first place, in the exercise of its control over the District Courts and subordinate courts it is not open to the High Court to deny to a member of the subordinate judicial service of the State the right of appeal given to him by the law which regulates the conditions of his service. Secondly, the High Court cannot, in the exercise of its power of control, deal with such person otherwise than in accordance with the conditions of his service which are prescribed by such law. [1052C]

There is no power in the High Court to pass a law though rules made by the High Court in the exercise of power conferred upon it in that behalf may have the force of law. Law which the second part of Art. 235 speaks of is law made by the Legislature. The clear meaning, therefore, of the second part of Art. 235 is that the power of control vested in the High Court by the first part will not deprive a judicial officer of the rights conferred upon him by a law made by the Legislature regulating his conditions of service. [1052G-H]

Article 235 does not confer upon the High Courts the power to make rules relating to conditions of service of judicial officers attached to District Courts and the courts subordinate thereto. Whenever it was intended to confer on any authority the power to make any special provision or rules including rules relating to conditions of service, the Constitution has stated so in express terms. For example the provisions contained in Articles 225, 227(2) & (3) and 229(1) & (2) confer powers on the High Court to frame rules for certain specific purposes. Art. 229(2) which is directly in point provides that subject to the provisions of any law made by Legislature of the State the conditions of service of officers of a High Court shall be made by the High Court. The framers of the Constitution would not have failed to incorporate a similar provision in Art. 235 if it was

intended that the High Courts should have the power to make rules regulating the conditions of service of judicial officers in the subordinate judiciary. [1053B-F]

The power of control vested in the High Court by Art. 235 is expressly made subject to the law which the State Legislature may pass for regulating the recruitment and service conditions of judicial officers of the State. The framers of the Constitution did not regard the power of the State Legislature to pass laws regulating the recruitment and conditions of service of judicial officers as an infringement of the independence of the judiciary. The mere powers to pass such a law is not violative of the control vested in the High Court over the State judiciary. [1053H; 1054C]

In order that there may be no vacuum until the passing of a law by the Legislature on the subject, the Constitution has made provision under the proviso to Art. 309 that until the State Legislature passes a law on the
1027
particular subject, it shall be competent to the Governor of the State to A make rules regulating the recruitment and conditions of service of the judicial officers of the State. The power exercised by the Governor under the proviso is thus a power which the Legislature is competent to exercise but has in fact not yet exercised. It partakes of the characteristics of the legislative, not executive, power. It is legislative power. [1054D-F]

That the Governor possesses legislative power under the Constitution is incontrovertible. Just as under Art. 213 the Governor substitutes tor the Legislature because the Legislature is in recess so under the proviso to Art. 309 he substitutes for the Legislature because the Legislature has not yet exercised its power to pass an appropriate law on the subject. [1054G and 1055B-C]

It is true that the power conferred by Article 309 is subject to the provisions of the Constitution but it is fallacious for that reason to contend that the Governor cannot frame rules regulating the recruitment and conditions of service of the Judicial officers of the State. Firstly, the power of control conferred upon High Courts by the first part of Article 235 is expressly made subject, by the second part of that Article, to laws regulating conditions of service of its Judicial officers. Secondly, the Governor, in terms equally express, is given the power by the proviso to Article 309 to frame rules on the subject. [1055B-C]

A combined reading of Arts. 235 and 309 will yield the result that though the control over the subordinate courts is vested in the High Court the appropriate Legislature and until that Legislature acts the Governor of the State has the power to make rules regulating the recruitment and the conditions of service of judicial officers of the State. The power of the Legislature or of the Governor thus to legislate is subject to all other provisions of the

Constitution like Arts. 14 and 16. [1055D-E]

The second part of Art. 235 recognises the legislative power to provide for recruitment and the conditions of service of the judicial officers of the State. The substantive provision of Art. 309 , including its proviso, fixes the location of the power. The opening words of Art. 309 limit the amplitude of that power. [1055F]

Seniority is undoubtedly an important condition of service. The control vested in the High Court by the first part of Art. 235 is, therefore subject to any law regulating seniority as envisaged by the second part of that article. The power to make such law is vested by Art. 309 in the Legislature and until it acts, in the Governor. Whether it is the Legislature which passes an Act or the Governor who makes rules regulating seniority, the end product is law within the meaning of second part of Art. 235. The Legislatures of Punjab and Haryana not having passed an Act regulating seniority of the respective State judicial officers, the Governors of the two States have the power to frame rules for that purpose under the proviso to Art. 309 of the Constitution Such rules are subject to the provisions of the Constitution and to the provisions of any Act which the appropriate Legislature may pass on the subject. [1055G-H]

The law passed by the Legislature or the rules made by the Governor can provide for general or abstract rules of seniority leaving it to the High Court to apply them to each individual case as and when the occasion arises. The power to legislate on seniority being subject to all other provisions of the Constitution cannot be exercised in a manner which will affect or be detrimental to the control vested in the High Court by Art. 235. [1056B-C]

1028

Though the Legislature or the Governor has the power to regulate seniority of judicial officers by laying down rules of general application, that power cannot be exercised in a manner which will lead to interference with the control vested in the High Court by the first part of Art. 235. In a word, the application of law governing seniority must be left to the High Court. The determination of seniority of each individual judicial officer is a matter which indubitably falls within the area of control of the High Court over the district courts and the courts subordinate thereto. For the same reason, though rules of recruitment can provide for a period of probation, the question whether a particular judicial officer has satisfactorily completed his probation or not is a matter which is exclusively in the domain or the High Court to decide. [1056E-F]]

The independence of the judiciary has to be preserved. at all costs. But at the same time the Legislature or the Governor cannot be deprived of their legitimate legislative powers under Art. 309. That power is subject to all other provisions of the Constitution which means that the power

cannot be exercised in a manner which will lead to the violation of Arts. 14 or 16 or the pervasive ambit of the first part of Art. 235. Since the power conferred by Art. 309 is not absolute or untrammeled it will be wrong to test the validity of that power on the anvil of its possible abuse. [1057 A-B]

High Court of Punjab and Haryana v. State of Haryana, [1975] 3 SCR 355, Union of India v. Justice S. H. Sheth, [1978] 1 S.C.R. 423., A. P. High Court v. Krishnamurthy, [1979] 1 S.C.R. 26 & State of Bihar v. Madan Mohan Prasad, [1976] 3 S.C.R. 110, referred to.

Rule 8 as its very heading shows, provides for a distinct condition of ser vice with reference to a specific point of time, namely "recruitment to service". The language of the rule also indicates that the operation of this rule is confined to the stage of initial recruitment to the service either by promotion or by direct appointment from the Bar. [1063F]

The reservation contemplated by rule 8 is intended to be made at the stage of initial appointment only by reserving two third of the total number of posts in the cadre for promotees and one third for direct recruits. A post which falls vacant in the quota of promotees cannot be filed by the confirmation of a direct recruit therein nor indeed can a promotee be confirmed in a post which is within the quota of direct recruits. [1063H]

If this be the true construction of rule 8 the method of confirmation by rotation of direct recruits and promotees, regardless of whether the vacancy assigned to the particular officer falls within the quota of the class to which he belongs will be in contravention of that rule. [1064B]

'Appointment' is not a continuous process. The process of appointment is complete as soon as a person is initially recruited to the service either by promotion or by direct recruitment and confirmation is not a part of the process of appointment. "Recruitment to the service" is a matter which falls within the power of the Governor under Art. 233 while "confirmation" is a matter of 'control' vesting in the High Court under Art. 235. The superimposition of rule 8, which fixes the quota at the stage of recruitment on the rules relating to confirmation and seniority is, therefore, contrary to the basic constitutional concepts governing judicial service. [1064C-D]

1029

The rule of rota cannot be read into the rule of quota. In other words the ratio of 2: 1 shall have to be applied at the stage of recruitment but cannot on the language of the relevant rules be applied at the stage of confirmation. [1066B]

A K. Subraman v. Union of India, [1975] 2 SCR 979, N.K. Chauhan v. State of Gujarat, [1977] 1 SCR 1037 referred to.

Paramjit Singh Sandhu v. Ram Rakha , [1979] 3 SCR 584

held inapplicable.

The High Court was not justified in applying tho rule of rotation at the time of confirmation of the members of the superior judicial service who were appointed to that service by promotion and by direct recruitment. In the discharge of its administrative functions the High Court could not have failed to follow a judgment of its own special bench consisting of five Judges. [1066C-D]

High Court of Punjab and Haryana v. State of Haryana, [1975] 3 S.C.R. 365, referred to.

On a proper interpretation of the rules, promotees are entitled to be confirmed in the vacancies which are available within their quota of two third, whether or not one third of the vacancies are occupied by confirmed direct recruits. Similarly direct recruits are entitled to be confirmed in vacancies which are available within their quota of one third whether or not two third of the vacancies are occupied by confirmed promotees. [1067D-E]

The fairness which Arts. 14 and 16 postulate is that it a promotee is otherwise fit for confirmation and a vacancy falling within the quota of promotees is available in which he can be confirmed, his confirmation ought not to be postponed until a direct recruit, whether yet appointed or not, completes his period of probation and thereupon becomes eligible for confirmation. The adoption of this principle in the matter of confirmation will not, in practice, give any undue advantage to the promotees. [1067D-E].

In so far as the confirmation of respondents 6, 7 and 8 is concerned, in the absence of exceptional circumstances justifying the reduction of their normal probationary period of two years, the order of the High Court confirming he three respondents before they were normally due for confirmation cannot be upheld. The order is in clear violation of the guarantee of equal opportunity, by the petitioners were prejudiced and must for that reason be sel aside. [1067G-H]

The power conferred by the proviso to rule 10(1) on the Governor is ex-facie bad because such a power directly impinges upon the control vested in the High Court by Art. 235 of the Constitution. If at all any authority could exercise such a power, it is the High Court and not the Governor. The rules must now be understood to mean that the High Court and not the Governor has the power of confirmation, that the normal period of probation of direct recruits is two years and that unless there are exceptional circumstances in regard to each individual case, a direct recruit cannot be confirmed from a date earlier than the date on which he has satisfactorily completed his probation of two years. The High Court is not free to fix any period of probation as it likes or to reduce the period of two years at its will and pleasure. [1068B-E]

As regards The power of the Governor to amend a rule with retrospective effect, since he exercises a legislative

power under proviso to Art. 309 it is open to him to give retrospective effect to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear
1030
either from the face of the rules or by extrinsic evidence reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period. In the instant case rule 12 which was amended retrospectively from April 9, 1976 by a notification dated December 31, 1976 is invalid because no such nexus is shown to exist. [1068F-H]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition Nos. 4228-4230 of 1978 and 266 of 1979.

(Under Article 32 of the Constitution) V. M. Tarkunde, O. P. Malhotra, K. N. Bhatt, Vijay Kumar Verma and R. C. Kathuria for the Petitioners in WPs 4228-4230/78.

Y. S. Chitale (Dr.), Lala Ram Gupta, C. R.

Somashekharan, M. S. Ganesh, P. N. Jain and M. V. Goswami for the Petitioners in W.P. 266/79.

5. N. Kackar, S. N. Ashri, R. N. Sachthey and M. N. Shroff for Respondent 1 in WP 4228-4230/78.

Soli J. Sorabjee, and Hardev Singh for R. 2 in WPs 4228-30 of 1978 and 266/79.

F. S. Nariman, B. R. Tuli and R. S. Sodhi for RR 3-11 in WP 266/79.

Kuldip Singh, Prem Malhotra and R. S. Mongia for R. 3 in WPs 4228-30/78 and intervener.

A. K. Sen and Mrs. Urmila Kapoor for R. 1 in WP 266/79. The Judgment of the Court was delivered by CHANDRACHUD, C.J.-These Writ Petitions under Article 32 of the Constitution involve the consideration of a two-fold controversy: first, as to the rules governing seniority between direct recruits and promotees appointed to the Superior Judicial Services of Punjab and Haryana and second, between the control over district courts and subordinate courts vested in the High Court by Art. 235 and the power conferred upon the Governor by the proviso to Art. 309 of the Constitution to make rules regulating the recruitment and conditions of service of persons appointed, inter alia, to the Judicial Service of the State.

We have two sets of Writ Petitions before us which involve identical points except for one material difference which we will mention later. Writ Petitions 4228 to 4230 of 1978 are filed by three judicial officers of the State of Haryana who are promotees, that is to say, who were promoted to the Superior Judicial Service of the State from the Haryana Civil Service (Judicial Branch). Respondents

1 and 2 to those Writ Petitions are the State of Haryana and the High Court of Punjab and Haryana respectively. Respondent 3, Shri N. S. Rao, is a direct recruit, having been appointed from the Bar to the Haryana Superior Judicial Service. Writ Petition 266 of 1979 is filed by twenty-two promotees, that is to say, those who were promoted to the Punjab Superior Judicial Service from the Punjab Civil Service (Judicial Branch). Respondents 1 and 2 to that petition are the State of Punjab and the High Court of Punjab and Haryana respectively. Respondents 3 to 11 were appointed directly from the Bar to the Punjab Superior Judicial Service.

Some of the more important grievances of the petitioners are that their seniority qua direct recruits is wrongly and unjustly made to depend upon the fortuitous circumstance of the date of their confirmation in the Superior Judicial Service; that even if a substantive vacancy is available, the confirmation of a promotee in that vacancy is postponed arbitrarily and indefinitely, that promotees are treated with an unequal hand qua direct recruits: for example, a promotee, despite his satisfactory performance and the availability of a substantive vacancy in which he can be confirmed, is continued in an officiating capacity until after a direct recruit completes his probation and is due for confirmation, and that, the High Court applies the principle of rotation as between promotees and direct recruits at the time of their confirmation when, in fact, that the relevant rules provide for is the application of a rule of quota at the time of their appointment.

These grievances of the promotees can best be understood in the light of the following facts: The three petitioners in the Haryana Writ Petitions were selected for recruitment to the Punjab Civil Service (Judicial Branch) after qualifying in a competitive examination. They were appointed as Subordinate Judges in 1950. By Act 3 of 1966, the State of Haryana came into existence on November li 1966. Petitioners 1 and 2-Shri B. S. Yadav and Shri V. P. Aggarwal- were promoted in an officiating capacity to the Haryana Superior Judicial Service on July 28 and October 7, 1967 respectively, while petitioner No. 3 Shri A. N. Aggarwal, was promoted similarly on March 27, 1968. Respondent 3, Shri N. S. Rao who as a member of the Bar was working as a District Attorney, was appointed directly to the Haryana Superior Judicial Service with effect from July 7, 1970. The normal period of his two years' probation expired on July 7, 1972 but before the issuance of the orders of his confirmation, a complaint dated August 2, 1977 was received against him. That complaint was inquired into by a High Court Judge who, by his report of March 1973, held it to be unfounded. Respondent 3 was thereupon confirmed by the High Court as a District and Sessions Judge with effect from March 30, 1973. By a notification dated May 4, 1973 that date was corrected to July 7, 1972 being the date on which Respondent 3 completed the two years' probationary period. By the same notification, the High Court confirmed the Petitioners and two other promotees as District and Sessions Judges with effect from July 8, 1972. Thus, the petitioners, who were officiating continuously in the Superior Judicial Service of the State as Additional District and Sessions Judges for two or three years prior to the appointment of Respondent 3 directly to that service, lost their seniority over him by being allotted a date of confirmation which was one day later than the date on which he completed his probationary period.

(A small digression will be permissible here. The Government of Haryana was unwilling to concede to the High Court the right to confirm a Judicial officer. It disregarded the High Court's order whereby Shri N. S. Rao was confirmed and passed an order reverting him to the post of a District

Attorney which he was holding at the time of his appointment as a District and Sessions Judge. Rao filed a Writ Petition in the High Court to challenge the order of the Government. The High Court set aside his reversion on certain other grounds but it held by a majority (N. S. Rao v. State of Haryana that the power to confirm a direct recruit vested in the Governor and not in the High Court. A Constitution Bench or this Court reversed the view of the High Court and held by a unanimous judgment (High Court of Punjab and Haryana v. State of Haryana), that the power to confirm a District and Sessions Judge resides in the High Court and not in the Governor).

In the Punjab Writ Petition, the contesting parties are twenty-two promotees who have filed the writ petition and Respondents 3 to 11 who were appointed directly to the Punjab Superior Judicial Service. Petitioner No. 1, Shri Pritpal Singh, was promoted to that Service on November 12, 1969 when he was 44 years of age. Respondent 3, Shri J. S. Sekhon, was appointed directly to that Service on February 1, 1973 when he was 41 years of age. The former, though promoted to the Superior Judicial Service more than three years before the appointment of Respondent 3, was confirmed on February 3, 1975 which was one day later than February 2, 1975 on which date Respondent 3 was confirmed on the completion of his two years' probation. The grievance of Petitioner No. 1 is that a permanent vacancy was available on December 23, 1972 in which he could have been confirmed but the High Court marked time in order to enable Respondent 3 to complete his probation and gave to Petitioner 1 an arbitrary and artificial date of confirmation in order that he may not rank higher in seniority to Respondent 3.

The case of Petitioner 1 in the Punjab Writ Petition is illustrative of the grievance of the other petitioners. Petitioners 2 to 6 were Promoted to the Superior Judicial Service between January 1972 and August 1972. Petitioner 7 was promoted in April 1973, Petitioners 8 to 10 in August 1974, Petitioners 11 to 16 in 1975, Petitioner 17 in 1976, Petitioners 18 to 20 in 1977 and Petitioners 21 and 22 in 1978. Respondents 4 and 5 were recruited directly in January 1973 and were confirmed in February 1975 on the completion of the probationary period. Their confirmation is open to no exception but, Petitioners 2 and 3 Shri Amarjit Chopra and Shri H. S. Ahluwalia who were promoted on January 16 and August 21, 1972 were confirmed on August 6 and August 7, 1975 respectively. The significance of these dates of confirmation becomes apparent in relation to the confirmation of respondents 6 and 7. Having been appointed directly to the Superior Judicial Service on the 1st and 2nd of April 1975, they were confirmed on the 2nd and 5th August 1976 respectively, which was even before they had completed their probationary period. Petitioners 2 and 3 who were promoted to the Superior Judicial Service roughly three years prior to the direct appointment of Respondents 6 and 7 were confirmed on the 6th and 7th August, 1976 which was three or four days later than the dates of confirmation allotted to Respondents 6 and 7. Petitioners 4 to 22 whose dates of promotion to the Superior Judicial Service range between August 1972 and July 1978 were not yet confirmed when the Writ Petition was filed on February 27, 1979.

Do the rules which apply to the members of the Superior Judicial Services of Punjab and Haryana warrant this course of action and how far are the rules valid ? For deciding these questions we must necessarily have a look at the relevant rules.

The recruitment to the Punjab Superior Judicial Service and the other conditions of service of the members thereof are regulated by the "Punjab Superior Judicial Service Rules, 1963" as amended from time to time. These rules were originally framed by the Governor of Punjab in consultation with the Punjab High Court, in exercise of the powers conferred on the Governor by the proviso to Art. 309 of the Constitution. By that proviso, the Governor has the power to make Rules regulating the recruitment and the conditions of service of persons appointed to services and posts in connection with the affairs of the State Rules 2, 4, 8, 9, 10, 11, 12 and 14 of the aforesaid rules which are relevant for the present purposes read as follows in so far as they are material:

> Rule 2: Definitions.-(1) 'appointment to the service' means an appointment to a cadre post, whether on permanent, temporary or officiating basis, or on probation;
>
> (2) 'cadre post' means a permanent post in the Service;
>
> (6) 'member of the Service' means a person-
>
> (a) who immediately before the commencement of these rules, holds a cadre post, whether on permanent, temporary or officiating basis, or on probation; or
>
> (b) who is appointed to a cadre post in accordance with the provisions of these rules;
>
> (7) 'Promoted officer' means a person-
>
> (a) who is not a direct recruit and is holding a cadre-post whether on permanent, temporary or officiating basis or on probation, immediately before the commencement of these rules; or
>
> (b) who is appointed to the Service by promotion from Punjab Civil Service (Judicial Branch). Rule 4: Appointing Authority-All appointments to the Service shall be made by the Governor in consultation with the High Court.
>
> Rule 8: Recruitment to service-(1) Recruitment to the Service shall be made-
>
> (i) by promotion from the Punjab Civil Service (Judicial Branch); or
>
> (ii) by direct recruitment.
>
> (2) of the total number of cadre-posts, two-third shall be manned by promoted officers and one- third by direct recruits:
>
> Provided that nothing in this sub-rule shall prevent the officiating appointment of a member of the provincial Civil Service (Judicial Branch) on any post which is to be filled up by direct recruitment, till a direct recruit is appointed.

Rule 9: Appointment of direct recruits.-(1) No person shall be eligible for direct recruitment unless he-

(i) is not less than 35 years and not more than 45 years of age on the first day of January next following the year in which his appointment is made;

(ii) has been for not less than 7 years an Advocate or a pleader and is recommended by the High Court for such appointment (2) No person who is recommended by the High Court for appointment under sub-rule (i) shall be appointed unless he is found physically fit by a Medical Board set up by the Governor and is also found suitable for appointment in all other respects.

Rule 10: Probation.-(1) Direct recruits to the Service shall remain on probation for a period of two years, which may be so extended by the Governor in consultation with the High Court, as not to exceed a total period of three years;

(2) on the completion of the period of probation the Governor may, in consultation with the High Court, confirm a direct recruit on a cadre-post with effect from a date not earlier than the date on which he completes the period of probation;

(3) If the work or conduct of a direct recruit has, in the opinion of the Governor, not been satisfactory he may, at any time, during the period of probation or the extended period of probation, if any, in consultation with the High Court, and without assigning any reason, dispense with the services of such direct recruits.

Rule 11: Reversion of promoted officers the work of E a promoted officer officiating on a cadre-post has, in the opinion of the Governor, not been satisfactory, he may, at any time during the period of officiation, in consultation with the High Court,-

(i) revert him to his substantive post; or

(ii) deal with him in such other manner as may be warranted by the terms and conditions of his substantive appointment.

Rule 12: Seniority-The seniority, inter se, of the substantive members of the Service, whether direct recruits of promoted officers, shall be determined with reference to the respective dates of their confirmation.

Provided that the seniority, inter se, of substantive members of the Service having the same date of confirmation shall be determined as follows:

(i) in the case of direct recruits the older in age shall be senior to the younger;

> (ii) in the case of promoted officers, in accordance with the seniority in the Punjab Civil Service (Judicial Branch) as it stood immediately before their confirmation;

(iii) in the case of promoted officers and direct recruits, the older in age shall be senior to the younger.

Rule 14: Selection Grades.-(1) The members of the Service shall be eligible for promotion, permanently or provisionally, to the following selection grade posts, carrying scales of pay specified against them: Two Selection Grade posts in the time scale of Rs. 1800- 100-2000; and Two Selection Grade posts at a fixed pay of Rs. 2,250.

(2) Promotion to the Selection grade posts shall be made on merit and suitability in all respects with due regard to seniority and no member of the Service shall be entitled as of right to suck promotion. Appendix to the rules shows that the Punjab Superior Judicial Service consisted then of 20 posts: one Legal Remembrancer and Secretary to Government, Punjab, Legislative Department; 15 District and Sessions Judges; and 4 Additional District and Sessions Judges.

These rules were amended from time to time with or without the consultation of the High Court. The relevant amendments are these:

On February, 1966 the Governor of Punjab, in exercise of the powers conferred by the proviso to Art. 309 of the Constitution and all other powers enabling him in this behalf, promulgated the "Punjab Superior Judicial Service (First Amendment) Rules, 1966". By clause 2 of these rules the following proviso was added to sub-rule (1) of rule 10 of the 1963 Rules:

> "Provided that the Governor may in exceptional circumstances or any case, after consulting the High Court, reduce the period or probation".

On December 31, 1976 the Governor of Punjab, in exercise of the powers conferred by the proviso to Art. 309 of the Constitution and all other powers enabling him in this behalf, made the "Punjab Superior Judicial Service (Second Amendment) Rules, 1976" in consultation with the High Court of Punjab and Haryana. These rules were given retrospective effect from April 9, 1976. Rule 2(2) of the 1963 Rules defined a 'cadre post' to mean a permanent post in the service. Clause 2 of the Second Amendment Rules substituted the following sub-rule (2) in rule 2 for the original sub-rule:

"2(2) 'cadre post' means a permanent or temporary post in the service .

Rule 12 of the 1963 Rules provided that the seniority, inter se, of the substantive members of the Service, whether direct recruits or promoted officers, shall be determined with reference to the respective dates of their confirmation. Clause 3 of the Second Amendment Rules substituted the following rule for the original rule 12:

> "12. Seniority.-The seniority, inter se, of the members of the service, shall be determined by the length of continuous ser vice on a post in the Service irrespective

of the date of confirmation; Provided that in the case of two members appointed on the same date, their seniority shall be determined as follows:

(i) in the case of direct recruits, the older in age shall be senior to the younger;

(ii) a member recruited by direct appointment shall be senior to a member recruited otherwise; and

(iii) in the case of members appointed by promotion, seniority shall be determined according to the seniority of such members in the appointments from which they were promoted."

This is how the rules stand in so far as the State of Punjab is concerned. The State of Haryana came into existence on November 1, 1966 by Act 3 of 1966. The Punjab Superior Judicial Service Rules, 1963, as amended upto November 1966 apply to the State of Haryana with the amendments made from time to time by the Governor of Haryana.

On March 17, 1971 certain formal amendments were made to the 1963 Rules by the Haryana First Amendment Rules, 1971. On April 21, 1972 the Governor of Haryana, in exercise of the powers conferred by the proviso to Article 309 of the Constitution and all other powers enabling him in that behalf, amended the 1963 Rules by the Haryana First Amendment Rules, 1972, with retrospective effect from April 1, 1970. By Clause 3 of the Amendment, the definition of "cadre post" in Rule 2(2) was amended to mean a post, whether permanent or temporary, in the service. Rule 8(2) of the 1963 Rules provided that the total number of cadre posts, two-third shall be manned by promoted officers and one-third by direct recruits. Clause 5 of the Amendment altered this ratio by providing that of the total number of posts, three-fourth shall be manned by promoted officers and one-fourth by direct recruits. Rule 12 governing seniority was amended by clause 6 in the same manner as in Punjab, that is to say, by providing that the seniority of the members of the service, whether direct recruits or promoted officers, shall be determined by the length of continuous service (in a post in the service irrespective of the date of confirmation. As an aside we may mention, though it has no direct relevance in the points under consideration, that on December 3, 1976 the Governor in the exercise of his constitutional and other power promulgated an amendment providing that:

"No person-

(a) who has more than two children and has not got himself or herself or his or her spouse sterilized, or

(b) who, having not more than two children, does not give an undertaking not to have more than two children.

shall be allowed to Join the Service."

On September, 2, 1977 the Governor in the exercise of his constitutional and other powers further amended the 1963 Rules with retrospective effect from April 1, 1970. The definition of 'cadre post' in rule 2(2) was once again amended to mean "a permanent post in the Service". Similarly, Rule 8(2) was amended for the purpose of restoring the quota between promotees and direct recruits. Once again, two-third of the cadre posts were to be manned by promoted officers and one-third by direct recruits. Rule 12, which deals with seniority, was also amended so as to restore the original position by providing that the seniority of members of the Service will be determined with reference to the dates of confirmation. In short, the Haryana First Amendment Rules, 1977, which were given retrospective effect from April 1, 1970, superseded the amendments made by the Haryana First Amendment Rules, 1972 and restored the position as it obtained originally under the 1963 Rules, in regard to the definition of 'cadre post', the quota between promotees and direct recruits and the rule of seniority.

Ever since November 1, 1966 when the State of Haryana was formed, there has been a common High Court for the States of Punjab and Haryana called the High Court of Punjab and Haryana. Two separate High Courts were not created for these two States probably because of considerations of viability in regard to one of the States and the need to foster a spirit of national integration. But the fact of there being two separate Governors for the two States with independent powers under the proviso to Article 309 of the Constitution has made the task of the High Court difficult and unenviable. The Chief Justice and Judges of the Common High Court of the two States are faced with the predicament of applying one set or service rules to members of the Superior Judicial Service of one State and a totally different, and to a large extent opposite, set of rules to those of the other State. As the matter stands to-day, (and we mean what we say because there is no knowing when one or the other State will amend the rules and with what degree of retroactivity) under the Haryana First Amendment Rules, 1977, 'cadre post' means a permanent post in the Service. Temporary posts are not cadre posts in Haryana. In Punjab, 'cadre post' means both permanent and temporary posts in the Superior Judiciary. The definition of 'cadre post' has a significant bearing on the fortunes and future of judicial officers. In Punjab, prior to the amendment made to the 1963 Rules on December 31, 1976 promotees alone used to be appointed, though on an officiating basis, to temporary posts in the Superior Judicial Service. Direct recruits were not appointed to temporary posts because temporary posts were outside the cadre and C. direct recruits were appointed to cadre posts only, in which they were entitled to be confirmed on the completion of the probationary period. After the amendment, applications were invited for direct recruitment to temporary posts also with the result that promotees lost the opportunity of being appointed to those posts, though on an officiating basis. Respondents 9 to 11 in the Punjab writ petition were appointed directly in July 1977 to temporary posts of Additional District and Session Judges.

In regard to the rule of seniority, the position as it obtains in the two States is fundamentally different: In Punjab, under rule 12 as amended on December 31, 1976 with retrospective effect from April 9, 1976, seniority is determined by the length of continuous service on a post irrespective of the date of confirmation. In Haryana, rule 12 as it stood originally was revived with effect from April 1, 1976 with the result, that seniority of judicial officers in the Superior Judicial Service is determined with reference to the dates of confirmation. The High Court has to deal with one set of officers under its control on the basis that the date of confirmation is the correct criterion of

seniority and with another set of officers, also under its control, on the basis that the length of continuous officiation in a post is the true test of seniority. Whatever decision the High Court takes or is driven to take administratively in the matter of seniority of judicial officers becomes a bone of contention between the promotees and direct recruits. Sometimes, the administrative decision satisfies neither the one class nor the other, leading to a triangular controversy. The frequent amendments to the rules which are often given a long retrospective effect, as long as seven years, makes the High Court's administrative task difficult. And if the amendments are made either without consulting the High Court or against its advice, the High Court has a delicate task to perform because if it adheres to its opinion, it is accused of bias and if it gives up its stand, it is accused of being weak kneed and vacillating. The administrative decisions taken by the High Court in the instant cases from time to time have been assailed by members of the Judiciary on one or the other of these grounds. That is hardly conducive to the sense of discipline and the feeling of brotherhood which ought to animate the Judiciary. Surely, the State Governments of Punjab and Haryana could have saved the High Court from this predicament by evolving a common set of rules of seniority, at least in the name of national integration. There is nothing peculiar in the soil of Punjab and nothing wanting in the soil of Haryana to justify the application of diametrically opposite rules of service to the judicial officers of the two States. The territories comprised in these two States were at one time, and that too not in the distant past, parts of the territory of the same State of Punjab. The promotees, at any rate, who figure in these proceedings, all flowered on the soil of Punjab but are not told that their claim to seniority will depend upon whether they remained in Punjab or were allotted to Haryana.

This unfortunate position has arisen largely because of the failure of the State Governments to take the High Court into confidence while amending the rules of service. The amendments made in Punjab on December 3, 1966 with retrospective effect from April 9, 1976, including the amendment to rule 12 governing seniority, were made in the teeth of opposition of the High Court and indeed, in so far as tho retrospective effect of the rules ii concerned, the amendment was made without consulting the High Court. In Haryana, rule 12 was amended in 1972 with retrospective effect from April 1, 1970 contrary to the advice of the High Court. The plain infirmity of that amendment could be that it was designed to operate to the detriment of one and only one judicial officer who was directly recruited to the Superior Judicial Service, namely, Shri. N. S. Rao, who is respondent No. 3 to the Haryana Petitions. The original rule 12 was, however, subsequently, restored by the State Government by yet another amendment dated September 4, 1977. There was a change in the Government which evidently led to a change in the rules, as if service rules are a plaything in the hands of the Government. This only shows how essential it is for the Governors, though not as a constitutional requirement, to consult the High Court before framing rules under the proviso to Article 309 of the Constitution. Consultation, be it said is not to be equated with the formal process of asking the High Court what opinion it holds on a particular issue. Consultation is a meaningful prelude to the proposed action, whereby the High Court is afforded an opportunity to discuss the matter under consideration and to meet the Government's or Governor's reasons for the proposed action. In the instant case, the High Court could have made an effort to persuade one or the other Governor to see its point of view; or else, it could at least have impressed upon the two Governors the imperative need to adopt an identical pattern of rules for the two States which are blessed with a common High Court.

Little wonder then that the Superior Judicial Service of the two States was thrown into a state of turmoil and uncertainty. Neither promotees nor direct recruits felt secure about their existing rank or seniority because the rules were being amended from time to time, sometimes just to suit the convenience, sometimes to tide over a temporary crisis, sometimes to appease a class of officers who shouted louder and at least once in order to strike at an individual. The amendments to the rules led to a spate of representations from the members of the service to the High Court and human nature being what it is, Judicial Officers were not wanting who sought the intercession of the concerned State Government in order to advance the interests of an individual or the interest of a class. Once it was known that the Governor could ignore or defy the High Court while framing rules of service, the centre of power shifted from the Nyayalaya to the Mantralaya which is an undesirable state of affairs because thereby the very independence of the Judiciary is put in jeopardy.

Questions regarding confirmation, seniority and the equitable integration of direct recruits and promotees had plagued the High Court for nearly two decades, even before the separate State of Haryana was formed. These questions were further complicated by the changes brought about in the rules of 1963 by the respective State Governments of Punjab and Haryana. The case of Shri N. S. Rao, who is respondent 3 to the Haryana Writ Petition, is an eloquent illustration of the effect of the amendments made to the rules with retrospective effect. At the time when the Governor of Haryana amended the rules in 1972 with retrospective effect from April 1, 1970, Shri N. S. Rao was the only direct recruit in the Haryana Superior Judicial Service. He was appointed on probation on July 7, 1970. The amendment was given retrospective effect from April 1, 1970, as if to demote him and him alone.

In so far as the Haryana Writ Petitions are concerned some time in February 1972 the Punjab and Haryana High Court took up the question of confirmation of some of the promotees, including the petitioners, against the permanent posts which fell within the quota of promotees out of the six permanent posts which were newly created w.e.f. January 18, 1972. Before the High Court could decide the question of confirmation of the promotees against the aforesaid posts, respondent 3 made a representation to the High Court on February 13, 1972 contending that the ratio of 2: 1 between the promotees and direct recruits had to be maintained at all stages, that is to say, not only at the time of appointment but at the time of confirmation also. The High Court appears to have postponed the confirmation of the promotees in response to respondent 3's representation. Later respondent 3 was confirmed with effect from July 7, 1972. Five promotees including the three petitioners were confirmed w.e.f. July 8, 1972, that is, a day after respondent 3 was confirmed. The Governor of Haryana refused to recognise the order of confirmation of respondent 3 passed by the High Court and he reverted the latter to the post of a District Attorney w.e.f. June 23, 1973. Respondent 3 challenged the order of his reversion by Writ Petition No. 2147 of 1973. The Petition was heard by a special Bench of five Judges of the High Court which set aside the order of reversion of respondent 3 but held by a majority that the order of respondent 3's confirmation passed by the High Court was invalid since the power to confirm a District & Sessions Judge was vested in the Governor and not in the High Court. The Judgment of the High Court is reported in Narendra Singh Rao v. State of Haryana(1). The view of the High Court regarding the power of confirmation was set aside by this Court by its judgment dated January 24, 1975 in High Court of Punjab and Haryana v. The State of Haryana.(2). It was held by this Court that the power to confirm a District and Sessions

Judge resides in the High Court and not in the Governor.

Petitioner No. 1 then made representations to the High Court on February 12 and March 31, 1975 contending that recruitment to the Superior Judicial Service was governed by a rule of quota only and not also by the rule of rotation; therefore, it was not open to the High Court to give an arbitrary date of confirmation to the promotees. Petitioners 2 and 3 also made similar representations. In the meanwhile the Governor of Haryana amended rule 12 by the Haryana First Amendment Rules 1972 providing that the seniority of the members of the Service, direct recruits or promoted officers, shall be determined by the length of the continuous service on a post in the service irrespective or the date of confirmation. In pursuance of that amendment, the High Court decided by an administrative order dated November 2, 1975 that the Petitioners were senior to respondent 3. It does not, however, appear to have taken any decision on the representations of the petitioners that the rule of rotation cannot be applied at the time of confirmation.

Aggrieved by the order of the High Court that the petitioners were senior to respondent 3 by reason of the amended rule 12, the latter filed yet another writ petition, No. 100 of 1977, in the High Court challenging the vires of the amended rule 12. During the pendency of that Writ Petition, the Governor of Haryana amended the rules again by a notification dated September 2, 1977 rescinding the amendment introduced to the rules in April 1972. The original rule 12 thus having been restored, the High Court dealt with respondent 3's writ petition on the basis that he had automatically become senior to the petitioners. The High Court therefore confined its judgement to the question of inter se seniority between respondent 3 and Shri J. M. Tandon (now a Judge of the High Court). The representations of the petitioners appear to have been rejected by the High Court since on June 6, 1978 respondent 3 was granted the selection grade, presumably on the basis that he was senior to the petitioners. It is thereafter that the petitioners filed these writ petitions (4228 to 4230 of 1978) under Art. 32 of the Constitution, claiming the following reliefs:

> (a) a writ of certiorari directing respondents 1 and 2 (the State of Haryana and the High Court of Punjab & Haryana respectively) to quash the order dated May 4, 1973 where by respondent 3 was confirmed w.e.f. July 7, 1972 and the order dated June 6, 1978 granting the selection grade to him;
>
> (b) a writ of mandamus declaring rule 12 of the Rules as violative of the fundamental rights of the petitioners guaranteed under Articles 14 and 16 of the Constitution; and
>
> (c) a writ of prohibition restraining respondents 1 and 2 from taking any action on the new seniority list or in pursuance of the orders dated May 4, 1973 and June 6, 1978.

This is the genesis of the controversy between the promotees and direct recruits in Haryana. In Punjab, matters were in no better shape, though it must be said to the credit of its Governor that no amendment was made with an evil eye on any individual Judicial Officer. In 1975, the Association of promoted officers made a representation to the State Government asking that in order to avoid arbitrary dates of confirmation being given to the promotees, continuous officiation in the service

and not the date of confirmation should be accepted as the criterion of seniority, as was done in the case of other employees of the Punjab Government. The State Government forwarded that representation to the High Court for its comments but the High Court appears to have kept the matter pending with it for quite some time. Sometime in 1976, the State Government ultimately sent a draft notification to the High Court proposing an amendment to the Rules. It seems that the Government did not then convey to the High Court its intention to give retrospective effect to the proposed amendment. By that time, ten vacancies in the quota of promoted officers had become available and an equal number of promoted officers was officiating for more than three years as Additional District and Sessions Judges. The High Court, however, did not confirm the promotees in those vacancies. On the contrary, apprehending that the proposed amendment to rule 12 may be given retrospective effect, the High Court confirmed the promotees and the direct recruits by applying the rule of rotation. It issued a Notification dated August 25, 1976 which was published in the Punjab Government Gazette dated September 3, 1976, whereby Respondents 3 to 8 were given prior dates of confirmation in comparison with the promotees. The confirmation of eight promotees was evidently postponed. In the case of respondents 6 to 8, the period of probation of two years was reduced by the High Court substantially. Respondent 6, Shri B. S. Nehra, was appointed on probation on April 1, 1975 and was confirmed on August 2, 1976. Respondent 7, Shri T. S. Cheema, was appointed on probation on April 2, 1975 and was confirmed on August 5, 1976. Respondent 8 Shri J. S. Sidhu was appointed on April 11, 1975 and was confirmed with effect from August 8, 1976. Thus, these direct recruits were confirmed within a period of one year and four months after their appointment, though the normal period of probation is two years.

On the issuance of the Notification dated August 25, 1976, petitioner 1 addressed a representation to the High Court stating that he was officiating in the Superior Judicial Service with effect from November 12, 1969 and asking that he should be confirmed in the post which became available from December 23, 1972. He complained against the date of confirmation, February 3, 1975, allotted to him as arbitrary.

Rule 12 of the Rules was thereafter amended by the Governor of Punjab by a Notification dated December 31, 1976 which was given retrospective effect from April 9, 1976. By that amendment, Seniority was to be determined by the length of continuous service on a post in the service, irrespective of the date of confirmation. The direct recruits, respondents 4 to 9, addressed a representation to the High Court contending that their seniority as fixed by the High Court's Notification dated August 23, 1976, with reference to the respective dates of their confirmation, ought not to be disturbed. They also challenged the validity of rule 12.

For the purpose of considering those conflicting claims of promotees and direct recruits, the High Court constituted a sub-committee consisting of three Judges, S. S. Sandhawalia (now Chief Justice), Bhopinder Singh Dhillon and Gurnam Singh, JJ. The Committee gave an oral hearing on February 7, 1979 to the representatives of the promotees and direct recruits. The High Court, however, has not readjusted the seniority of the promotees and direct recruits in the light of amended rule 12.

It is interesting that before the Sub-Committee heard the representatives of the promotees and direct recruits, a Full Bench of five Judges of the High Court of Punjab and Haryana, delivered its judgment on December 13, 1977 in Civil Writ 100 of 1977 which was filed by Shri N. S. Rao, who is respondent 3 in the Haryana petition. By the aforesaid judgment which is reported in AIR 1978 (P and H) 234, the High Court rejected the plea of Shri Rao that the rules not only required the application of a rule of quota at the time of appointment but they also required the application of a rule of rotation at the time of confirmation. At page 240 of the report appears the conclusion of the High Court to the effect that rules 8 and 12 were independent of each other, that rotational system could not be implicitly read in the quota rule provided for by rule 8 and that members of the Superior Judicial Service were entitled to claim seniority strictly in accordance with the provisions of rule 12. The grievance of the promotees is that this decision which was rendered by the High Court in the exercise of its judicial functions is not being followed by the High Court in the discharge of its administrative duties. After the amendment of rule 12 by the Notification dated December 31, 1976, two vacancies of District and Sessions Judges arose and on each of these occasions the High Court promoted a direct recruit, treating the date of his confirmation as the criterion of seniority. In the quarterly Gradation and Distribution list of officers of the Judicial Department which the High Court publishes, the inter se seniority has been shown according to the dates of confirmation and not in accordance with the amended rule 12. One of the grievances of the promotees is that the High Court amended the quarterly Gradation List in compliance with the amendments made by the Governor of Haryana in rule 12 but it did not amend the Gradation List of the Punjab Officers in compliance with the amended rule 12.

This, according to the petitioners, has deeply affected their sense of security, contentment and well-being. It is said that eight more vacancies arose within the quota of promotees after the High Court issued the Notification dated August 25, 1976 but the promotees, who were officiating for a period of more than three years, have not yet been confirmed in those posts.

One of the other grievances of the petitioners is that the High Court acted upon the amendment made by the Governor of Punjab on December 31, 1976 in the definition of 'cadre post' by appointing direct recruits to temporary posts in the Superior Judicial Service. It however ignored the other amendment effected by the same Notification, namely, amendment to rule 12, under which continuous officiation is the test of seniority.

Being aggrieved by the Gradation List prepared by the High Court, the promotees in Punjab have filed Writ Petition 266 of 1979 in this Court claiming the following reliefs:

> (i) an appropriate writ or direction quashing the impugned notification dated 25th August, 1976;
>
> (ii) a writ of mandamus directing the High Court to discharge its constitutional obligation to redetermine the, seniority inter se of all the members of the Punjab Superior Judicial Service in accordance with the provisions of rule 12, as amended by the notification dated December 31, 1976 and to make corrections in the Gradation and Distribution Lists, accordingly;

(iii) an appropriate writ, directing the State Government and the High Court to confirm the petitioners with effect from the dates that the vacancies arose and became available in their quota without applying the rule of rotation;

(iv) an appropriate writ directing the High Court to consider afresh the matter of filling up four vacancies of District and Sessions Judges which occurred after 9-4-1976 and to readjust the seniority and respective dates of confirmation of the petitioners and respondents 3 to 11 in accordance with the amended rule 12;

(v) a writ of prohibition restraining the State of Punjab and the High Court from acting upon the seniority fixed prior to the amendment of rule 12, for any purpose whatsoever, including further promotions within the Service; and

(vi) a writ of certiorari quashing rule 11 of the Rules as being violative of the fundamental rights of the petitioners guaranteed under Articles 14 and 16 of the Constitution.

These then are the respective grievances and demands of the promotees and direct recruits in the Superior Judicial Services of Punjab and Haryana. In so far as the High Court is concerned, its point of view may best be stated in the language of the report dated May 2, 1978 which was submitted by the Sub-Committee consisting of its three learned Judges. After setting out the background of the controversy, the report says:

> "It is in the aforesaid context that the question pointedly and squarely arises, whether the determination of seniority of the members of the Service is a matter which is within the exclusive jurisdiction of the High Court as a necessary consequence of the control vested in it by virtue of Article 235 of the Constitution of India. If that be so, then it is plain that any intrusion into the field of this control by any agency other than the High Court would be unwarranted and therefore, unconstitutional. We are of the firm view that both on principle and logic and in view of the trend of the present authorities, it appears to be plain that the Seniority of the members of the judicial Service is so integral and vital to the control of the High Court over them, that any erosion thereof would both be violative of Article 235 of the Constitution and equally run counter to the settled concept of the independence of judiciary which is now coming to be recognised as the basic feature of the Constitution.. it follows a fortiori that if seniority of the members of Superior Judicial Service is once deemed to be not within the control of the High Court under Article 235, then, in fact, it could be determined by the State Governments by making rules without even reference or consultation with the High Court. Such a position would be utterly anomalous and wholly destructive of the exclusive control over the district courts and courts subordinate thereto vested in the High Court by Art. 235. It appears to be well-settled both on principle and precedents that the power of determining the seniority of the members of the Service cannot possibly be vested in an authority other than the High Court. For example, it cannot on the existing provisions be vested in the Governor or the State Government. Therefore, it appears to us that what the State Government

cannot do directly, it cannot be allowed to do indirectly by framing rules even by the exercise of executive power vested in it by virtue of Article 309 and without even consulting or informing the High Court. It is, however, well-settled that Art. 309 is subject to the other provisions of the Constitution. Therefore, the control over the subordinate judiciary vested in the High Court by Article 235 must necessarily override Article 309 wherever the two happen to conflict at all. Consequently, if seniority is exclusively within the ambit of the control of the High Court, then it cannot be surreptitiously intruded upon either directly or by devious method of framing rules under Article 309 without even reference or consultation with the High Court."

"The true rationale underlying the ratio of N. S. Rao's case and the subsequent decisions of Their Lordships of the Supreme Court to which a reference would follow appears to be that in the field of control over the district courts and courts subordinate thereto under article 235, there cannot be a duality. There cannot exist control by the High Court on the one hand and by the State Government or the Governor on the other. Therefore, the situation that seniority must be determined by the State Government without reference or consultation with the High Court cannot be countenanced in principle. To our mind this would be a patent example of a duality of control against which the final Court has firmly set its face."

"On principle, therefore we are of the view that the seniority of the members of the Superior Judicial Service is exclusively within the control of the High Court under Article 235 and the State Government is, therefore, not competent to frame or alter rules with regard thereto".

After examining the decisions of this Court and of various High Courts, the report concludes thus:

"Both on principle and precedents we are of the view that the Seniority of the members of higher Judicial Service being vested entirely under the control of the High Court cannot be intruded upon by the framing and re-framing of rules by the State Government, which it is not competent to make and consequently rule 12 is ultra vires of Article 235 of the Constitution."

"Once we arrive at that finding, it is obvious that till the vires of the said rule are authoritatively pronounced upon on the judicial side, no firm basis can exist for determining the individual seniority inter se of the members of the Service-both direct recruits and promotees-whose innumerable representations are before the Committee. The High Court has earlier taken action on the basis of some of the earlier amendments to the rules and on the administrative side it would be obviously inept to take up a contradictory position now. Even otherwise it does not appear appropriate to us in the present case to act administratively in violation of the purported promulgation of statutory rules on the point. There is thus no choice but to place the matter squarely for a binding and authoritative decision on the judicial side

forthwith."

"The High Court inevitably is the guardian of the independence and integrity of the subordinate judicial service, whose control is constitutionally vested in it. As an institution, it is fundamentally interested in the maintenance of these traits. We are of the view that it would be invidious to push a private litigant or any one of the affected members of the judicial service to a court of law to seek the necessary decision. This burden, therefore, must also be carried by the High Court. We would consequently recommend that the Registrar be directed to immediately initiate necessary proceedings under Article 226 of the Constitution of India on behalf of the High Court." "Once it is settled that the determination of seniority of the members of the Superior Judicial Service vests exclusively in the High Court, then there is no manner of doubt that such control inevitably implies the power of framing rules to make the exercise of such control feasible, convenient and effective. This has been recently settled in the Constitution Bench judgment reported in State of U.P. v. Tripathi, AIR 1978 (Vol. 2) S.C. Cases page 102. We have no doubt in our mind that rules for the determination of the seniority inter se of the members of the Superior Judicial Service can be framed to the satisfaction of both the wings of the promotees and direct recruits".

The Haryana Writ Petition was filed in this Court by the promotees in July 1978 and the Punjab Writ Petition was filed in February 1979. The High Court was thereby spared the need to have a Writ Petition filed under Article 226 before itself and the embarrassment of being required to decide it.

The arguments advanced before us by the learned counsel for the promotees, direct recruits, the High Court of Punjab and Haryana, the Government of Punjab and the Government of Haryana cover a wide range but on a careful analysis of those arguments, the questions raised by the counsel resolve themselves into two issues. They are: (1) whether the power to frame rules of seniority of District and Session Judges vests in the Governor or in the High Court and (2) whether the High Court, basing itself on the rule of quota, is justified in applying the rule of rotation at the time of the confirmation of promotees and direct recruits as District and Session Judges.

The decision of the first question depends on the scope, meaning and purpose of the provisions contained in Article 309 and Article 235 of the Constitution. Article 309 reads thus:

"309. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the

> recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act".

Article 235 reads thus:

> "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, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

It is urged by Shri V. M. Tarkunde who appears on behalf of the promotees in Haryana that if the two parts of Article 235 are read together, it will be obvious that the control which the High Court is entitled to exercise over District Courts and courts subordinate thereto does not include the power to make rules regulating the conditions of service of judicial officers. According to the learned counsel, the power which the Constitution has conferred on the Governor by the proviso to Article 309 is a legislative and not an executive power; and since the Governor exercises a legislative power while making rules under the proviso to Article 309, the principle of the independence of the judiciary is not in any manner violated thereby. Judicial independence, says the Counsel, means freedom from executive interference, not freedom from laws.

Shri A. K. Sen, Shri S. N. Kackkar, Dr. Y. S. Chitale, Shri F. S. Nariman and Shri B. R. Tuli supported the argument of Shri Tarkunde by citing various decisions of this Court and of the High Courts, the connected provisions of the Constitution and the debates of the Constituent Assembly. On the other hand, it was contended by the learned Solicitor General, Shri Sorabji, who appears on behalf of the High Court that the paramount object of Article 235 is to secure the independence of the judiciary by insulating it from executive interference, which postulates that once an appointment of a judicial officer is made, his subsequent career should be under the control of the High Court. He should not be exposed to the possibility of any improper executive pressure in the course of his judicial career. The control over the subordinate judiciary, which is vested in the High Court by Article 235, is exclusive in nature, comprehensive in extent and effective in operation. There can be no duality in these matters, says the Solicitor General, and therefore the power to frame rules in regard to seniority of judicial officers must reside in the High Court and not in the Governor. That, according to the Solicitor General, is a necessary consequence of the control over the subordinate courts which is vested in the High Court.

There is no direct decision on the question whether the Governor, in the exercise of power conferred by the proviso to Article 309, has the power to frame rules regulating the seniority of judicial officers of the State. The reason for the absence of precedent on this point, when law reports are overflowing

with constitutional decisions, probably is that during the last thirty years of the working of our Constitution, no one ever disputed the power of the Governor to frame rules governing seniority of judicial officers. In several States such rules are in force in the absence of a law passed by the State legislature on the subject and High Courts have been applying those rules from time to time and case to case without demur. It is also significant that hardly any High Court has framed rules of its own for determining the seniority of its judicial officers. Even the High Court of Punjab and Haryana, which disputes the right of the Governor so to frame rules, has not made any rules of its own to occupy that field. All this, which is stark history, cannot be dismissed by saying that the absence of a precedent is no authority for holding that what has not been challenged is lawful. It is true that the novelty of a contention cannot be its infirmity and indeed law would have remained static and stagnant if it had not been allowed to grow from case to case. But the point of the matter is that there has been no unconcerned acquiescence by High Courts and judicial officers in rules framed by the Governors. In Haryana itself, respondent 3, Shri N. S. Rao, challenged the Governor's power to override the order of his confirmation which was passed by the High Court. And he won. Whenever there was the semblance of a justification for doing so, either one or the other party motivated by personal interest or out of the broader consideration that the High Court's controlling jurisdiction must remain inviolate has challenged the rules framed by the Governor as being excessive. But there is a good reason why the rules of seniority framed by the Governor have been acquiesced in, all over the country, over all these years. The reason is as follows:

On a plain reading of Articles 235 and 309 of the Constitution, it is clear that the power to frame rules regarding seniority of officers in the judicial service of the State is vested in the Governor and not in the High Court. The first part of Article 235 vests the control over district courts and courts subordinate thereto in the High Court. But the second part of that article says that nothing in the article shall be construed as taking away from any person belonging to the judicial service of the State any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law. Thus, Article 235 itself defines the outer limits of the High Court's power of control over the district courts and courts subordinate thereto. In the first place, in the exercise of its control over the district courts and subordinate courts, it is not open to the High Court to deny to a member of the subordinate judicial service of the State the right of appeal given to him by the law which regulates the conditions of his service. Secondly, the High Court cannot, in the exercise of its power of control, deal with such person otherwise than in accordance with the conditions of his service which are prescribed by such law.

Who has the power to pass such a law? Obviously not the High Court because, there is no power in the High Court to pass a law, though rules made by the High Court in the exercise of power conferred upon it in that behalf may have the force of law. There is a distinction between the power to pass a law and the power to make rules, which by law, have the force of law. Besides, "law" which the second part of Art. 235 speaks of, is law made by the legislature because, if it were not so, there was no purpose in saying that the High Court's power of control will not be construed as taking away certain rights of certain persons under a law regulating their conditions of service. It could not have been possibly intended to be provided that the High Court's power of control will be subject to the conditions of service prescribed by it. The clear meaning, therefore, of the second part of Article 235

is that the power of control vested in the High Court by the first part will not deprive a judicial officer or the rights conferred upon him by a law made by the legislation regulating him conditions of service.

Article 235 does not confer upon the High Courts the power to make rules relating to conditions of service of judicial officers attached to district courts and the courts subordinate thereto. Whenever, it was intended to confer on any authority the power to make any special provisions or rules, including rules relating to conditions of service, the Constitution has stated so in express terms. See, for example Articles 15(4), 16(4), 77(3), 87(2), 118, 145(1), 146(1), and 2(148)(5), 166(3), 176(2), 187(3), 208, 225, 227(2) and (3), 229(1) and (2), 234, 237 and 283(1) and (2). Out of this fasciculus of Articles, the provisions contained in Articles 225, 227(2) and (3) and 229(1) and (2) bear relevance on the question, because these Articles confer power on the High Court to frame rules for certain specific purposes. Article 229(2) which is directly in point provides in express terms that subject to the provisions of any law made by the legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by the rules made by the Chief Justice or by some other Judge or Officer of the Court authorised by the Chief Justice to make rules for the purposes. With this particular provision before them, the framers of the Constitution would not have failed to incorporate a similar provision in Article 235 if it was intended that the High Courts shall have the power to make rules regulating the conditions of service of judicial officers attached to district courts and courts subordinate thereto.

Having seen that the Constitution does not confer upon the High Court the power to make rules regulating the conditions of service of judicial officers of the district courts and the courts subordinate thereto, we must proceed to consider: who, then, possesses that power? Article 309 furnishes the answer. It provides that Acts of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to posts in connection with the affairs of the Union or of any State. Article 248(3), read with Entry 41 in List II of the Seventh Schedule, confers upon the State legislatures the power to pass laws with respect to "State public services" which must include the judicial services of the State. The power of control vested in the High Court by Art. 235 is thus expressly, by the terms of that Article itself, made subject to the law which the State legislature may pass for regulating the recruitment and service conditions of judicial officers of the State. The power to pass such a law was evidently not considered by the Constitution makers as an encroachment on the "control jurisdiction" of the High Courts under the first part of Article 235. The control over the district courts and subordinate courts is vested in the High Court in order to safeguard the independence of the judiciary. It is the High Court, not the executive, which possesses control over the State judiciary. But, what is important to bear in mind is that the Constitution which has taken the greatest care to preserve the independence of the judiciary did not regard the power of the State legislature to pass laws regulating the recruitment and conditions of service of judicial officers as an infringement of that independence. The mere power to pass such a law is not violative of the control vested in the High Court over the State Judiciary.

It is in this context that the proviso to Art. 309 assumes relevance and importance. The State legislature has the power to pass laws regulating the recruitment and conditions of service of judicial officers of the State. But it was necessary to make a suitable provision enabling the exercise of that

power until the passing of the law by the legislature on that subject. The Constitution furnishes by its provisions ample evidence that it abhors a vacuum. It has therefore made provisions to deal with situations which arise on account of the ultimate repository of a power not exercising that power. The proviso to Art. 309 provides, in so far as material, that until the State legislature passes a law on the particular subject, it shall be competent to the Governor of the State to make rules regulating the recruitment and the conditions of service of the judicial officers of the State. The Governor thus steps in when the legislature does not act. The power exercised by the Governor under the proviso is thus a power which the legislature is competent to exercise but has in fact not yet exercised. It partakes of the characteristics of the legislative, not executive, power. It is legislative power.

That the Governor possesses legislative power under our Constitution is incontrovertible and, therefore, there is nothing unique about the Governor's power under the proviso to Article 309 being in the nature of a legislative power. By Article 168, the Governor of a State is a part of the legislature of the State. And the most obvious exercise of legislative power by the Governor is the power given to him by Art. 213 to promulgate ordinances when the legislature is not in session. Under that Article, he exercises a power of the same kind which the legislature normally exercises : the power to make laws. The heading of Chapter IV of Part VI of the Constitution, in which Art. 213 occurs, is significant: "Legislative Power of the Governor". The power of the Governor under the proviso to Article 309 to make appropriate rules is of the same kind. It is legislative power. Under Article 213, he substitutes for the legislature because the legislature is in recess. Under the proviso to Article 309, he substitutes for the legislature because the legislature has not yet exercised its power to pass an appropriate law on the subject.

It is true that the power conferred by Article 309 is "subject to" the provisions of the Constitution. But it is fallacious for that reason to contend that the Governor cannot frame rules regulating the recruitment and conditions of service of the judicial officers of the State. In the first place, the power of control conferred upon High Courts by the first part of Article 235 is expressly made subject, by the second part of that Article, to laws regulating conditions of service of its judicial officers. The first part of Article 235 is, as it were, subject to a proviso which carves out an exception from the area covered by it. Secondly, the Governor, in terms equally express, is given the power by the proviso to Article 309 to frame rules on the subject. A combined reading of Articles 235 and 309 will yield the result that though the control over Subordinate Courts is vested in the High Court, the appropriate legislature, and until that legislature acts, the Governor of the State, has the power to make rules regulating the recruitment and the conditions of service of judicial officers of the State. The power of the legislature or of the Governor thus to legislate is subject to all other provisions of the Constitution like, for example, Articles 14 and 16. The question raised before us is primarily one of the location of the power, not of its extent. The second part of Article 235 recognises the legislative power to provide for recruitment and the conditions of service of the judicial officers of the State. The substantive provision of Article 309, including its proviso, fixes the location of the power. The opening words of Article 309 limit the amplitude of that power.

We entertain no doubt that seniority is a condition of service and an important one at that. The control vested in the High Court by the first part of Article 235 is therefore subject to any law regulating seniority as envisaged by the second part of that article. The power to make such law is

vested by Article 309 in the legislature, and until it acts, in the Governor. Whether it is the legislature which passes an Act or the Governor who makes rules regulating seniority, the end product is 'law' within the meaning of the second part of Article 235. The legislatures of Punjab and Haryana not having passed an Act regulating seniority of the respective State judicial officers, the Governors of the two States have the power to frame rules for that purpose under the proviso to Article 309 of the Constitution. Such rules are, of course, subject to the provisions of the Constitution and to the provisions of any Act which the appropriate legislature may pass on the subject.

As we have said earlier, the mere power to pass a law or to make rules having the force of law regulating seniority does not impinge upon the control vested in the High Court over the district courts and the courts subordinate thereto by Article 235. Such law or the rules, as the case may be, can provide for general or abstract rules of seniority, leaving it to the High Court to apply them to each individual case as and when the occasion arises. The power to legislate on seniority being subject to all other provisions of the Constitution, cannot be exercised in a manner which will affect or be detrimental to the control vested in the High Court by Article 235. To take an easy example, the State legislature or the Governor cannot provide by law or by rules governing seniority that the State Government in the concerned department will determine the seniority of judicial officers of the State by the actual application of the rules of seniority to each individual case. Thereby, the High Court's control over the State judiciary shall have been significantly impaired. The opening words of Article 309, "Subject to the provisions of this Constitution" do not exclude the provision contained in the first part of Article 235. It follows that though the legislature or the Governor has the power to regulate seniority of judicial officers by laying down rules of general application, that power cannot be exercised in a manner which will lead to interference with the control vested in the High Court by the first part of Article 235. In a word, the application of law governing seniority must be left to the High Court. The determination of seniority of each individual judicial officer is a matter which indubitably falls within the area of control of the High Court over the district courts and the courts subordinate thereto. For the same reason, though rules of recruitment can provide for a period of probation, the question whether a particular judicial officer has satisfactorily completed his probation or not is a matter which is exclusively in the domain of the High Court to decide. That explains partly why in High Court of Punjab & Haryana v. State of Haryana(1) this Court held that the power to confirm a judicial officer is vested in the High Court and not in the Governor.

The error of the High Court's point of view, like the error of the report dated May 2, 1978 of its Sub-Committee, consists in the assumption that the Governor, while acting in the exercise of power conferred by the proviso to Article 309, exercises an executive function. That is why it felt so greatly exercised that the independence of the judiciary was being eroded. That independence has to be preserved at all costs but, as Constitutional realists, we cannot deprive the legislature or the Governor of their legitimate legislative powers under Article 309. That power is subject to all other provisions of the Constitution which means that the power cannot be exercised in a manner which will lead, for example, to the violation of Articles 14, 16 or the pervasive ambit of the first part of Article 235. Since the power conferred by Article 309 is not absolute or untrammeled, it will be wrong to test the validity of that power on the anvil of its possible abuse. The various constitutional safeguards are an insurance against its abuse.

Numerous decisions were cited before us to highlight the importance of insulating the judiciary from executive interference. It was urged by the learned Solicitor General on behalf of the High Court that the paramount object of Article 235 is to secure the independence of the judiciary by ensuring that the subordinate judiciary is insulated from executive interference and once the appointment of a judicial officer is made, his subsequent career should be under the control of the High Court and he should not be exposed to the possibility of any improper executive pressure (Union of India v. Justice S. H. Sheth(1), that the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in extent and effective in operation; and that there can be no "duality" in the matter of control over the district courts and the courts subordinate thereto (A. P. High Court v. Krishnamurthy(2). The short answer to these submissions is that the power conferred by Article 309 is a legislative, not executive, power and that the power is subject to all the provisions of the Constitution. If despite this position, the Governor's rule-making power is likely to create a magnetic field wherein the executive will be the focal point of attraction, it is not the Constitution that is to blame. As is often said, the danger to judicial independence springs more from within than from without.

Before parting with this point, we would like to refer to a decision of this Court in State of Bihar v. Madan Mohan Prasad(3). Sarkaria J., speaking for the Court, observed in that case that in determining the seniority of the Bihar Superior Judicial Service the High Court was bound to act in accordance with the rules validly made by the Governor under the proviso to Art. 309 of the Constitution. The judgment does not discuss the question any further which makes it unnecessary to analyse it in detail.

For these reasons, we reject the contention that the Governor has no power to make rules of seniority of the District and Sessions Judges.

That takes us to the second question which is, whether the rotation method devised by the High Court in applying the relevant service rules in the matter of confirmation and consequent fixation of seniority of the petitioners vis-a- vis the direct recruits suffers from any legal or constitutional infirmity. The main thrust of the argument of the promotees, who have filed the two sets of Writ Petitions before us, is that the method of rotation applied by the High Court at the time of confirmation is violative of their fundamental rights under Articles 14 and 16 of the Constitution. In the Punjab Writ Petition, the petitioners have taken an alternative plea that their seniority should be fixed in accordance with the amendment made by the Governor of Punjab by the Notification dated December 31, 1976, effective from April 9, 1976. By that amendment, length of continuous service in a cadre irrespective of the date of confirmation is the governing criterion of seniority. In so far as the power of the Governor to amend the rules is concerned, that question must be deemed to have been set at rest by the preceding part of our judgment in which we have upheld the Governor's power to frame rules of seniority.

To recapitulate briefly, the Superior Judicial Service Rules, 1963, which are currently in force in Haryana, are identical with the rules which were in force in Punjab before the amendment dated December 31, 1976. The Governor of Haryana had introduced amendments similar to those which are now in force in Punjab, but those amendments were subsequently withdrawn and the original

position as it obtained under the Rules of 1963 was restored.

Under the rules now in force in Haryana, which were in force in Punjab prior to the aforesaid amendment dated December 31, 1976, 'cadre post' by rule 2(2) means a permanent post in the Service. Under rule 8(2), two-third of the total number of cadre posts have to be manned by promoted officers and one-third by direct recruits. Under rule 10(1), direct recruits have to remain on probation for two years provided that the Government may, in exceptional circumstances of any case, reduce the period of probation in consultation with the High Court. The probation can be extended by the Governor beyond the period of two years in consultation with the High Court but not so as to exceed a total period of three years. Rule 10 (2) gives to the Governor the power in consultation with the High Court to confirm a direct recruit on a cadre post with effect from a date not earlier than the date on which he completes the period of probation.

Rule 12 now in force in Haryana and which was in force in Punjab prior to the amendment dated December 31, 1976, provides that the seniority of direct recruits and promoted officers shall be determined with reference to the respective dates of their confirmation. The proviso to rule 12 deals with three kinds of cases in which substantive members of the Service have the same date of confirmation. In regard to the third category of such cases, the proviso says that in the case of promoted officers and direct recruits having the same date of confirmation, the older in age shall be senior to the younger.

Under the amendment effected in Punjab by the Notification dated December 31, 1976, which is given retrospective effect from April 9, 1976, 'cadre post' means a permanent as well as a temporary post in the Service. In so far as the rule of seniority is concerned, under the aforesaid amendment the inter se seniority of the members of the Service is to be determined by the length of continuous service on a post in the Service irrespective of the date of confirmation.

It may be recalled that in High Court of Punjab and Haryana v. State of Haryana (supra), it was held by this Court that rule 10, in so far as it confers the power of confirmation on the Governor, is bad because the power of confirmation is a part of the control of the High Court which is vested in it by Article 235 of the Constitution. Therefore, the High Court alone had the power to confirm a District & Sessions Judge. As a result of that judgment, respondent 3 came back into the service as a confirmed District & Sessions Judge.

It is necessary to bear in mind that the only provision of which the validity was assailed by respondent 3 in the aforesaid case was the one contained in rule 10(2) which conferred a right on the Governor to confirm a direct recruit. No challenge was made therein to that part of sub- rule (2) which requires that the confirmation shall be made from a date not earlier than the date on which the direct recruit satisfactorily completes his period of probation. That part of sub-rule (2) still holds the field. It must also be mentioned that no opinion was expressed by this Court on the validity of rule 12 of the Haryana Superior Judicial Service Rules as it then stood, which was in material respects identical with rule 12 of the Punjab Rules as it exists now under the amendment of 1976.

Dr. Chitale, who appears on behalf of the promotees in the Punjab Writ Petition, contends that the promotees are not being confirmed by the High Court in the Superior Judicial Service even though vacancies occur within their two-third quota, which is prescribed by rule 8(2). The argument of the learned counsel is that the quota of 2/3: 1/3, which is provided for by rule 8 is applicable at the time of initial recruitment only. There is therefore no warrant, according to counsel, for extending the application of that rule at the time of confirmation. In support of this argument, reliance is placed on a unanimous decision dated December 13, 1977 of a Bench of five learned Judges of the Punjab and Haryana in Narender Singh Rao v. State of Haryana(1). The High Court held in that case that rule 8 which provides for quota and rule 12 which contains a rule of seniority, are independent of each other, that the rule of rotation cannot implicitly be read into the quota rule and that every member of the Superior Judicial Service is entitled to claim seniority strictly in accordance with the provisions of rule 12. The promotees have made a very strong and emphatic grievance that in spite of the fact that the Punjab Rules prior to the 1976 amendment were in material respects similar to the rules applicable in Haryana, the High Court has been persistently refusing to follow, in the exercise of its administrative functions, the decision which was rendered by it in the exercise of its judicial powers. The promotees contend that the judgment of the five Judge Bench which held that there is no scope for the application of the rule of rotation at the time of confirmation is binding on the High Court as an administrative body and that therefore the seniority of the promotees and direct recruits must be fixed without applying the rule of rotation at the time of confirmation.

In order to demonstrate the hardship caused to the promotees, Dr. Chitale has drawn our attention to Annexure P-I to the Writ Petition which has been further elaborated in Annexure II to his written submissions. These Annexures show, and that is not disputed, that the direct recruits have been assigned a date of confirmation which is a day or so earlier than the date of confirmation allotted to the promotees. Our attention is also drawn to the relevant order passed by the High Court in the case of Haryana officers whereby the date of confirmation allotted to the direct recruit, Shri N. S. Rao, is only one day prior to the dates of confirmation allotted to the three promotees, even though the latter were officiating for a much longer period in the Superior Judicial Service than respondent 3. The promotees have assailed both the legality and propriety of the High Court's Notification dated August 25, 1976, under which eight direct recruits and eight promotees in Punjab were confirmed by applying the method of rotation, and the direct recruits were confirmed with effect from dates which are a little earlier than the dates assigned to the promotees. The grievance of the promotees is accentuated by the circumstance that respondents 6 to 8 had not even completed their normal period of probation and yet they were confirmed by the High Court after reducing the period of their probation to approximately a year and four months, without there being any exceptional circumstances for adopting such a course. Besides, the power to reduce the probationary period is vested in the Governor under the proviso to rule 10(1). And if that provision is unconstitutional for reasons similar to those for which it was held by this Court in Shri N. S. Rao's(1) case that the Governor had no power of confirmation, there is no provision under which the High Court can claim the power to reduce the period of probation.

The High Court has submitted in its written brief that we should decide upon the scope of Article 235, including the question as to who has the power to frame the rules of seniority, and leave the other questions to be decided by it administratively. Representations of both sides are still pending

before it and if we were to pronounce upon the validity of the impugned notifications, numerous practical complications may arise rendering the High Court's task of fixing seniority difficult. In Haryana, we are concerned with two officers only: Shri B. S. Yadav, a promotee, and Shri N. S. Rao, a direct recruit, since petitioners 2 and 3 have been compulsorily retired during the pendency of these writ petitions. But the High Court says that our decision on the other issues will have a far-reaching impact in Punjab where the conflicting claims of several members of the Superior Judicial Service require consideration.

The High Court justifies the method adopted by it for determining the seniority of promotees vis-a-vis the direct recruits by the application of the rule of rotation at the time of confirmation. It contends that persons recruited from these two sources have to be merged in such a manner so as not only to maintain a proper ratio amongst them in the service but also to so deal with them as to have due regard to their promotional prospects, in the over all context of the maintenance of highest standards of Administration of Justice by the members of the service. Translated in concrete terms, it means that members of the subordinate judiciary who are promoted to the Superior Judicial Service and those who are recruited from amongst the members of the Bar should have an equal chance of promotion to the Selection Grade as also of elevation to the High Court Bench. When recruitment to the Superior Judicial Service is from two sources, it becomes imperative to ensure proper blending of the members of the service and it is for that reason that the quota rule (whenever direct recruits are available) has to be applied even at the time of confirmation. It will not be in the interest of the service if it were otherwise since, according to the High Court, if direct recruits are confirmed and assigned seniority in a block, that will adversely affect the chances of further promotion of the promotees assigned seniority below them. Direct recruits when recruited are much younger than the promotees, when promoted. It is for this reason that, wherever possible, the High Court claims to have assigned seniority to direct recruits by interposing two promotees between two direct recruits. Promotees, on the other hand, have been confirmed and assigned seniority one after the other, in numbers exceeding two, when there were no direct recruits. In order to explain and justify its point of view, the High Court has annexed four annexures to its written brief, Annexures 'A' to 'D'. Annexure 'A' shows seniority of the members of the service as fixed and determined by the High Court from 1-11- 1966, up to and including August 1976. The direct recruits are placed therein at serial Nos. 4, 5, 10, 21, 24, 27, 38, 41, 44, 47, 50 and 53. The rest are promotees. Not only, says the High Court, did it confirm a large number of promotees between each group of direct recruits but it interposed two promotees between the direct recruits. Annexure 'B' shows the likely seniority of members of the service with reference to the dates of the availability of posts in accordance with the quota rule. This depicts the position of direct recruits if they are assigned seniority with effect from the dates when they complete their period of probation. Annexure 'C' is the same as Annexure 'B' with the modification that it depicts the position of direct recruits if seniority is assigned to them with effect from the date from which they joined service. Annexure 'D' shows the position of the members of the service in accordance with the dates of their continuous officiation a such members. These statements, the High Court says, will show that it has assigned seniority to promotees and direct recruits in a manner designed to secure the interests of both the classes.

Whereas the promotees complain that they have been discriminated against and the High Court replies that it has held the scales of justice even between the two classes of officers, the direct

recruits contend that it is in fact they who have suffered injustice under the notification of seniority issued by the High Court on August 25, 1976. Respondents 3 to 5 in the Punjab Writ Petition complain that they were not confirmed by the High Court on the due dates, that is, on their completing the period of probation satisfactorily.

The High Court confirmed ten promotees in between Shri S. S. Sodhi, who is at present the Registrar of the High Court, and respondents 3 to 5, thereby giving to the promotees the benefit of their officiation in vacancies meant for direct recruits. According to the direct recruits, the quota rule will lose its relevance unless the rule of rotation is applied at the time of confirmation. They assail the validity of the amended rule 12, which is in force in Punjab, on the ground that the rule that seniority must depend upon the date of continuous officiation in any post is neither just nor reasonable. They also challenge the notification issued by the Governor of Punjab on December 31, 1976 on the ground that it was given retrospective effect from April 9, 1976 arbitrarily, with a view only to superseding the notification of seniority issued by the High Court on August 25, 1976. It is contended by them, in the alternative, that if the period of their probation has to be weighed against the period of officiation of the promotees, it should be reckoned from the date on which the promotee officer begins to officiate against a permanent vacancy available in his quota.

In the light of these contentions, the question for determination is whether the method of confirmation adopted by the High Court by the rotation of promotees and direct recruits in the ratio of 2:1 is justified on a proper interpretation of the relevant rules. Is the operation of rule 8 confined to the stage of initial recruitment to the service by promotion and by direct appointment? Or, can that rule be superimposed on rules 10 and 12 so as to justify its application at the stage of confirmation also? These are the questions which are posed for our consideration.

Rule 8, as its very heading shows, provides for a distinct condition of service with reference to a specific point of time, namely: 'Recruitment to Service'. The words "to be filled up by direct recruitment" which occur in the proviso to sub-rule (2) of rule 8 also point in the direction that the operation of this sub-rule is confined to the stage of initial recruitment to the service either by promotion or by direct appointment from the Bar. Rules 10, 11 and 12 provide for the regulation of probation, reversion of promoted officers and seniority, which conditions of service are distinct and separate from 'Recruitment to Service' dealt with in rule 8. In other words, rule 8 only fixes the respective quota of recruits from the two sources specified in clauses (i) and (ii) of sub-rule (1). Such reservation is intended to be made at the stage of initial appointments only, by reserving 2/3rd of the total number of posts in the cadre for promotees and 1/3rd for direct recruits. It seems to us evident that a post which falls vacant in the quota of promotees cannot be filled by the confirmation of a direct recruit therein nor indeed can a promotee be confirmed in a post which is within the quota of direct recruits.

If this be the true construction of rule 8, the method of confirmation by rotation of direct recruits and promotees, regardless of whether the vacancy assigned to the particular officer falls within the quota of the class to which he belongs will be in contravention of that rule. It was held by this Court in Punjab and Haryana High Court v. State of Haryana (Supra) that 'appointment' is not a continuous process, that the process of appointment is complete as soon as a person is initially

recruited to the service either by promotion or by direct recruitment and that confirmation is not a part of the process of appointment. The necessity of treating 'Recruitment to the Service' and 'confirmation' as two distinct and separate matters can be appreciated if only it is realised that 'Recruitment to the Service' is a matter which falls within the power of the Governor under Article 233 while 'confirmation' is a matter of 'control' vesting in the High Court under Article 235. The superimposition of rule 8, which fixes the quota at the stage of recruitment, on the rules relating to confirmation and seniority is therefore contrary to the basic constitutional concepts governing judicial service.

This apart, the application of Rota system at the stage of confirmation is beset with practical difficulties. For example, if vacancies in the quota of direct recruits cannot be filled for 2 or 3 years for the not uncommon reason that direct recruits are not available, and during that period several vacancies occur in the quota of promotees who have been officiating continuously for two or three years, can the postponement of the confirmation of such promotees against vacant posts in their quota, until the direct recruits are appointed and become eligible for confirmation on completing the prescribed period of probation, be justified on any reasonable ground? Is it proper and fair to defer the confirmation of the promotees merely because direct recruits are not available at that point of time so as to enable the High Court to make confirmations from both the sources by rotation? This, precisely, is what the High Court has done by the impugned notification dated 25-8-1976 and that is the reason why it has not confirmed ten more promotees in Punjab, for whom vacancies are available within the quota of promotees.

In A. K. Subraman v. Union of India,(1) the contention of the respondents that there is an implied rotational system involved in the quota rule and that therefore the quota rule must also be applied at the stage of confirmation was rejected by this Court. It is true that it was observed in that case that when recruitment is from two or more sources, there is no inherent invalidity in introducing the quota system and working it out by the rule of rotation. But that is not the question which we have to consider in the writ petitions before us. What is relevant is the decision of the Court (page 994) that the quota rule will be enforced at the time of initial recruitment and not at the time of confirmation. The Court observed that the tests to be applied for the purposes of promotion and confirmation are entirely different since there is a well recognised distinction between 'promotion' and 'confirmation'.

In N. K. Chauhan v. State of Gujarat,(1) it was reiterated (pages 1051-1053) that having regard to the recent decisions of this Court, it could not be held that 'quota' is so interlocked with 'rota' that where the former is expressly prescribed the latter is impliedly inscribed. One of us, Krishna Iyer, J., while summarising the conclusions of the Court said:

> "The quota rule does not, inevitably, invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filled up by promotees, later direct recruits cannot claim 'deemed' dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancies arose".

Seniority of promotees, according to this decision, could not be upset by later arrivals from the open market, save to the extent to which any excess promotees have to be pushed down.

In Paramjit Singh Sandhu v. Ram Rakha,(2) it was held by this Court on a harmonious reading of rules 3, 4, 6, 8 and 10 of the Punjab Police Rules, 1959 that the quota rule was operative both at the time of initial recruitment and at the time of confirmation. We would like to clarify that this case is not an authority for the proposition that whenever Service Rules provide for quota, the rule of rota must be read into the rule of quota. We are not laying down that the rules of quota and rota cannot coexist. Service Rules may so provide or they may yield to such an interpretation. In that event, their validity may have to be tested in the total setting of facts. Therefore, whether the quota system has to be observed not only at the stage of initial recruitment but also at the stage of confirmation is not a matter of abstract law but will depend on the wording of the rules and the scheme of the rules under consideration. Any dogmatic assertion, one way or the other, is wrong to make. On a review of these authorities, all that we would like to say is that on a proper interpretation of the rules governing the Punjab and Haryana Superior Judicial Service, the rule of rota cannot be read into the rule of quota. In other words, the ratio of 2:1 shall have to be applied at the stage of recruitment but cannot, on the language of the relevant rules, be applied at the stage of confirmation.

In our opinion, therefore, the High Court was not justified in applying the rule of rotation at the time of confirmation of the members of the Superior Judicial Service who were appointed to that Service by promotion and by direct recruitment. In fact, we would like to remind that a special Bench of five learned Judges of the High Court of Punjab and Haryana had itself held on December 13, 1977 in N. S. Rao v. State of Haryana, (supra) that the rule of rota cannot be read into the rule of quota prescribed by rule 8 of the Punjab Superior Judicial Service Rules. It was observed by the Special Bench in paragraph 14 of its judgment that a plain reading of rule 8 shows that the intention of the framers of the Rules was only to provide for quota and that no indication at all has been given that the rotational system also had to be followed at the time of confirmation or for the purpose of fixing seniority. In coming to this conclusion, the High Court placed reliance on the decisions of this Court in A. K. Subraman and N. K. Chauhan to which we have already referred. The High Court expressed its conclusion in paragraph 22 of the judgment by saying that rules 8 and 22 are independent of each other, that the rotational system cannot impliedly be read into the quota rule prescribed by rule 8 and that the members of the Superior Judicial Service are entitled to claim seniority, strictly in accordance with the provisions of rule 12. We are unable to understand how, in the discharge of its administrative functions. the High Court could have failed to follow a judgment of its own special Bench consisting of five learned Judges. We are of the opinion that the aforesaid judgment has taken a correct view of the matter on a combined reading of rules 8 and 12.

We would like to say at the cost of repetition that we are not dealing with the abstract question as to whether the rule of quota necessarily excludes the rule of rotation. We are only concerned to point out that it is not correct to say that the rule of rota must necessarily be read into the rule of quota. We have to decide in those cases the narrow question as to whether, on a true interpretation of rules 8 and 12 of the Superior Judicial Service Rules of Punjab and Haryana, the quota rule prescribed by rule 8 justifies, without more, its extension at the time of confirmation so that, after every two promotees are confirmed one direct recruit has to be confirmed and until that is done, promotees

cannot be confirmed even if vacancies are available within their quota in which they can be confirmed. We are of the opinion, on a proper interpretation of the rules, that promotees are entitled to be confirmed in the vacancies which are available within their quota of 2/3rd, whether or not 1/3rd of the vacancies are occupied by confirmed direct recruits. And similarly, direct recruits are entitled to be confirmed in vacancies which are available within their quota of 1/3rd, whether or not 2/3rd of the vacancies are occupied by confirmed promotees. What we find lacking in justification is the refusal of the High Court to confirm the promotees even if vacancies are available in their quota in which they can be confirmed merely because, by doing so, more than two promotees may have to be confirmed at one time, without the confirmation of a proportionate number of direct recruits. The fairness which Articles 14 and 16 postulates is that if a promotee is otherwise fit for confirmation and a vacancy falling within the quota of promotees is available in which he can be confirmed, his confirmation ought not to be postponed until a direct recruit, whether yet appointed or not, completes his period of probation and thereupon becomes eligible for confirmation. The adoption of this principle in the matter of confirmation, will not, in practice, give any undue advantage to the promotees. The facts and figures supplied by the High Court in Annexure R-4 to its counter- affidavit in W. P. 266 of 1979 show that vacancies in the quota of promotees do not generally become available before the promotees have put in two to five years' service as officiating District and Sessions Judges.

In so far as the confirmation of respondents 6, 7 and 8 is concerned, the facts set out by the Registrar of the High Court in his counter affidavit do not, in our opinion, constitute "exceptional circumstances" such as to justify their confirmation long before they had completed the normal period of their probation. It may be recalled that they were confirmed after they had each completed a period of probation of approximately a year and four months. In the absence of exceptional circumstances justifying the reduction of their normal probationary period of two years, we find ourselves unable to uphold the order of the High Court by which these three respondents were confirmed before they were normally due for confirmation. The order is in clear violation of the guarantee of equal opportunity, by which the petitioners are prejudiced, and must for that reason be set aside.

The High Court will be at liberty now to confirm them with effect from the date or dates on which they completed their normal period of probation, to the satisfaction of the High Court. This is apart from the question as to whether the High Court can exercise the power which was conferred by the proviso to rule 10(1) on the Governor. The power conferred by the proviso on the Governor is ex facie bad because such a power directly impinges upon the control vested in the High Court by Article 235 of the Constitution. If at all any authority could exercise such a power, it is the High Court and not the Governor. We are assuming for the limited purpose of these petitions that the High Court may, in exceptional circumstances, reduce the period of probation of a direct recruit. The rules must now be understood to mean that the High Court and not the Governor has the power of confirmation, that the normal period of probation of direct recruits is two years and that unless there are exceptional circumstances attaching to each individual case, a direct recruit cannot be confirmed from a date earlier than the date on which he has satisfactorily completed his probation of to years. The High Court is not free to fix any period of probation as it likes or to reduce the period of two years at its will and pleasure.

The amended rule 12, as in force in Punjab, lays down the length of continuous service in a cadre post as the guiding criterion for fixing seniority. That rule was notified by the Governor on December 31, 1976 and was given retrospective effect from April 9, 1976. Since the Governor exercises a Legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case. No such nexus is shown in the present case on behalf of the State Government. On the contrary, it appears to us that the retrospective effect was given to the rules from April 9, 1976 for the mere reason that on August 25, 1976 the High Court had issued a notification fixing seniority of the promotees and direct recruits appointed to the Superior Judicial Service of Punjab. The notification issued by the Governor on December 31, 1976 will, therefore, operate on future appointments or promotions made after that date and not on appointments or promotions made before that date. The seniority of all officers appointed or promoted to the Superior Judicial Service, Punjab, before December 31, 1976 will be determined by the High Court according to the criterion of the dates of confirmation, without applying the rule of rotation. The seniority of those promoted or appointed after December 31, 1976 will be determined in accordance with the rules promulgated under the notification of that date. In so far as we see, Judicial officers from Serial No. 1 to 36 mentioned in Annexure P-I to the Punjab Writ Petition, that is, beginning with Shri J. S. Chatha and ending with Sri Hardev Singh were appointed or promoted prior to December 31, 1976. Those from serial No. 37 to serial No. 43, that is beginning with Shri G. S. Kalra and ending with Shri H. L. Garg, were appointed or promoted after December 31, 1976. The validity of the notification dated December 31, 1976 was not seriously challenged before us, apart from its retrospectivity. We do not also see any constitutional or legal objection to the test of continuous officiation introduced thereby.

In so far as the Haryana writ petitions are concerned, they involve a question of seniority really between two officers only, namely, Shri B. S. Yadav, who is a promotee and Shri N. S. Rao, who is a direct recruit. The other two promotees, namely, petitioners 2 and 3, have been compulsorily retired during the pendency of the Writ Petitions in this Court. Rule 12, which is not in force in Haryana, is similar to rule 12 which was in force in Punjab prior to its amendment on December 31, 1976. Rule 12, as it originally existed, was amended by the Governor of Haryana, on April 21, 1972 with retrospective effect from April 1, 1970. However, on September 2, 1977 the Governor superseded that amendment, again with effect from April 1, 1970, and restored the rule of seniority as it existed originally in the 1963 Rules. In Haryana, therefore, the seniority of the members of the Superior Judicial Service will be determined with reference to the dates of confirmation, without applying the rule or rotation.

We must express our concern at the manner in which the Rules of the Superior Judicial Service have been amended by the Governor of Punjab and, particularly, by the Governor of Haryana. In Punjab, the High Court was never consulted on the question whether the amendments made on December 31, 1976 should be given retrospective effect and, if so, from what date. The amendments were made despite the opposition of the High Court. In Haryana, the amendment of April 21, 1972 was made just in order to spite a single judicial officer who is a direct recruit. Fortunately, that amendment

was withdrawn by the successor Government on September 2, 1977. A long retrospective effect was given to that amendment from April 1, 1970 because the amendment of April 21, 1972 was given retrospective effect from April 1, 1970 and that amendment had to be effectively superseded. We do hope that the State Governments will apply their mind more closely to the need to amend the Service Rules of the Superior Judiciary and that the Rules will not be tinkered with too often. It should also be realised that giving retrospective effect the rules creates frustration and discontentment since the just expectations of the officers are falsified. Settled seniority is thereby unsettled, giving rise to long drawn-out litigation between the promotees and direct appointees. That breeds indiscipline and draws the High Court into the arena, which is to be deprecated.

Punjab and Haryana have a peculiar problem since they have a common High Court. But they are blessed, not cursed, with a common High Court. Today we find the strange spectacle of the High Court being called upon to determine the seniority of officers in one State by one test and that of officers in the other State by an opposite test. In Punjab, continuous officiation on a post in the Service is the criterion of seniority. In Haryana, the date of confirmation is the governing factor. Can the two Governors not come together and take a joint decision applying a uniform test of seniority to their judicial officers who are under one common High Court? And though that is not the requirement of the proviso to Article 309 of the Constitution, we hope that whatever amendments are going to be made hereafter to the Rules will be made in consultation with the High Court. Nothing will be lost thereby and there is so much to gain: Goodwill, expert advice and the benefit of the experience of a body which has to administer the Rules since the control over the Subordinate Courts is vested in it by Article 235. It is sad that the promotees and direct recruits have to dissipate their time and energy in litigation which they can ill-afford and which arises largely because of the lack of co-ordination between the High Court and the State Governments. It is time enough now to turn a new leaf.

In the result, we partly allow Writ Petition 266 of 1979, quash the impugned orders including (i) the order dated August 25, 1976 of the High Court, published in the Punjab Government Gazette dated September 3, 1976; (ii) the order whereby Respondents 6, 7 and 8 were confirmed by reducing their period of probation; and (iii) all subsequent orders of the High Court confirming the promotees and direct recruits by rotation. We direct that:

> (a) The High Court will revise and refix the respective dates of confirmation of the petitioners and respondents 3 to 11, without applying the rule of rotation;
>
> (i) The petitioners, if they are otherwise fit for confirmation, shall be confirmed with effect from the dates on which vacancies became available to them in the quota of promotees;
>
> (ii) Respondents 3 to 11 shall be confirmed against vacancies falling within the quota of direct recruits, with effect from dates on which they successfully completed their two years' probation. Since, the normal period of probation cannot be reduced unless the High Court is satisfied in each individual case that there are "exceptional circumstances" justifying the reduction of that period, and since the High Court had

not given such reasons while reducing the probationary period of some of the respondents, respondents 3 to 11 will be confirmed as stated above without reducing the period of their probation.

(b) The High Court will re-draw the inter se seniority-

(i) of such of the petitioners and respondents as were promoted or appointed to the Superior Judicial Service prior to December 31, 1976, on the basis of the respective dates of confirmation allotted to them in compliance with the aforesaid direction (a); and

(ii) of such of the petitioners, respondents and others who were appointed to a post in the service on or after December 31, 1976 in accordance with the amended rule 12.

(c) The High Court will review and reconsider promotions to the Selection Grade and other allied orders made by it, having regard to these directions and the seniority to be fixed on the basis thereof. The High Court will make necessary adjustments and alterations therein, in the light of the action to be taken in compliance with the aforesaid directions (a) and (b). The confirmations, promotions and other orders passed by the High Court during the pendency of these Writ Petitions are, according to the interim order passed by this Court, subject to the result of these Writ Petitions.

Writ Petitions 4228 to 4230 of 1978 are also allowed partly, to the same extent as Writ Petition No. 266 of 1979. The High Court will readjust the seniority of the petitioners and respondent No. 3 therein by the application of the aforesaid principles and in accordance with the Haryana Superior Judicial Service Rules, 1963 as in force on, or as given effect to from April 1, 1970. The seniority list will be drawn by the High Court on the basis of the dates of confirmation without applying the rule of rotation and in the light of the directions given by us in the Punjab Writ Petition, in so far as relevant. The High Court will also comply with the other directions therein given regarding the review of the promotions to Selection Grade and the consequential orders.

These directions in the aforesaid Writ Petitions from Punjab and Haryana shall be complied with as soon as possible, preferably within a period of three months from to-day.

Parties will pay and bear their own costs.

P. B. R. Petitions allowed in part.