CHAPTER IV

SUPREME COURT

SYNOPSIS

A. INTRODUCTORY

In any country, the Judiciary plays the important role of interpreting and applying the law and adjudicating upon controversies between one citizen and another and between a citizen and the state. It is the function of the courts to maintain rule of law in the country and to assure that the government runs according

to law. In a country with a written constitution, courts have the additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and keeping all authorities within the constitutional framework.

In a federation, the Judiciary has another meaningful assignment, namely, to decide controversies between the constituent States *inter se*, as well as between the Centre and the States. A Federal Government is a legalistic government,[1] a characteristic feature of which is the allocation of powers between the Centre and the States. Disputes usually arise between the Centre and the constituent units relating to distribution of powers and functions between them. An arbiter is, therefore, required to scrutinize laws to see whether they fall within the allotted legislative domain of the enacting legislature and this function is usually left to the Judiciary.

In India, in addition to the above, the judiciary also has the significant function of protecting and enforcing the Fundamental Rights of the people guaranteed to them by the Constitution. JUSTICE UNTWALIA has compared the Judiciary to "a watching tower above all the big structures of the other limbs of the state" from which it keeps a watch like a sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme".[2]

India has a unified Judicial system with the Supreme Court standing at the apex.[3] There are High Courts[4] below the Supreme Court, under each High Court there exists a system of subordinate courts.[5] The Supreme Court thus enjoys the topmost position in the judicial hierarchy of the country. It is the supreme interpreter of the Constitution[6] and the guardian of the people's Fundamental Rights.[7] It is the ultimate court of appeal in all civil and criminal matters and the final interpreter of the law of the land, and thus helps in maintaining a uniformity of law throughout the country.

Article 124(1) establishes the Supreme Court of India. The Chief Justice of the Court is designated as the Chief Justice of India. The Supreme Court sits at Delhi, or at such other place, as the Chief Justice of India may, with the approval of the President, appoint from time to time [Art. 130].

Explaining the purport of Art. 130, the Supreme Court has stated in *Union of India v. S.P. Anand*[8] that it is an enabling provision and does not cast a mandatory obligation on the Chief Justice of India to appoint any place other than Delhi as the seat of the Supreme Court. Whether the Supreme Court should sit at a place other than Delhi involves taking a policy decision by the Chief Justice of India which must receive the approval of the President of India.

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1. DICEY *Law of the Constitution*, Ch. III, 175 (1956). Also, M.P. JAIN, *Role of Judiciary in a Democracy*, 6 J.M.C.L. 239 (1979).
2. *Union of India v. Sankalchand Himatlal Sheth*, AIR 1977 SC 2328 : (1977) 4 SCC 193; see, *infra*, Ch. VIII.
3. However the Supreme Court does not exercise administrative control over the High Courts.
4. For a discussion on the High Courts, see, *infra*, Ch. VIII.
5. *Infra*, Ch. VIII
6. *Infra*, Ch. XL, for discussion on 'Constitutional Interpretation'.
7. *Infra*, Ch. XX.
8. AIR 1998 SC 2615 : (1998) 6 SCC 466.

Thus, making of an order under Art. 130 of the Constitution providing for sitting of the Supreme court at a place other than Delhi requires, in the first place, a decision by the Chief Justice of India in that regard and, thereafter, the approval of the proposal of the Chief Justice of India by the President on the advice of the Council of Ministers.

To enable the courts to discharge their multi-faceted functions effectively, it is extremely important that the courts enjoy independence.[9] Therefore, independence of the judiciary becomes a basic creed in a democratic society. The need for judicial independence becomes all the more necessary in India as judicial review is regarded as the 'fundamental feature' of the Indian Constitution.[10]

B. COMPOSITION OF THE COURT

(a) STRENGTH OF THE COURT

Originally, under Art. 124(1), the strength of the Court was fixed at one Chief Justice and seven other Judges. But Parliament has been given power to increase the number of other Judges beyond seven [Art. 124(1)]. This number has been increased progressively to 25 by the enactment of the Supreme Court (Number of Judges) Act, 1956, amended in 1977 and again in 1986 and lastly in 2009.

(b) APPOINTMENT OF JUDGES

According to Art. 124(2), the Judges of the Supreme Court are appointed by the President. While appointing the Chief Justice, the President has consultation with such of the Judges of the Supreme Court and the High Courts as he may deem necessary. In case of appointment of other Judges, the President is required to consult the Chief Justice of India though he may also consult such other Judges of the Supreme Court and the High Courts as he may deem necessary. [Proviso to Art. 124(2)].

(c) PROCEDURE TO APPOINT JUDGES IN THE UK AND USA

In Great Britain, the Judges are appointed by the Crown, which prior to 2005 meant the Executive of the day, without any restriction. The power of the Executive was curtailed in March 2005, by the Constitutional Reform Act, 2005 which established a Judicial Appointments Commission for England and Wales and a Judicial Appointments and Conduct Ombudsman. In the U.S.A., on the other hand, the President appoints the Supreme Court Judges with the consent of the Senate.

The framers of the Indian Constitution saw difficulties in both the methods prevailing at that time and so they adopted a middle course. The earlier English method appeared to give a blank cheque to the Executive while the American system is cumbersome and involves the possibility of subjecting judicial appointments to political influence and pressures. The Indian method, as laid down in Art. 124(2), as mentioned above, neither gives an absolute authority to the Executive nor does it permit Parliament to influence appointment of Judges. The Executive is required to consult persons who are *ex hypothesi* well-qualified to give proper advice in this matter.

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9. For discussion on the concept of "Independence of the Supreme Court:, see, *infra,* Sec. K.

10. For discussion on the concept of "Fundamental Features of the Constitution, see, *infra,* Ch. XLI.

(d) APPOINTMENT OF SUPREME COURT JUDGES

POSITION before 1993

Before the year 1993, the President's power to appoint the Supreme Court Judges was purely of a formal nature, for, he would act in this matter, as in other matters, on the advice of the concerned Minister, *viz.*, the Law Minister. The final power to appoint Supreme Court Judges rested with the Executive and the views expressed by the Chief Justice were not regarded as binding on the Executive.

For long, the practice in India had been to appoint the senior-most Judge of the Supreme Court as the Chief Justice whenever a vacancy occurred in that office. In 1958, the Law Commission criticised this practice on the ground that a Chief Justice should not only be an able and experienced Judge but also a competent administrator and, therefore, succession to the office should not be regulated by mere seniority.[11] The Government did not act upon this recommendation for long. It continued to appoint the senior-most Judge as the Chief Justice as it was afraid that it might be accused of tampering with judicial independence. A mechanical adherence to the rule at times resulted in the Chief Justice holding office only for a few months before he retired from the Court.

In 1973, the Government suddenly departed from this practice and appointed as Chief Justice a Judge [Justice A.N. RAY] who was fourth in the order of seniority. Thus, three senior Judges were by-passed, who then resigned from the Court in protest. This raised a hue and cry in the country and the Government was accused of tampering with the independence of the Judiciary.[12] Although the Government invoked the Law Commission's recommendation to support the step taken by it, no one believed that the seniority rule had been jettisoned only because of what the Law Commission had said a few years back.

The appointment of the new Chief Justice was even challenged in the Delhi High Court through a petition for *quo warranto* under Art. 226 on the ground that—(*i*) it was *mala fide*, (*ii*) it was against the rule of seniority inherent in Art. 124(2), and (*iii*) the mandatory consultative process envisaged in Art. 124(2) had not been resorted to.

The High Court dismissed the petition holding that the motives of the appointing authority are irrelevant in *quo warranto* proceedings. Without expressing any definitive opinion on points (*ii*) and (*iii*), the court ruled that even if these contentions were correct, any writ issued by the court would be futile as Justice RAY could immediately be reappointed, by following the requisite consultative procedure as he was now the senior-most Judge on the Bench.[13]

Again in 1976, the Government appointed Justice BEG as the Chief Justice bypassing Justice KHANNA who was senior to him at the time. Consequently, Justice KHANNA resigned in protest. However, after the retirement of Chief Justice BEG, the senior-most Judge, Justice CHANDRACHUD was appointed as the Chief

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11. Law Comm., *XIV Rep*., I, 39-40 (1958).

12. For details of the controversy see, KULDIP NAYAR, *SUPERSESSION OF JUDGES* (1973); KUMARAMANGLAM, *JUDICIAL APPOINTMENTS* (1973); PALKHIVALA, *OUR CONSTITUTION DEFACED & DEFILED*, 93-105 (1974), and *A JUDICIARY MADE TO MEASURE*.

13. *P.L. Lakhanpal v. A.N. Ray*, AIR 1975 Del. 66.
For Art. 226 and writ of *quo warrants*, see Ch. VIII, Secs. D and E, *infra*.

Justice. Since then again the rule of seniority has been followed in the matter of appointment of the Chief Justice of India.

In the context of India, it appears to be best to adhere to the convention of appointing the senior-most Judge as the Chief Justice. This will avoid any suspicion that the Government seeks to tamper with the judiciary. Also, when the Government has discretion to appoint the Chief Justice, there is no guarantee that the best man for the post will always be appointed and that considerations other than merit will not come into play. Appointment of a junior Judge invariably results in the resignation of Judges senior to him and thus the country loses the services of able and experienced Judges who could make significant contribution to the cause of law and justice. In India, the tradition so far has been to have a non-political Judiciary and it appears to be best to maintain that tradition. Since 1978, again, the practice has developed of appointing the senior-most judge as the Chief Justice.

POSITION AFTER 1993

The question of selection and appointment of the Judges is crucial to the maintenance of independence of the judiciary. If the final power in this respect is left with the executive, then it is possible for the executive to subvert the independence of the judiciary by appointing pliable judges.

The Constitution does not lay down a very definitive procedure for the purpose as it merely says that the President is to appoint Supreme Court Judges in consultation with the Chief Justice and "such" other Judges of the Supreme Court and of the High Courts as "the President may deem necessary". [Art. 124(2)]. It was not clear from this provision as to whose opinion was finally to prevail in case of difference of opinion among the concerned persons. This important question has been considered by the Supreme Court in several cases.

In 1991, in *Subhash Sharma v. Union of India,*[14] a three Judge Bench of the Supreme Court expressed the view that consistent with the constitutional purpose and process, as expressed in the Preamble to the Constitution, "it becomes imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court...."

As regards the word "consultation" in Art. 124(2), the Court said: "The constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished values of judicial independence". The Bench suggested that this question be considered by a larger Bench. The Bench emphasized:[15]

> "An independent non-political judiciary is crucial to the sustenance of our chosen political system. The vitality of the democratic process, the ideals of social and economic *egalitarianism*, the imperatives of a socio-economic transformation envisioned by the Constitution as well as the Rule of law and great values of liberty and equality are all dependent on the tone of the judiciary. The quality of the judiciary cannot remain unaffected, in turn, by the process of selection of judges".

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14. AIR 1991 SC 631, 641 : 1991 Supp (1) SCC 574.
15. *Ibid*. at 640.

Subsequent to *Subhash Sharma*, the question of the process of appointing the Supreme Court Judges came to be considered by the Supreme Court in *S.C. Advocates on Record Association v. Union of India*.[16] A public interest writ petition was filed in the Supreme Court by the Lawyers' Association raising several crucial issues concerning the Judges of the Supreme Court and the High Courts. The petition was considered by a bench of nine Judges.[17] The majority judgment was delivered by J.S. VERMA, J., on behalf of himself and YOGESHWAR DAYAL, G.N. RAY, A.S. ANAND and BHARUCHA, JJ.

The Court considered the question of the primacy of the opinion of the Chief Justice of India in regard to the appointment of the Supreme Court Judges. The Court emphasized that the question has to be considered in the context of achieving "the constitutional purpose of selecting the best" suitable for composition of the Supreme Court "so essential to ensure the independence of the judiciary, and, thereby, to preserve democracy."[18]

Referring to the 'consultative' process envisaged in Art. 124(2) for appointment of the Supreme Court Judges, the Court emphasized that this procedure indicates that the Government does not enjoy 'primacy' or "absolute discretion" in the matter of appointment of the Supreme Court Judges.[19]

The Court has pointed out that the provision for consultation with the Chief Justice was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court Judge, and it was also necessary to eliminate political influence.

The Court has also emphasized that the phraseology used in Art. 124(2) indicates that it was not considered desirable to vest absolute discretion or power of veto in the Chief Justice as an individual in the matter of appointments so that there should remain some power with the Executive to be exercised as a check, whenever necessary. Accordingly, the Court has observed:[20]

> "The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight, the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual."

Thus, in the matter of appointment of a Supreme Court Judge, the primary aim ought to be to reach an agreed decision taking into account the views of all the consultees giving the greatest weight to the opinion of the Chief Justice. When decision is reached by consensus, no question of primacy arises. Only when conflicting opinions emerge at the end of the process, the question of giving primacy

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16. AIR 1994 SC 268 : (1993) 4 SCC 441.
17. For discussion on the concept of 'Public Interest Litigation', see, *infra*, Chs. VIII, Sec. D and XXXIII, Sec. B.
18. AIR 1994 SC at 425 : (1993) 4 SCC 441.
19. *Ibid*, at 429.
20. *Ibid*, at 430.

to the opinion of the Chief Justice arises, "unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable."[21]

The Court has further clarified that "the primacy of the opinion of the Chief Justice of India" is, in effect, "primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion".

Emphasizing upon this aspect further, the Court has said that the principle of non-arbitrariness is an essential attribute of the Rule of Law and is all pervasive throughout the Constitution. An adjunct of this principle is "the absence of absolute power in one individual in any sphere of constitutional activity. Therefore, the meaning of the "opinion of the Chief Justice" is "reflective of the opinion of the judiciary" which means that "it must necessarily have the element of plurality in its formation". The final opinion expressed by the Chief Justice is not merely his individual opinion but "the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function".[22] The Court has observed in this connection:[23]

> "Entrustment of the task of appointment of superior Judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive much less in any individual, be the Chief Justice of India or the Prime Minister."[24]

The Court also laid down the following propositions in relation to the appointment of the Supreme Court Judges:

(1) Initiation of the proposal for appointment of a Supreme Court Judge must be by the Chief Justice.

(2) In exceptional cases alone, for stated and cogent reasons, disclosed to the Chief Justice, indicating that the person who was recommended is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice and other Supreme Court Judges who have been consulted in the matter, on reiteration of the recommendation of the Chief Justice of India, the appointment should be made as a healthy convention.

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21. *Ibid,* at 430.
22. *Ibid,* 434.
23. *Ibid,* at 434-435.
24. KULDIP SINGH and PANDIAN, JJ., in separate opinions mainly concurred with the majority opinion.

(3) No appointment of any Judge to the Supreme Court can be made by the President unless it is in conformity with the final opinion of the Chief Justice formed in the manner indicated above.

(4) As the President acts on the advice of the Council of Ministers in the matter of appointment of a Supreme Court Judge, the advice of the Council of Ministers is to be given in accordance with Art. 124(2) as interpreted by the Supreme Court.

(5) All consultation with every one involved, including all the Judges consulted, must be in writing. Expression of opinion in writing is an inbuilt check on exercise of the power, and ensures due circumspection.

(6) Appointment to the office of Chief Justice of India ought to be of the senior-most Judge of the Supreme Court considered fit to hold the office. "The provision in Art. 124(2) enabling consultation with any other Judge is to provide for such consultation, if there be any doubt about the fitness of the senior-most Judge to hold the office, which alone may permit and justify a departure from the long standing convention", *i.e.,* to appoint the senior-most Supreme Court Judge to the office of the Chief Justice of India.

(7) "*Inter se* seniority among Judges in their High Court and their combined seniority on all India basis" should be "kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court."

The main purpose underlying the law laid down by the Supreme Court in the matter of appointing Supreme Court Judges was to minimise political influence in judicial appointments as well as to minimise individual discretion of the Constitutional functionaries involved in the process of appointment of the Supreme Court Judges. The entire process of making appointments to high judicial offices is sought to be made more transparent so as to ensure that neither political bias, nor personal favouritism nor animosity play any part in the appointment of Judges.

Clarifying certain points arising out of the above judgment, the Supreme Court has now delivered an advisory opinion on a reference made by the President[25] under Art. 143[26]. In this opinion, the Court has laid down the following propositions in regard to the appointment of the Supreme Court Judges:

(1) In making his recommendation for appointment to the Supreme Court, the Chief Justice of India ought to consult four senior-most puisne Judges of the Supreme Court. Thus, the collegium to make recommendation for appointment should consist of the Chief Justice and four senior-most puisne Judges.

(2) The opinion of all members of the collegium in respect of each recommendation should be in writing.

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25. *In re: Special Reference,* AIR 1999 SC 1 : (1998) 7 SCC 739.
26. For discussion on Art. 143, see, *infra*, section F.

(3) The views of the senior-most Supreme Court Judge who hails from the High Court from where the person recommended comes must be obtained in writing for the consideration of the collegium.

(4) If the majority of the collegium is against the appointment of a particular person, that person shall not be appointed. The Court has gone on to say that " if even two of the Judges forming the collegium express strong views, for good reasons, that are adverse to the appointment of a particular person, the Chief Justice of India would not press for such appointment."

(5) The following exceptions have now been engrafted on the rule of seniority among the High Court Judges for appointment to the Supreme Court:

(a) A High Court Judge of outstanding merit can be appointed as a Supreme Court Judge regardless of his standing in the seniority list. "All that needs to be recorded when recommending him for appointment is that he has outstanding merit".

(b) A High Court Judge may be appointed as a Supreme Court Judge for "good reasons" from amongst several Judges of equal merit, as for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench.

Thus, the responsibility to make recommendations for appointment as Supreme Court Judges has been taken away from the Central Executive and has now been placed on a collegium consisting of the Chief Justice of India and four senior-most puisne Judges. The sphere of consultation has thus been broadened. Before this opinion was delivered, this collegium consisted of the Chief Justice and two senior-most Judges. The Court has now specifically stated that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in matter of appointments to the Supreme Court and the Government is not obliged to act thereon.[27] The process of consultation among the members of the collegium has now been formalized as every member Judge has to give his opinion in writing.

(e) PROPOSAL FOR SETTING UP A JUDICIAL COMMISSION

In its 121st report issued in 1987, the Law Commission has advocated the setting up of a Judicial Commission. In 1987, after the case of *S.P. Gupta,*[28] the executive came to wield overriding powers in the matter of selection and appointment of Judges. The Commission was unhappy with the situation prevailing at the time. Criticising the system prevailing in 1987, the Law Commission observes:

> "The present model… confers overriding powers on the executive in the matter of selection and appointment of judges and in dealing with the judiciary. The constitutional mandate all was to separate executive and judiciary in all its ramifications. The Constitution aims at ensuring independence of Judiciary, when translated in action, independence from executive."

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27. *Ibid,* at 16.

28. *S.P. Gupta v. Union of India,* AIR 1982 SC 149 : 1981 Supp SCC 87. For discussion on this case, see, Ch. VIII, Sec. B(c), *infra.*

Accordingly, the Law Commission suggested that a National Judicial Commission be set up. But the Law Commission did not work out its composition and function. In this regard, the Law Commission said : "Composition and functions of such a National Judicial Service Commission will have to be worked out in meticulous detail." Tentatively, however, the Law Commission suggested the following composition: Chief Justice of India (Chairman); three seniormost judges of the Supreme Court; retiring Chief Justice of India; Three Chief Justices of the High Courts according to their seniority; Minister of Law and Justice, Government of India; Attorney-General of India, and an outstanding law academic.

The Law Commission issued its report in 1987. It is clear that it was primarily to dilute the executive power, and as a hedge against executive interference with the judiciary, that the Law Commission mooted the idea of a Judicial Commission. Since then things have changed drastically as a result of the two Supreme Court cases mentioned above. In fact, the 121st report of the Law Commission played a significant role in the Supreme Court decision in *Advocates-on-Record* case in 1994.

The rationale underlying the Report has now been overtaken by the two Supreme Court decisions *viz*., *Supreme Court Advocates-on-Record Association v. Union of India* and *In re* : *Presidential Reference*, as discussed above. As a result of these judicial pronouncements, the effective power to appoint Supreme Court and High Court Judges has come to vest in a collegium of Judges as mentioned above. Theoretically at least, this '*de facto*' Judicial Commission ensured a freedom from executive interference and consequently guaranteed judicial independence. But actual freedom from political considerations and other pressures, turning as they do on the personal characteristics of selectors coupled with the absence of public scrutiny, has led to a recent rethinking on the issue. The National Commission to Review the Working of the Constitution in its report submitted in 2002 has opined that a National Judicial Commission should be constituted for making recommendations as to the appointments of judges of all superior courts other than the Chief Justice of India. It has expressed the view that the Vice President of India, the Chief Justice of India, the two senior most puisne judges of the Supreme Court and the Union Minister for Law and Justice should constitute the Judicial Commission. The Chief Justice of a High Court would also be associated as a Member of the Commission when considering the appointment of a judge of that High Court.

(f) ACTING CHIEF JUSTICE

The President can appoint a Supreme Court Judge as the acting Chief Justice in case the office falls vacant, or the Chief Justice is unable to perform his duties due to absence or otherwise [Art. 126].

(g) OATH

A person appointed as a Supreme Court Judge, before entering upon his office, has to make and subscribe before the President, or some person appointed by him for the purpose, an oath or affirmation in the form prescribed [Art. 124(6)].

(h) QUALIFICATIONS

A person to be appointed a Supreme Court Judge should be a citizen of India. In addition, he may have been—

(i) either a Judge of a High Court (or High Courts) for five years, or

(ii) an advocate of a High Court (or High Courts) for ten years, or,

(iii) may be, in the opinion of the President, a distinguished jurist [Art. 124(3)].

It is thus possible to appoint an eminent non-practising, academic lawyer to the Supreme Court. This provision has been inspired by the American example where distinguished law teachers have often been appointed to the Supreme Court and they have proved to be successful Judges.[29] At times, a non-practising laywer-judge might be in a better position, because of his breadth of outlook and freedom from a narrow and technical approach to law, to deal with problems of public law.[30] While there have been two appointments to the Supreme Court directly from the Bar till now, however, no jurist, as such, has been appointed as a Supreme Court Judge in India.

(i) SALARY

To begin with, the salary payable to a Supreme Court Judge was specified in the Constitution [Art. 125(1) and the Second Schedule].[31] But then by the Fifty-fourth Constitutional Amendment, Parliament has been given power to determine the salary payable to a Supreme Court Judge by law.

Parliament is also authorised to determine, from time to time, by law such questions as the privileges, allowances, rights in respect of leave of absence and pension for these Judges. None of these can, however, be varied by Parliament to the disadvantage of a Judge after his appointment to the Court [Art. 125(2) and the proviso]. All these matters are now regulated by the Supreme Court Judges (Salaries and Conditions of Service) Act, 1958.[32]

(j) AD HOC JUDGE

The Chief Justice may call a Judge of a High Court to act as an ad hoc Judge of the Supreme Court, for such period as may be necessary, if the quorum of the Supreme Court Judges is insufficient to hold or continue a session of the Court. The Judge so appointed should be qualified to act as a Supreme Court Judge.

Before making such an appointment, the Chief Justice of India has to consult the Chief Justice of the High Court concerned and also obtain the prior consent of the President [Art. 127(1)]. It is the duty of the High Court Judge so appointed, in priority to other duties of his office, to attend the sittings of the Supreme Court at such time and for such period for which his attendance is required there. While so attending the Supreme Court, an *ad hoc* Judge enjoys all the jurisdiction, powers and privileges of, and discharges all such duties like, any other Supreme Court Judges [Art. 127(2)].

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29. VIII *CAD* 254; Law Commission of India, *ibid.*, 36.

30. MC WHINNEY, *JUDICIAL REVIEW, Passim* (1969); FREUND, *UMPIRING THE FEDERAL SYSTEM*, 54 *Col. L.R.* 574.

31. The Schedule has been amended by the Fifty-Fourth Amendment of the Constitution enacted in 1986; see, *infra*, Ch. XLII.

32. This Act has been recently amended by the High Court and Supreme Court Judges (Salaries and Conditions of Services) Amendment Act, 2002.

(k) RETIRED SUPREME COURT JUDGE

A person who has held office as a Supreme Court Judge cannot plead or act in any court or before any authority in India [Art. 124(7)]. This disqualification has been placed on the ex-Judge with a view to preserving the dignity of the Supreme Court and also to avoid embarrassment to the tribunal or the court before whom he may appear.

However, the Chief Justice of India, with the previous consent of the President, may request any retired Supreme Court Judge to sit and act as a Judge of the Court. If he agrees to do so, then while so sitting and acting, he is entitled to such allowances as may be determined by an order of the President. He will also enjoy all the jurisdiction, powers and privileges of a Supreme Court Judge, but shall not otherwise be deemed to be a Judge of the Court.

The Chief Justice may similarly request a retired High Court Judge, who is duly qualified to be appointed as a Supreme Court Judge, to sit and act as a Judge of the Supreme Court [Art. 128].

(l) TENURE

A Judge of the Supreme Court may resign his office by writing to the President.[33] He holds office until he attains the age of 65 years.[34] If a question arises regarding his age, it is to be determined by such authority and in such manner as Parliament may by law provide.[35] Parliament has now laid down the procedure for the purpose.[36]

The Indian provision fixing a retiring age has this virtue that it ensures infusion of new talent from time to time and thus protects the Court from falling into a groove or getting out of tune with the contemporary social and economic philosophy and this aspect is important because of the Court's significant function of interpretation of the Constitution. On the other hand, an unfortunate result of the provision at times may be to remove some Judges untimely from the bench just when they may be beginning to find their feet as constitutional judges and approaching the period of their greater intellectual usefulness. It may therefore be advisable to extend the age of retirement of a Supreme Court Judge to 70 years.

(m) REMOVAL OF A JUDGE

The question of removal of a Judge before the age of retirement is an important one as it has a significant bearing on the independence of the judiciary. If a Judge of the Supreme Court could be removed by the Executive without much formality, then it can be imagined that the Court would lose its independence and become subject to the control of the Executive.

In every democratic country swearing by the Rule of Law, therefore, special provisions are made making removal of judges an extremely difficult exercise. In Britain, for example, Judges hold office during good behaviour and can be removed only on an address from both Houses of Parliament.[37] In the U.S.A., a Supreme Court Judge holds office for life and is removable only by the process

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33. Art. 124(2), proviso (a).
34. Art. 124(2).
35. Art. 124(2A).
36. See, *infra*, Ch. VIII, Sec. B(g), for details of the procedure.
37. S.A. de Smith, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 353, 362 (1977).

of impeachment in case of treason, bribery or other high crimes and misdemeanours.[38] Provision has however been made by law for voluntary retirement on full salary after ten years of service and attainment of the age of seventy.

The Constitution of India also makes a provision for the removal of a Supreme Court Judge.[39] He may be removed from office by the President on an address by both Houses of Parliament presented in the same session for proved misbehaviour[40] or incapacity. The address must be supported by a majority of the total membership in each House, and also by a majority of not less than two thirds of the members of each House present and voting.[41]

The word 'proved' in this provision indicates that the address can be presented by Parliament only after the alleged charge of misbehaviour or incapacity against the Judge has been investigated, substantiated and established by an impartial tribunal. The constitutional provision does not prescribe how this investigation is to be carried on. It leaves it to Parliament to settle and lay down by law the detailed procedure according to which the address may be presented and the charge of misconduct or incapacity against the Judge investigated and proved.[42]

In accordance with the above provision, Parliament has enacted the necessary law for the purpose. The Judges (Inquiry) Act, 1968, now regulates the procedure for investigation and proof of misbehaviour or incapacity of a Supreme Court Judge for presenting an address by the Houses of Parliament to the President for his removal.

The procedure for the purpose is as follows: A notice of a motion for presenting such an address may be given by 100 members of the Lok Sabha, or 50 members of the Rajya Sabha. The Speaker or the Chairman may either admit or refuse to admit the motion. If it is admitted, then the Speaker/Chairman is to constitute a committee consisting of a Supreme Court Judge, a Chief Justice of a High Court and a distinguished jurist. If notices for the motion are given on the same day in both the Houses, the Committee of Inquiry is to be constituted jointly by the Speaker and the Chairman.

The Committee of inquiry is to frame definite charges against the Judge on the basis of which the investigation is proposed to be held and give him a reasonable opportunity of being heard including cross-examination of witnesses. If the charge is that of physical or mental incapacity, the Committee may arrange for the medical examination of the Judge by a medical board appointed by the Speaker/Chairman or both as the case may be.

The report of the Committee is to be laid before the concerned House or Houses. If the Committee exonerates the Judge of the charges laid against him, then no further action is to be taken on the motion for his removal. If, however, the Committee finds the Judge to be guilty of misbehaviour, or suffering from an incapacity, the House can take up consideration of the motion. On the motion being adopted by both Houses according to Art. 124(4), noted above, an address

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38. SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW*, 135; Art. II(4) of the U.S. Constitution.
39. Art. 124(2), proviso (*b*); Art. 124(4) and Art. 124(5).
40. Even if a Judge commits errors, even gross errors, it does not amount to misbehaviour on his part: *C.K. Daphtary v. O.P. Gupta*, AIR 1971 SC 1132. See further under 'Power to Review'.
41. Art. 124(2), proviso (*b*) and Art. 124(4).
42. Art. 124(5).

may be presented to the President for removal of the Judge. Rules under the Act are to be made by a committee consisting of 10 members from the Lok Sabha and 5 members from the Rajya Sabha.

It can be seen that the constitutional provision in India for the removal of a Supreme Court Judge is modelled on the English provision, though the former is somewhat more rigid than the latter insofar as—(i) it requires a special majority in both Houses whereas in England no special majority is prescribed; (ii) while in India the grounds have been specified on which an address for the removal of a Judge can be presented, there is no such provision in England; (iii) in India, there is provision for investigation and proof of the grounds before presenting an address, no such provision exists in England. Therefore, it appears that the provision in England for the removal of Judges is more flexible than that in India.

The procedure outlined above for the removal of a Supreme Court Judge was activated in 1991. For the first time since the Constitution came into force, the above-mentioned procedure to remove a Supreme Court Judge was put in motion in 1991. Steps were initiated to remove a Supreme Court Judge on charges of misconduct prior to his appointment when he was the Chief Justice of a High Court. 108 members of the Ninth Lok Sabha gave notice to the Speaker of a motion for presenting an address to the President for removal of Justice V. Ramaswami of the Supreme Court.

The charge against him was that he committed financial irregularities while he was the Chief Justice of Punjab and Haryana High Court. The Speaker of the Lok Sabha admitted the motion on 12th March, 1991, and proceeded to constitute an Enquiry Committee consisting of Justice P.B. SAWANT, a sitting Judge of the Supreme Court, Chief Justice DESAI of the Bombay High Court and Mr. CHINNAPPA REDDY, a retired Supreme Court Judge as a distinguished jurist. This was done by the Speaker in terms of S. 3(2) of the Judges (Inquiry) Act, 1968. Before the Committee could present its report, Lok Sabha was dissolved.[43]

In *Sub-Committee of Judicial Accountability v. Union of India*,[44] the Supreme Court was called upon to consider the question whether dissolution of the Lok Sabha put an end to the motion for removal of the concerned Supreme Court Judge. The Court's response to this question was that the motion for removal of a Judge under Art. 124 of the Constitution does not lapse with the dissolution of the House. The motion having been submitted to the Speaker, its validity would in no way be impaired by the dissolution of the House. The Court reached this conclusion as a result of interpretation of Ss. 3(1) and 6 of the Judges (Inquiry) Act. Referring to these statutory provisions, the Court observed:[45]

> "The effect of these provisions is that the motion shall be kept pending till the Committee submits its report and if the Committee finds the Judge guilty, the motion shall be taken up for consideration".

The Court ruled that the Committee of Inquiry appointed by the Speaker was a body outside Parliament and a statutory body under the Judges (Inquiry) Act, and till it furnishes its findings to the House, the Committee maintains its own separate identity.

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43. On dissolution of Lok Sabha, see, *supra,* Ch. II, Sec. I(c).
44. AIR 1992 SC 320 : (1981) 4 SCC 399.
45. AIR 1992 SC at 344 : (1981) 4 SCC 399.

The Court ruled further that whether a motion has lapsed or not because of the dissolution of the House is not solely for the House to decide. In the Court's opinion, because of the written Constitution, "the usual incidents of parliamentary sovereignty do not obtain and the concept is one of 'limited Government'".[46] Judicial review is an inevitable part of a written Constitution which is the fundamental law of the land. The Court ruled accordingly:[47]

> "The interpretation of the laws is the domain of the courts and on such interpretation of the constitutional provisions as well as the Judges (Inquiry) Act, 1968, it requires to be held that under the law such a motion does not lapse and the courts retain jurisdiction to so declare."

Interpreting Arts. 121 and 124, the Supreme Court ruled that the constitutional process for the removal of a Judge up to the point of admission of the motion, constitution of the Committee and the recording of findings by the Committee are not, strictly speaking, proceedings of the House of Parliament. This part is covered by the enacted law. The Speaker is a statutory authority under the Judges (Inquiry) Act up to that point and the matter cannot be said to remain outside the Court's jurisdiction. Till this stage, the matter cannot be discussed on the floor of the House because of the bar placed by Art. 121.[48]

The Speaker while admitting a motion and constituting a committee to investigate the alleged grounds of misbehaviour or incapacity does not act as part of the House. The House does not come into the picture at this stage. The Parliament comes in the picture only when a finding is reached by that machinery that the alleged misbehaviour or incapacity has been proved.

Prior proof of misconduct in accordance with the law made under Art. 124(5) is a condition precedent for the lifting of the bar under Art. 121 against discussing the conduct of a Judge in Parliament. Art. 124(4) really becomes meaningful only with a law made under Art. 124(5). Without such a law having been made, the constitutional scheme and process for removal of a Judge remain inchoate. The Judges (Inquiry) Act, 1968 is, therefore, constitutional and *intra vires* Parliament.

When the Speaker admits the motion under S. 3 of the Judges (Inquiry) Act, the Judge concerned is not, as a matter of right, entitled to any notice or hearing. Also, there is no legal provision under which the Court has power to interdict the Judge from attending to judicial work in the Court pending enquiry against him. It may, however, be advisable to do so if so advised by the Chief Justice.

The Chief Justice is expected to find a desirable solution in such a situation to avoid embarrassment to the Judge and to the institution in a manner which is conducive to the independence of the judiciary. Should the Chief Justice be of the view that in the interests of the institution of judiciary it is desirable for the Judge to abstain from judicial work till the final outcome under Art. 124(4), he would advise the Judge accordingly. The Judge would ordinarily abide by the advice of the Chief Justice.

The Court also ruled that the petitioner, being a Committee of the Bar, has *locus standi* to move a writ petition in the Court to raise these matters concerning the removal of a Supreme Court Judge.

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46. *Ibid.,* at 345.
47. *Ibid.,* at 346
48. *Supra,* Ch. II; Sec. L(i)(a) *infra.*

Soon after the Inquiry Committee started proceedings, a Congress M.P., Shri M. Krishnaswami, filed a petition in the Supreme Court challenging the Committee's functioning. His complaint was that Justice Ramaswami had not been given a fair hearing and also that the Judge was entitled to a copy of the report. The Supreme Court dismissed the petition on the ground that the petitioner had no *locus standi*. If Justice Ramaswami wanted a copy of the report, he would have to appeal to the Court himself.[49]

Next, a writ petition was filed in the Supreme Court on behalf of Justice Ramaswami by his wife claiming a copy of the report of the Inquiry Committee before its being submitted to the Speaker so that the Judge may take recourse to judicial review in case he was found guilty by the Committee. In *Sarojini Ramaswami v. Union of India*,[50] the Supreme Court considered several important questions arising out of the writ petition, *viz.*:

(1) Whether the concerned Judge has a right of judicial review of the order of removal made by the President under Art. 124(4)?

(2) Is the Inquiry Committee a tribunal and thus subject to the Supreme Court's appellate jurisdiction under Art. 136?

(3) Does the concerned Judge have a right to get a copy of the report before its submission to the Speaker?

A five-Judge Bench considered the issues involved; three opinions were filed. The majority opinion (3 Judges) was written by VERMA, J.; a separate but concurring opinion was filed by KASLIWAL, J., and K. RAMASWAMY, J., filed a dissenting opinion. The following summary is based on the three Judge-opinion given by VERMA, J.

After reading the constitutional provisions and the provisions of the Judges (Inquiry) Act and the rules made thereunder, the Court pointed out that if the Inquiry Committee reaches the verdict of 'not guilty', either unanimously or by majority, the matter ends there and Parliament is not required to take up the motion of removal for consideration.

This means that the Inquiry Committee is "the sole and final arbiter on the question of removal of the Judge where the findings reached by the Committee, whether unanimously or by majority, is that the Judge is 'not guilty'[51]. This indicates that there can be no judicial review where the Inquiry Committee makes a finding that the Judge is 'not guilty' of any misbehaviour. In such a situation, no question arises of furnishing a copy of the report of the Committee to the concerned Judge.

In case, the Inquiry Committee finds the Judge guilty, then the matter goes to Parliament. The Supreme Court has come to the conclusion that under Art. 124(4), "a full consideration on merits, including correctness of the finding of 'guilty' made by the Inquiry Committee on the basis of the materials before the Parliament is contemplated during the Parliamentary part of the process of removal of a Judge."

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49. *Krishnaswami v. Union of India*, (1992) 4 SCC 605.
50. AIR 1992 SC 2219 : (1992) 4 SCC 506.
51. *Ibid.*, 2235.

This means that despite the finding of 'guilty' by the Committee, the Parliament may decide, after considering the matter, not to adopt the motion for removing the Judge. This leads to the conclusion that the concerned Judge should also have an opportunity to comment on the finding by the Inquiry Committee. For this purpose, therefore, the Speaker/Chairman of the House has to supply a copy of the Inquiry Committee's report to the concerned Judge while causing it to be laid before the Parliament under S. 4(3) of the Act.[52]

As regards judicial review, the Court has ruled that if Parliament does not adopt the motion for removal of the Judge, the process ends there with no challenge available to anyone. The judicial review of the finding of 'guilty' made by the Inquiry Committee may be permissible on limited grounds "pertaining only to the legality" but only after "the making of the order of removal by the President in case the Parliament adopts the motion by the requisite majority". "Resort to judicial review by the concerned Judge between the time of conclusion of the inquiry by the Committee and making of the order of removal by the President would be premature and is unwarranted in the constitutional scheme."[53]

The Supreme Court has ruled that the Inquiry Committee appointed under the Judges (Inquiry) Act cannot be treated as a 'tribunal' for the purposes of Art. 136 because the report finding the Judge guilty of misbehavour is "in the nature of recommendation for his removal which may or may not be acted upon by the Parliament". Since the Committee holding that the Judge is guilty of any misbehaviour is not "final and conclusive", "it is legally not permissible to hold that the Committee is a tribunal under Art. 136 of the Constitution."[54] This means that an appeal cannot be filed in the Supreme Court from the Inquiry Committee under Art. 136.[55]

This judgment has seeds of confrontation between the Supreme Court and Parliament. Ordinarily, after Parliament has taken a decision to remove the Judge, on the basis of the report of the Committee of Inquiry, the matter should come to an end. As the Court has said itself, if the Inquiry Committee report is favourable to the concerned Judge, the matter ends there and Parliament cannot take any further action in the matter. If, however, the report of the Inquiry Committee goes against the Judge, then, only Parliament can take action to remove him after giving him a hearing on the inquiry report.

Once Parliament has passed the resolution removing the Judge after following the due procedure and the President assents to the motion, the Judge stands removed and there appears to be no need for any judicial review thereafter. Otherwise, there is a chance of controversy arising between the Judiciary and Parliament. In any case, judicial review can only be on procedural grounds and not on the merits of the grounds of removal.

In the long and arduous process of removal of the Supreme Court Judge, the third stage was reached when the Inquiry Committee held the Judge guilty of wilful and gross misuse of office and moral turpitude by using public funds for private ends in several ways while he was the Chief Justice of the Punjab and Haryana High Court during Nov. 11, 1987 to Oct. 6, 1989. The Committee reported

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52. *Ibid.*, 2241–42.
53. *Ibid.*, 2244.
54. *Ibid.*, 2248.
55. For discussion on Art. 136, see, *infra*, Sec. D.

that acts committed by the Judge were of such a nature that his "continuance in office will be prejudicial to the administration of justice and public interest". The Committee said: "The acts constitute 'misbehaviour' within the meaning of Art. 124(4) of the Constitution."

The report of the Committee was tabled in Parliament on December 17, 1992.[56] Thereafter, the motion was debated in the Lok Sabha. A lawyer was allowed to appear before the House to defend Justice RAMASWAMI. Ultimately, the motion was put to vote in the House but was lost as it could not receive the requisite votes in the House because of the absence of the Congress Party members from the House.

As a sequel to the above episode, a writ petition was moved in the Supreme Court seeking a declaration that the motion of impeachment moved in the Lok Sabha for the removal of the Supreme Court Judge ought to be regarded to have been carried by construing the expression "supported by a majority" in Art. 124(4) as meaning that a member abstaining from voting should be deemed to have supported the motion. The Supreme Court rejected the contention. The Court argued that the expression "not less than two-thirds of the members present and voting" in Art. 124(4) implies that motion is to be deemed carried only when the requisite number of members express their support for the motion by casting votes in its favour. Abstention from casting vote cannot be construed as deemed support for the motion.[57]

The President cannot remove a Supreme Court Judge except in accordance with the procedure laid down in Art. 124(4). Thus, the President cannot remove a Judge unless each House of Parliament passes an address for the removal of the Judge supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members present and voting on the ground of proved misbehaviour and incapacity. Unless such an address is presented to the President in the same session by the two Houses, the President is not empowered to remove a Judge.[58]

The second time in the history of Indian Judiciary, the CJI recommended the impeachment of Justice, SOUMITRA SEN of the Calcutta High Court. Justice Sen allegedly misappropriated funds while acting as a Receiver prior to his appointment as a Judge. The further allegation was that the funds were not returned or accounted for till several years after his elevation and only pursuant to a judicial order of the Court. The Chief Justice of the High Court's request that he should resign or retire prematurely was refused. The three-judge committee set up by the Chief Justice of India to enquire into the matter reported that Justice Sen was guilty of misconduct. On August 4, 2008, the Chief Justice of India wrote a letter to the Prime Minister recommending impeachment proceedings against Justice Sen under Article 217(1) read with Article 124(4) of the Constitution. About 60 Rajya Sabha MPs have filed a petition before the Chairman of the Upper House demanding the impeachment of Justice Sen. The debate in Parliament is pending.

The word 'misbehaviour' used in Art. 124(4), "is a vague and elastic word and embraces within its sweep different facets of conduct as opposed to good conduct". Literally 'misconduct' means wrong conduct or improper conduct. Guarantee

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56. *THE HINDU*, dated December 26, 1992, p. 12.
57. *Lily Thomas v. Speaker, Lok Sabha*, (1993) 4 SCC 234.
58. *K. Veeraswami v. Union of India*, (1991) 3 SCC 655 : (1991) SCC (Cri) 734.

of tenure to a Judge, and its protection by the Constitution does not mean giving sanctuary for corruption or grave misbehaviour. But, at the same time, every action or omission by a Judge in the performance of his duties which may not be a good conduct necessarily, may not be regarded 'misbehaviour' for purposes of Art. 124(4) indictable by impeachment.[59] Error in judgment, however gross, cannot amount to 'misbehaviour'.[60]

In December 2006, a Bill to amend the 1968 Act was introduced in the Lok Sabha. It seeks to effect far reaching reforms in the action permissible against a judge for "misbehaviour" or "incapacity". Both words are defined. Provisions are also sought to be introduced for the setting up of a National Judicial Council to enquire into allegations of misbehaviour or incapacity of a judge. The proposed Council is to consist of the Chief Justice of India as the Chairperson, the two senior most judges of the Supreme Court and two Chief Justices of High Courts. If the Chief Justice of India is the object of the inquiry, the President may appoint the senior most judge of the Supreme Court to discharge the functions of the Chairperson. In a sharp departure from the provisions of the 1968 Act, the Bill seeks to allow complaints to be filed by any person to the Council apart from the procedure earlier followed, namely by way of a reference by the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha. If after inquiry, the complaint is found established by the Council, it may, if the charge is serious, advise the President accordingly, who is required to place the advice before both Houses of Parliament so that the Constitutional process for removal of the judge can commence. If the charges established are not serious and do not warrant the removal of the judge, the Council may issue advisories or warnings to the judge concerned or withdraw judicial work or censure or admonish the judge privately or publicly or request the judge to voluntarily retire. The Bill, if enacted, would meet the need for accountability in judges, transparency in the system and allow for some punitive action against a judge found guilty of misbehaviour or incapacity without resorting to the long drawn and uncertain political outcome of impeachment.

C. JURISDICTION AND POWERS

The Supreme Court is a multi-jurisdictional Court and may be regarded as the most powerful Apex Court in the World.

The Constitution confers very broad jurisdiction on the Court. The jurisdiction of the Court may be put under the following heads:

(i) The Court has power to commit a person for its contempt [Art. 129].

(ii) The Court has original jurisdiction to decide inter-governmental disputes [Art. 131].

(iii) The Court has appellate jurisdiction. It is the highest court of appeal in the country in all matters, civil or criminal [Arts. 132 to 134].

(iv) The Court has a very extensive appellate jurisdiction under Art. 136 from any court or tribunal in the country in matters not falling under heading (iii).

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59. *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee*, (1995) 5 SCC 457 : 1995 SCC (Cri) 953.

60. *Daphtary v. Gupta*, AIR 1971 SC 1132 : (1971) 1 SCC 626.

(v) The Apex Court has power under Art. 32 to enforce Fundamental Rights. [Art. 32][61]

(vi) The Court has advisory jurisdiction. [Art. 143]

(vii) The Court has power to review its own decisions. [Art. 137]

(viii) The Court has power to make any order necessary for doing complete justice in any case. [Art. 142]

All the above provisions are discussed below except Art. 32 which is discussed later in the book.[62]

(i) COURT OF RECORD

(a) CONTEMPT OF SUPREME COURT

The Supreme Court is a 'court of record'[63] and has all the powers of such a court including the power to punish for its contempt. A court of record has—

(1) power to determine its own jurisdiction, and

(2) it has power to punish for its contempt.

On the first question, the Supreme Court has asserted:[64]

> "In the absence of any express provision in the Constitution the Apex Court being a court of record has jurisdiction in every matter and if there be any doubt, the court has power to determine its jurisdiction."

On the question of contempt of court, the Supreme Court has a summary jurisdiction to punish contempt of its authority. This is an extraordinary power and is exercised only when the public interest so demands. Such a power is very necessary to prevent interference with the course of justice, to maintain the authority of law as administered in the court, and thus to protect public interest in the purity of the administration of justice.

The Supreme Court has emphasized upon the need for the concept of contempt of court in the following words.[65]

> "Availability of an independent judiciary and an atmosphere wherein judges may act independently and fearlessly is the source of existence of civilisation in society. The writ issued by the court must be obeyed. It is the binding efficacy attaching with the commands of the court and the respect for the orders of the court which deter the aggrieved persons from taking the law in their own hands because they are assured of an efficacious civilised method of settlement of disputes being available to them wherein they shall be heard and their legitimate grievances redeemed. Any act or omission which undermines the dignity of the court is therefore viewed with concern

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61. For discussion on Fundamental Rights, see, Chs. XX-XXXIII, *infra*.

62. See, Ch. XXXIII, *infra.*

63. A court of record is a court whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, the records of which are admitted to be of evidentiary value and are not to be questioned when produced before any court. A court of record as such has power to punish for its contempt.

64. *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1 : (1966) 3 SCR 744; *Ganga Bishan v. Jai Narain*, AIR 1986 SC 441 : (1986) 1 SCC 75; *Delhi Judicial Service Association v. State of Gujarat*, AIR 1991 SC at 2005.

65. *Om Prakash Jaiswal v. D.K. Mittal*, AIR 2000 SC 1136 : (2000) 3 SCC 171.

> by the society and the court treats it as an obligation to zealously guard against any onslaught on its dignity."

The Supreme Court exercises this power to punish an act which tends to interfere with the course of administration of justice. The following *inter alia* have been held to constitute contempt of court:[66]

(a) insinuations derogatory to the dignity of the Court which are calculated to undermine the confidence of the people in the integrity of the Judges;

(b) an attempt by one party to prejudice the Court against the other party to the action;

(c) to stir up public feelings on the question pending for decision before the Court and to try to influence the Judge in favour of himself;

(d) an attempt to affect the minds of the Judges and to deflect them from performing their duty by flattery or veiled threat;

(e) an act or publication which scandalises the Court attributing dishonesty to a Judge in the discharge of his functions;

(f) wilful disobedience or non-compliance of the Court' order.[67]

The Supreme Court directed the Delhi Development Authority to constitute a committee of inquiry to look into several allegations of irregularities committed in the allotment of plots in the Naraina Warehousing Scheme. The DDA took no action in the matter. Holding DDA guilty of committing contempt of court, the Court observed:[68]

> "Public bodies like, DDA, which are trustees of public properties, and are to carry out public functions, in our view, cannot escape their accountability for their failure to carry out the orders of this court made in public interest. The officers of the DDA who are guilty of inaction, in our view, should be proceeded against in contempt action."

However, in the instant case, instead of imposing any punishment, the Court gave to the DDA one more chance to comply with the Court order.

The Supreme Court has emphasized that in a government of laws and not of men, such as exists in India, the Executive branch of government bears a grave responsibility for upholding and obeying judicial orders.[69] Cases usually arise where government officials are found guilty by the Supreme Court of contempt of court for disregarding, not obeying, deliberately disobeying or not imple-

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66. *Hira Lal Dixit v. State of Uttar Pradesh*, AIR 1954 SC 743 : (1955) 1 SCR 677; *Brahma Prakash v. State of Uttar Pradesh*, AIR 1954 SC 10 : 1953 SCR 1169; *C.K. Daphtary v. O.P. Gupta*, AIR 1971 SC 1132 : (1971) 1 SCC 626; *Pritam Pal v. High Court of M.P.*, AIR 1992 SC 904 : 1993 Supp (1) SCC 529.

67. *Rajiv Choudhary v. Jagdish Narain Khanna*, (1996) 1 SCC 508; *Vineet Kumar Mathur v. Union of India*, (1996) 7 SCC 714; *Indian Airports Employees Union v. Ranjan Chattergee*, AIR 1999 SC 880 : (1999) 2 SCC 537. See also *Sunkara Lakshminarasamma v. Sagi Subba Raju*, (2009) 7 SCC 460 : (2009) 11 JT 264; swearing of false affidavit, punishment by ordering exemplary costs. Also see, *infra*, under Art. 144, Sec. I(e).

68. *M/s. Shorilal & Sons v. Delhi Development Authority*, AIR 1995 SC 1084, 1088 : (1995) 3 SCC 320.

69. *Mohd. Aslam v. Union of India, (*1994) 6 SCC 442 : AIR 1995 SC 548*; Bihar Finance Service House Construction Coop. Society Ltd. v. Gautam Goswami, (*2008) 5 SCC 339, at page 348 : AIR 2008 SC 1975.

menting court orders.[70] Punishment by way of imprisonment for a month has been imposed on a Minister in charge of a department as well as the Principal Secretary of the department, who were found guilty of a wilful violation of an order of the Supreme Court.[71]

In several cases, private parties violating or flouting Supreme Court orders have been held guilty of contempt of court.[72] Gomti River water was being polluted due to discharge of effluents from the distillery of a company. The Supreme Court ordered the company to remove deficiencies in the effluent treatment plant by a certain date. The company failed to do so and yet kept on running its plant. The Court ruled that violation of the Court order by the company was deliberate and pre-planned indicating a defiant attitude on its part. The Court imposed a fine of Rs. 5 lacs on the company which amount was to be utilised for cleaning of the Gomti River.[73]

The Managing Director and Director of a Company held liable for contempt, were sentenced to undergo six months' and three months' imprisonment respectively in *Maruti Udyog Ltd. v. Mahinder C. Mehta*[74] .

As the Court has observed in *Duda*:[75] "Any publication which was calculated to interfere with the due course of justice or proper administration of law would amount to contempt of court. A scurrilous attack on a judge, in respect of a judgment or past conduct has in our country the inevitable effect of undermining the confidence of the public in the judiciary; and if confidence in judiciary goes administration of justice definitely suffers."

In *Hiralal Dixit*,[76] the Supreme Court has observed that it is not necessary that there should be an actual interference with the course of administration of justice. It is enough if the offending act or publication tends in any way to so interfere. If there are insinuations made which are derogatory to the dignity of the court and are calculated to undermine the confidence of the people in the integrity of the judges, the conduct would amount to contempt.

In *Daphtary*, the Court refused to accept the contention that after the case is decided, even if it is criticised severely and unfairly, it should not be treated as contempt of court. The Court observed:

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70. See, for example, *Mohd. Aslam v. Union of India*, (1994) 6 SCC 442 : AIR 1995 SC 548; *Manilal Singh v. H. Borobabu Singh*, AIR 1994 SC 505 : 1994 Supp (1) SCC 718; *J. Vasudevan v. T.R. Dhananjaya*, (1995) 6 SCC 249 : AIR 1996 SC 137; *Mohd. Quiser v. L.K. Sinha*, 1995 Supp (4) SCC 283 : (1995) 9 JT 133; *T.R. Dhananjaya v. J. Vasudevan*, (1995) 5 SCC 619 : AIR 1996 SC 302; *T.M.A. Pai Foundation v. State of Karnataka*, AIR 1995 SC 1938 : (1995) 4 SCC 1; *Vineet Kumar Mathur v. Union of India*, (1996) 1 SCC 119, *In re, M.P. Dwivedi*, AIR 1996 SC 2299 : (1996) 4 SCC 152.

71. *T.N.Godavarman Thirumalpad v. Ashok Khot*, (2006) 5 SCC 1 : AIR 2006 SC 2007; See also *Anil Ratan Sarkar v. Hirak hosh*, JT 2002(2) SC 602 : (2002) 4 SCC 21; *Indra Sawhney v. Union of India*, AIR 2000 SC 498 : (2001) 1 SCC 168; *Abhijit Tea Co. (P.) Ltd. v. Terai Tea Co. (P.) Ltd.*, (1996) 1 SCC 589.

72. *Rajiv Choudhary v. Jagdish Narian Khanna*, (1996) 1 SCC 508; *Delhi Development Authority v. Skipper Consruction Co. (P.) Ltd*., AIR 1996 SC 2005 : (1996) 4 SCC 622.

73. *Vineet Kumar Mathur v. Union of India*, (1996) 7 SCC 714 : 1996 (1) JT 454.

74. (2007) 13 SCC 220, at page 230.

75. *P.N. Duda v. P. Shiv Shankar*, AIR 1988 SC 1208, 1226 : (1988) 3 SCC 167 . See also *C. Elumalai v. A.G.L. Irudayaraj*, (2009) 4 SCC 213.

76. *Hira Lal Dixit v. State of Uttar Pradesh*, AIR 1954 56 743 : (1955) 1 SCR 677; see, *supra*, footnote 66.

> "We are unable to agree.... that a scurrilous attack on a Judge in respect of a judgment or past conduct has no adverse effect on the due administration of justice. This sort of attack in a country like ours has the inevitable effect of undermining the confidence of the public in the judiciary. If confidence in the judiciary goes, the due administration of justice definitely suffers."[77]

An article in a daily, criticising a Supreme Court decision, atrributing improper motives to the Judges and seeking to create an impression in the public mind that the Supreme Court Judges act on extraneous considerations in deciding cases has been held to constitute Court's contempt. The Court has stated that if an impression were created in the public mind that the Judges in the highest court act on extraneous considerations in deciding cases, public confidence in the administration of justice would be undermined and no greater mischief than that could possibly be imagined.[78]

Contempt of court is committed when a court is scandalised by casting "unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice".[79] Charging the judiciary as "an instrument of oppression", and the judges as "guided and dominated by class hatred" "instinctively favouring the rich against the poor" has been held to constitute contempt of court as these words weaken the authority of law and law courts, and have the effect of lowering the prestige of judges and courts in the eyes of the people.[80]

A fair, reasonable, temperate and legitimate criticism of the Judiciary, or of the conduct of a Judge in his judicial capacity is permissible.

A distinction is drawn between a mere libel or defamation of a Judge personally and what amounts to a contempt of the court. A mere defamatory attack on a Judge is not actionable but it becomes punishable when it is calculated to interfere with the due course of justice, or the proper administration of law by the court. Alternatively the test is whether the wrong is done to the Judge personally, or it is done to the public.[81]

The power to punish for contempt, large as it is, is not invoked very frequently, and as the Court has itself observed, it should be exercised "cautiously, wisely and with circumspection."[82] On occasion, factors which have been considered sufficient to warrant a lesser punishment, in one case have not drawn a similar response in another. Thus, even when criminal contempt was found established and the contemnor had "not shown any repentance or regret or remorse", a "symbolic" punishment of imprisonment for one day and a fine of Rs. 2000/- was imposed "keeping in mind that the respondent was a woman"[83]. In a later case however, a woman who was found guilty of contempt was sentenced to

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77. *C.K. Daphtary v. O.P. Gupta*, AIR 1971 SC 1132, 1144 : (1971) 1 SCC 626.
78. *In the matter of the Editor, Printer and Publisher, Times of India (Daily) Bombay, Delhi*, AIR 1953 SC 75.
79. *Jaswant Singh v. Virender Singh*, (1995) Supp (1) SCC 384 : AIR 1995 SC 520; *Chetak Construction Ltd. v. Om Prakash*, AIR 1998 SC 1855 : (1998) 4 SCC 577.
80. *E.M.S. Namboodiripad v. T.N. Nambiar*, AIR 1970 SC 2015 : (1970) 2 SCC 325.
81. *Rustom Cawasjee Cooper v. Union of India*, AIR 1970 SC 1318 : (1970) 2 SCC 298; *Perspective Publications v. Maharashtra*, AIR 1971 SC 221; *C.K. Daphtary v. O.P. Gupta*, *supra*, note 77.
82. *In re* under Art. 143 (*Keshav Singh's* case), AIR 1965 SC 745; *infra*, Sec. F.
83. *Arundhati Roy, In re*, (2002) 3 SCC 343 : AIR 2002 SC 1375.

undergo imprisonment for 1 year and to pay costs of Rs. 50,000/- for having conducted herself in a manner "which illegitimately affect(ed) the presentation of evidence in…courts"[84]. The Court can punish its contempt by fine or imprisonment.[85] The Court does not use its power to punish for contempt unless there is real prejudice which can be regarded as 'substantial interference' with the due course of justice.[86]

A news item was published in *The Times of India* regarding a document containing a "vituperous attack" upon the Supreme Court's decision during the emergency in the *Skukla* case.[87] Contempt proceedings were initiated against the editor of the paper but these were dropped later by the majority decision. The minority view (BEG C.J.) was that the attack on the decision was "primarily irrational and abusive".[88]

Contempt of court is characterised either as civil or criminal. Any wilful disobedience of a court order to do or abstain from doing any act is a civil contempt. Civil contempt arises when the power of the court is invoked or exercised to enforce obedience to court orders.[89] On the other hand, criminal contempt is criminal in nature. It includes outrages on judges in open court, defiant disobedience to the judges in the court, libels on judges or courts or interfering with the course of justice or any act which tends to prejudice the course of justice.

A person is guilty of criminal contempt when his conduct tends to bring the authority and administration of law into disrespect or tends to interfere with or prejudice litigants during the litigation.[90] A government official while filing an affidavit on behalf of his department cast aspersions on, and attributed motives to, the Court. The Supreme Court came to the conclusion that the accusations, attributions and aspersions made in the affidavit were not only deliberately calculated to malign the Court but also to undermine its authority and to deter it from performing its duty. It was an intentional attempt to obstruct the course of justice and, thus, amounted to criminal contempt of the Court.[91] Threat by a lawyer representing a litigant to file prosecution against the Judge in respect of the judicial proceedings conducted by him in his own court amounts to a positive attempt to interfere with the due course of administration of justice.[92] A witness who takes inconsistent stands before courts in the course of a trial has also been held guilty of contempt.[93]

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84. *Zahira Habibullah Sheikh v. State of Gujarat:* (2006) 3 SCC 374 : AIR 2006 SC 1367.
85. On contempt of court also see, *In re S. Mulgaokar*, AIR 1978 SC 727.
86. *Rizwan-ul-Hasan v. State of Uttar Pradesh*, (1953) SCR 581 : AIR 1953 SC 185; *Shareef v. Judges*, (1955) 1 S.C.R. 767 : AIR 1955 SC 19.
87. *Additional District Magistrate, Jabalpore v. S. Shukla*, AIR 1976 SC 1207. See, *infra*, Ch. XXXIII, Sec. F.
For Emergency Provisions in the *Constitution*, see, Ch. XIII, *infra.*
88. *In re, Sham Lal*, AIR 1978 SC 489 : (1978) 2 SCC 479.
89. *Delhi Development Authority v. Skipper Construction*, (1995) 3 SCC 507.
90. *DDA v. Skipper Construction, ibid.; Ram Avtar Sharma v. Arvind Sharma*, (1995) Supp 2 SCC 130; *Dhananjay Sharma v. State of Haryana*, AIR 1995 SC 1795 : (1995) 3 SCC 757; *D.C. Saxena v. Chief Justic of India*, AIR 1996 SC 2481 : (1996) 5 SCC 216. *In Re* : *Bineet Kumar Singh*, AIR 2001 SC 2018 : (2001) 5 SCC 501; *In Re Arundhati Roy*, (2002) 3 SCC 343 : AIR 2002 SC 1375.
91. *In re Sanjiv Datta, Dy. Secy., Ministry of Information & Broadcasting*, (1995) 3 SCC 619.
92. *Re Ajit Kumar Pandey*, (1996) 6 SCC 510. Also see, *D.C. Saxena v. Chief Justice of India*, AIR 1996 SC 2481.
93. *Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 SCC 374 : AIR 2006 SC 1367.

A newspaper published a news item that two sons of a Supreme Court Judge had been allotted petrol pumps by the Minister out of his discretionary quota. However, on verification the news was found to be incorrect. The Court held the printer, publisher, editor and the reporter guilty of the contempt of the court. None of them took the necessary care in evaluating the correctness and credibility of the information published by them as a news, item in the newspaper in respect of the allegation of a very serious nature causing an embarrassment to the Court.[1]

The Court can take cognisance of its contempt *suo motu.*[2] An advocate of the Court can also bring to the notice of the Court any contempt of the court. In *Daphtary,*[3] a pamphlet published and circulated by the respondent was alleged to contain statements amounting to contempt of the Court. The President of the Supreme Court Bar chose to bring the matter to the Court's notice. The Court ruled that it could issue a notice *suo motu* and the President of the Supreme Court Bar was perfectly entitled to bring to the notice of the Court any contempt of the Court.

Under section 14 of the Contempt of Courts Act, in case of a criminal contempt of the Supreme Court, the Court may take action in either of the three ways: (1) on its own motion; (2) on the motion of the Attorney-General or the Solicitor-General; or (3) any other person with the consent of the Attorney-General/Solicitor-General. If, therefore, a citizen wants to initiate proceedings for contempt of court, he must first seek the consent in writing either of the Attorney-General or the Solicitor-General. If any of these refuses to give consent, the matter can be brought before the Court for judicial review of the refusal. The Court has ruled in *Duda*[4] that if the Attorney-General or Solicitor-General refuses to give permission to a person to move the Court for its contempt, the non-granting of the consent is a justiciable matter. The Court has observed in this connection:[5]

> "Discretion vested in law officers of this Court to be used for a public purpose in a society governed by rule of law is justiciable."

Another option may be that when a person draws the Court's attention to commission of contempt by some one, and he has not been given permission either by the AG or the SG, the Court may take cognisance of the complaint *suo motu*. The party which brings the contumacious conduct of the contemnor to the notice of the court, whether a private person or the subordinate court, is only an informant and does not have the status of a litigant in the contempt of court case. The case of contempt is not *stricto-sensu* a cause or a matter between the parties *inter se.* It is a matter between the Court and the contemner.[6] It is not tried as an adversarial litigation. However, in *Bal Thackeray v. Harish Pimpalkhute,*[7] the Court dismissed an application alleging criminal contempt on the ground that it did not comply with section 15 of the Contempt of Courts Act, 1971. The decision, which appears to be contrary to earlier decisions on the subject, can be justi-

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1. *Re Harijai Singh,* (1996) 6 SCC 466.
2. *Delhi Development Authority v. Skipper Construction,* (1995) 3 SCC 507.
3. *C.K. Daphtary v. O.P. Gupta,* AIR 1971 SC 1132 : (1971) 1 SCC 626; *supra,* note 77.
4. *P.N. Duda v. P.N. Shivshankar,* AIR 1988 SC 1211 : (1988) 3 SCC 167; *supra,* note 75.
5. *Ibid.,* 1225.
6. *Supreme Court Bar Association v. Union of India,* (1998) 4 SCC 409 : AIR 1998 SC 1895.
7. **(**2005) 1 SCC 254 : AIR 2005 SC 396.

fied, if at all, on the narrow ground that there was no prayer in the petition for taking *suo motu* action against the alleged contemnor.[8]

The decision illustrates the reluctance of Courts to exercise the power to act *suo motu* in matters which otherwise require the Attorney-General to initiate proceedings or at least give his consent to such initiation.

In *Daphtary*, the pamphlet in question ascribed bias and dishonesty to a Judge of the Supreme Court while acting in judicial capacity. This was made the basis of contempt proceedings against the respondent. Examining the scope of the concept of contempt of court, the Supreme Court stated that the test was whether the impugned publication was a mere defamatory attack on the Judge or whether it would interfere with the due course of justice or proper administration of law by the Court. On this test, the Court found that the pamphlet contained scurrilous remarks about a Supreme Court Judge which amounted to gross contempt of the Judge and of the Court itself. The Court laid down the following general propositions regarding the scope of the concept of contempt of court.

(1) There is no excuse whatsoever for imputing dishonesty to a Judge even if it were to be assumed that the judgment contained numerous errors.

(2) No evidence other than affidavits is allowed to justify allegation amounting to contempt of court.

(3) In trying contempt of court, the Court can deal with the matter summarily and adopt its own procedure. However the procedure must be fair. The Code of Criminal Procedure does not apply in matters of contempt.

(4) When the charge against the contemner is simple and clear, there is no need to draw up a formal charge by the Court.

(5) The President of the Supreme Court Bar Association can bring to the notice of the Court any contempt of court as the Bar is vitally concerned in the maintenance of the dignity of the courts and the proper administration of justice.

The Court has also ruled in *Nahata*[9] that a contempt petition cannot be withdrawn by the petitioner as a matter of right. The matter is primarily between the Court and the contemner. It is, therefore, for the Court to allow or refuse withdrawal in the light of the broad facts of the case and more particularly whether respect for judicial process would be enhanced or reduced by the grant or refusal of withdrawal. It is for the Court to determine whether the act complained of tending to scandalize the Court if viewed with certain severity with a view to punishing the person would in the larger interest of the society enhance respect for the judicial process, or too sensitive attitude in such matter may even become counter-productive. The power to commit for contempt of court has to be exercised with the greatest caution.

Shri Shiv Shankar, Minister for Law, Justice and Company Affairs, in a speech delivered before the Bar Council of Hyderabad made certain statements

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8. SAMARADITYA PAL: THE LAW OF CONTEMPT (4th edn. 2006 pp. 438-439).
9. *Amrit Nahata v. Union of India*, (1985) 3 SCC 382, 385-87 : AIR 1986 SC 791.

which were derogatory to the dignity of the Supreme Court. He attributed to the Court partiality towards economically affluent sections of the people.

A practising lawyer brought the speech to the notice of the Supreme Court and thus contempt proceedings were initiated against the Minister. Dismissing the action in *P.N. Duda v. P. Shiv Shankar*,[10] the Court adopted the following words spoken by LORD ATKIN in *Ambard v. A. G. for Trinidad and Tobago*:[11] "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." The Court went on to observe (as per SABYASACHI MUKHARJI, J.):

> "Administration of justice and judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by their conscience and oath of their office, that is, to defend and uphold the Constitution and the laws without fear and favour. This the judges must do in the light given to them to determine what is right."

And also:

> "In the free market place of ideas criticisms about the judicial system or the Judges should be welcomed, so long as criticisms do not impair or hamper the administration of justice."[12]

Contempt of court arises when criticism about the judicial system or the Judges hampers the administration of justice or which erodes the faith in the objective approach of Judges and brings administration of justice into ridicule. Judgments can be criticised but motives should not be attributed to the Judges as "it brings the administration of justice into deep disrepect". Applying this test to the Minister's speech, the Court ruled that there was no imminent danger of interference with the administration of justice, or of bringing administration of justice into disrepute. In that view of the matter, the Court held the Minister not guilty of its contempt.

Again, the Supreme Court has emphasized that contempt of court is not committed if a person publishes any fair comment on the merits of any case which the Court has heard and decided finally. But, in the guise of criticising a judgment, personal criticism of the Judge is not permissible. "Courts like any other institution do not enjoy immunity from criticism as long as the criticism is fair, reasonable and temperate and does not accuse Judges of discharging their duties for improper motives or on extraneous consideration."

The rationale underlying this proposition is that to ascribe motives to a Judge is to sow the seed of distrust in the minds of the public about the administration of justice as a whole. Nothing can be more pernicious in its consequences than to prejudice the minds of public against Judges of the Court who are responsible for implementing the law. Judges do not defend their decisions in public.[13] With the introduction of truth as a valid defence to an allegation of contempt, by an amendment to the Contempt of Courts Act, 1971 in 2006,[14] a judge may have to do just that if the judgment is claimed to have been prompted by improper motives.

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10. AIR 1988 SC 1212 : (1988) 3 SCC 167.
11. AIR 1936 PC 141.
12. AIR 1988 SC at 1214 : (1988) 3 SCC 167.
13. *J.R. Parashar v. Prasant Bhushan*, JT 2001 (7) 189 at 195 : (2001) 6 SCC 735 : AIR 2001 SC 3395.
14. Contempt of Courts Act (Amendment) Act, 2006

The Supreme Court also clarified the point that under the law, in case of contempt in the face of the Supreme Court (criminal contempt), the Supreme Court may take action either on its own motion, or on a motion by the Attorney-General or Solicitor-General, or any other person with the consent of the Attorney-General or the Solicitor-General. If, therefore, a citizen wants to initiate proceedings for contempt he has first to seek the consent in writing of the Attorney-General or the Solicitor-General. The Court further ruled that "Discretion vested in law officers of this Court to be used for a public purpose in a society governed by rule of law is justiciable".

The Supreme Court has clarified the relationship between Art. 129 and the Contempt of Courts Act, 1971, in *Pallav Sheth v. Custodian*.[15]

(b) CONTEMPT OF SUBORDINATE COURTS

In *Delhi Judicial Service Association v. State of Gujarat*,[16] the Supreme Court has given a broad and expansive interpretation to Art. 129 and has thus made a significant contribution towards maintaining the integrity and independence of subordinate courts by taking them under its protective umbrella. The Court has ruled that under Art. 129, it has power to punish for contempt not only of itself but also of High Courts and of the lower courts. This is the inherent power of the Court as 'a court of record' as laid down in Art. 129. Explaining the reasons for taking such a liberal view of its contempt power, the Supreme Court has observed:[17]

> "The subordinate courts administer justice at the grass root level. Their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice at its base level."

The Court claimed that under Art. 136, it has a very wide and effective power to correct judicial orders of the subordinate courts. Thus, the Supreme Court has a wide power of judicial superintendence overall courts in India. Accordingly, the Court stated:[18]

> "Since this Court has power of judicial superintendence and control over all the courts and tribunals functioning in the entire territory of the country, it has a corresponding duty to protect and safeguard the interest of inferior courts to ensure the flow of the stream of justice in the courts without any interference or attack from any quarter. The subordinate and inferior courts do not have adequate power under the law to protect themselves, therefore, it is necessary that this Court should protect them…. . We therefore hold that this Court being the Apex Court and a superior court of record has power to determine its jurisdiction under Art. 129 of the Constitution and ..... it has jurisdiction to initiate or entertain proceedings for contempt of subordinate courts."

What happened in this case was extremely deplorable. In the State of Gujarat, the police authorities in a district falsely implicated the Chief Judicial Magistrate in a criminal case, misbehaved with him and handcuffed him. The Supreme Court took a very serious view of the misbehaviour of the police authorities and

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15. AIR 2001 SC 2763 : (2001) 7 SCC 549.
For this case, see, *infra*, Ch. VIII, Sec. C(i). *Ram Preeti Yadav v. Mahendra Pratap Yadav*, (2007) 12 SCC 385, at page 389.

16. AIR 1991 SC 2176. See also *Daroga Singh v. B.K. Pandey*, (2004) 5 SCC 26 : AIR 2004 SC 2579.

17. *Ibid.*, at 2200.

18. *Ibid.*, at 2204, 2205.

initiated contempt of court proceedings against them, held them guilty of contempt of court, and awarded them suitable punishments. The Court observed in this connection:[19]

> "The Chief Judicial Magistrate is head of the Magistracy in the District who administers justice to ensure, protect and safeguard the rights of citizens. The subordinate courts at the district level cater to the need of the masses in administering justice at the base level. By and large the majority of the people get their disputes adjudicated in subordinate courts, it is in the general interest of the community that the authority of subordinate courts is protected....."

The Supreme Court acted in this matter under Art. 129. The concerned police officials disputed the authority of the Supreme Court to act in this matter and take cognisance of it, but the Supreme Court ruled that under Art. 129 the Court has been declared to be a court of record and, thus, it has authority to punish not only for its own contempt but also of subordinate courts. The Supreme Court has wide power of judicial supervision over all courts in the country. The jurisdiction and power of a superior court of record to punish contempt of subordinate courts is founded on the premise of its judicial power to correct the errors of the subordinate courts.[20]

(c) CONTEMPT OF HIGH COURTS

A question was raised in *In re: Vinay Chandra Mishra*[21] whether under Art. 129, the Supreme Court can take cognisance of the contempt of a High Court. It was argued that the Supreme Court cannot do so for two reasons: (1) Art. 129 vests the Supreme Court with the power to punish only for the contempt of itself and not of the High Courts; (2) the High Court is itself a court of record having power to punish for its own contempt under Art. 215.[22] The Supreme Court however rejected the contention and ruled that it was empowered to take cognisance of the contempt of a High Court under Art. 129.

The Court has argued that Art. 129 vests power in the Supreme Court not only as the highest court but also as a court charged with appellate and superintending powers over the lower courts and tribunals. To discharge its obligations, the Court "is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour and for that purpose all the courts and tribunals are protected while discharging their legitimate duties. To discharge this obligation, this Court has to take cognizance of the deviation from the path of justice in the tribunals of the land, and also of attempts to cause such deviations and obstruct the course of justice".[23] The Court invoked the authority of *Delhi Judicial Service Association v. State of Gujarat.*[24]

(d) CONTEMPT OF ADJUDICATORY BODIES

The Supreme Court has ruled that under Art. 129, it has jurisdiction to take cognisance of the contempt of the Income-tax Appellate Tribunal which performs

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19. *Ibid.*, at 2207.
20. *Ibid.*, at 2201.
21. (1995) 2 SCC 584.
22. See, Ch. VIII, Sec. C(a) *infra.*
23. (1995) 2 SCC, at 603.
24. *Supra*, footnote 16. Also see, *Re Ajay Kumar Pandey*, (1996) 6 SCC 510.

judicial functions and is subordinate to the High Court. The Tribunal has Benches in different parts of the country and is thus a national tribunal and its functioning affects the entire country. Appeals from the Tribunal lie ultimately to the Supreme Court. The Court can take *suo motu* cognisance of the contempt of the Tribunal. In the instant case, the Secretary, Ministry of Law, wrote a letter to the President of the Tribunal adversely commenting on a Tribunal decision in a specific case characterising it as disclosing "judicial impropriety of highest order". The Secretary was held guilty of committing contempt of the Tribunal as he questioned the *bona fides* of the members of the Tribunal in deciding a specific case and asked them to explain the judicial order which they had passed. Thus, he unfairly tampered with the judicial process and interfered with judicial decision-making.[25]

The Court characterized the letter "as an attempt to affect their (tribunal members) decision making" and "a clear threat to their independent functioning". "The letter also tends to undermine confidence in the judicial functioning of the Tribunal".

The decision will go a long way towards ensuring independence of the tribunals. The executive's responsibility is only administrative supervision and control but not controlling or questioning specific tribunal decisions as such.

(e) SUPREME COURT'S POWER CANNOT BE CONTROLLED BY A STATUTE

Entry 77, List I, states: "Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such court), and the fees taken therein; persons entitled to practice before the Court".[26]

Explaining the power of Parliament to enact a law with regard to the contempt of the Supreme Court under entry 77, the Court has observed that such a law may prescribe the procedure to be followed and it may also prescribe the maximum punishment which could be awarded and it may provide for appeal and for other matters. But Parliament has no legislative competence "to abridge or extinguish the jurisdiction or power conferred on this Court under Art. 129 of the Constitution". Parliament's power to legislate in relation to law of contempt relating to Supreme Court is limited.[27] The Court has further observed in this connection:

> "… the power to punish for contempt being inherent in a court of record it follows that no Act of Parliament can take away that inherent jurisdiction of the Court of Record to punish for contempt and the Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Court…"[28]

The Supreme Court has ruled that its contempt jurisdiction under Art. 129 is "independent of the statutory law of contempt enacted by Parliament under Entry 77 of List I of the Seventh Schedule of the Constitution." The jurisdiction to take cognizance of the contempt as well as to award punishment for it is "constitutional" and, therefore, it cannot be controlled or restricted by any statute. The

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25. *Income-tax Appellate Tribunal v. V.K. Agarwal*, AIR 1999 SC 452 : (1999) 1 SCC 16.
26. See, *infra*, Ch. X.
27. *Delhi Judicial Service Assoication, Tis Hazari Courts v. State of Gujarat*, AIR 1991 SC 2716 at 2199.
28. *Supreme Court Bar Ass. v. Union of India*, AIR 1998 SC 1895 at 1901 : 1998 (4) SCC 409.

constitutionally vested right under Art. 129 cannot be either abridged, abrogated or cut down, by any legislation, such as, the Contempt of Courts Act or the Code of Civil Procedure.[29]

The Court has also asserted reading Arts. 129 and 142[30] together that there is no restriction or limitation on the nature of punishment that the Supreme Court may award while exercising its contempt jurisdiction including suspension of the license to practice of a lawyer held guilty of committing contempt of court. In the instant case, a senior lawyer was found guilty of the offence of the criminal contempt of the court for having interfered with, and obstructed the course of justice "by trying to threaten, overawe and overbear the court by using insulting, disrespectful and threatening language". He was awarded a suspended sentence of simple imprisonment for six weeks as well as his practice licence was suspended for three years.[31]

Later, in the following case,[32] the Court has revised its view as expressed in *Vinay Chandra* and has ruled that under Art. 129, it has no power to suspend the practice licence of an advocate held guilty of contempt of the court. An advocate held guilty of contempt of court may also be guilty of professional misconduct. Action against the advocate may be taken by the Bar Council under the provisions of the Advocates Act, 1961.

(ii) ORIGINAL JURISDICTION

(a) ENFORCEMENT OF FUNDAMENTAL RIGHTS

The Supreme Court has been constituted as the guardian of the Fundamental Rights. Art. 32 empowers the Court to issue writs for enforcement of Fundamental Rights. Art. 32 has been discussed later in the book.[33]

The High Courts can also enforce Fundamental Rights by issuing writs under Art. 226.[34]

(iii) EXTRAORDINARY ORIGINAL JURISDICTION

(a) ELECTION OF THE PRESIDENT AND VICE-PRESIDENT

As noted earlier,[35] disputes concerning election of the President or Vice-President are decided exclusively by the Supreme Court and no other court.

(b) INTER-GOVERNMENTAL DISPUTES

Under Art. 131, the Supreme Court has exclusive original jurisdiction in any dispute between—

(*i*) the Centre and a State;

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29. *Pritam Pal v. High Court of M.P.*, AIR 1992 SC 904 : 1993 Supp (1) SCC 529; *In re Vinay Chandra Mishra*, (1995) 2 SCC 584 : AIR 1995 SC 2348; *Re Ajay Kumar Pandey*, (1996) 6 SCC 510 : AIR 1996 SC 260.

30. For discussion on Art. 142, see, *infra*, Sec. G.

31. Also see, *Lalit Mohan Das v. Advocate General, Orissa*, AIR 1957 SC 250 : 1957 SCR 167.

32. *Supreme Court Bar Association v. Union of India*, AIR 1998 SC 1895 : 1998 (4) SCC 409.

33. For discussion on Art. 32, see, *infra*, Ch. XXXIII, Sec. A.

34. For discussion on Art. 226, see, *infra*, Ch. VIII, Sections C and D.

35. *Supra*, Ch. III, Sec. A(i)(b).

(*ii*) the Centre and a State on one side, and a State on the other side;

(*iii*) two or more States.

A dispute to be justiciable by the Supreme Court under Art. 131 should involve a question, whether of law or fact, on which the existence or extent of a legal right depends. Thus, questions of a political nature not involving any legal aspect are excluded from the Court's purview.

The Supreme Court's jurisdiction under Art. 131 is subject to two limitations, *viz.*, (i) as to the parties; (ii) as to the subject-matter.

In exercise of powers under Art.145 of the Constitution, the Supreme Court framed the Supreme Court Rules, 1966, Part III Orders 22 to 34 which prescribes the procedure to be followed in connection with the filing, hearing and disposal of proceedings under Article 131. Execution of decrees and orders has been provided for by the Supreme Court (Decrees and Orders) Enforcement Order, 1954 issued by the President under Article 142(1) of the Constitution.

PARTIES

The Indian Constitution sets up a federal polity[36] where intergovernmental disputes often arise. It therefore becomes necessary to set up a forum for resolving such disputes. Art. 131 does so by authorising the Supreme Court to settle intergovernmental disputes. As BHAGWATI J., has observed in *State of Karnataka v. Union of India*:[37] "The article is a necessary concomitant of a federal or a *quasi*-federal form of government and it is attracted only when the parties to the dispute are the Government of India or one or more States arranged on either side".

The State of Mysore contested a demand, under the Central Excise Act, for payment of excise duty on agricultural implements manufactured in the factory belonging to the State. The State took the matter to the highest appellate tribunal under the law, *viz*., the Government of India, which rejected the same. The State then filed a writ petition in the High Court against the Central Government's decision. The High Court rejected the argument that being a dispute between a State and the Centre, the matter lay within the exclusive original jurisdiction of the Supreme Court. It took the view that the Central Government had disposed of the matter as a tribunal and so it was not a party to the dispute, and that for Art. 131 to apply, a dispute must directly arise between the State and the Central Government as the repository of the executive power of the Union.[38]

This judgment of the High Court was affirmed by the Supreme Court on the ground that Government of India acted only as a tribunal and that there was no dispute between the Centre and the States.[39] But there is another aspect of the case which the Court did not refer to. The claim for excise was made by the Central Excise Department and, thus, it could be said that there was a dispute between the Centre and the State.

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36. On Federalism, see, *infra*, Chs. X-XV.
37. AIR 1978 SC at 143.
Also see, *infra*, Ch. XIII, Sec. C.
38. *State of Mysore v. Union of India*, AIR 1968 Mysore 237.
39. *Union of India v. State of Mysore*, AIR 1977 SC 127.

Under Art. 131, the Supreme Court cannot take cognisance of a suit brought by a private individual against a Government. The State of Bihar filed a suit in the Supreme Court under Art. 131 against the Union of India as the owner of Railways, and the Hindustan Steel Ltd., a government company, claiming damages for short supply of iron and steel ordered by the State in connection with the Gandak Project. The Court held that the suit did not lie under Art. 131, because its phraseology excludes the idea of a private citizen, a firm or a corporation, figuring as a disputant either alone or along with a government. "The most important feature of Art. 131 is that it makes no mention of any party other than the Government of India or any one or more of the States who can be arrayed as a disputant."[40] No private party, be it a citizen, or a firm or corporation, can be impleaded as a party in a suit under Art. 131, along with a state either jointly or in the alternative.[41]

It was argued that Hindustan Steel could be regarded as a "State" under Art. 12.[42] But the Court said that the enlarged definition of the "state" given under Art. 12 could not be applied under Art. 131, and Hindustan Steel could not be regarded as a "State" for that purpose.

This means that only inter-governmental disputes can be brought into the Supreme Court under Art. 131, and a State cannot sue under Art. 131 a government company belonging to the Central Government even though it may be deemed to be a 'state' under Art. 12. As to the nature of the dispute which can be brought under Art. 131, the Court stated that the "dispute must arise in the context of the Constitution and the Federalism it sets up," and that "the disputes should be in respect of legal right and not disputes of a political character."

The Court was justified in rejecting the argument based on Art. 12. To accept it would have meant that any dispute between a government and an administrative agency, of which there are numerous, could be brought before the Supreme Court, which would have placed an impossible burden on it. It was well, therefore, that the Court restricted Art. 131 to such disputes as arise between the constituent units of the Indian Union and the Central Government.

Writ petitions filed by individuals and agents of the State of Sikkim and Meghalaya challenging the prohibition of 'on line and internet lottery' had been dismissed by the Karnataka High Court on the basis of Article 131. The Supreme Court reversed the decision of the High Court saying:

> "It is no doubt true that had the State of Sikkim or the State of Meghalaya intended to sue the State of Karnataka independently; in terms of Article 131 of the Constitution the only forum where the dispute between them could have been resolved is this Court alone but when such a lis is brought by the State jointly with their agents who had also independent cause of action and had a legal right to maintain writ application questioning the legality and/or validity of the said notification issued by the State, a suit in terms of Article 131 of the Constitution would not have been maintainable."[43]

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40. *State of Bihar v. Union of India*, AIR 1970 SC 1446, at 1448.
41. *Ibid*, at 1452.
42. For discussion on Art. 12, see, *infra*, Ch. XX, Sec. D.
43. *Tashi Delek Gaming Solutions Ltd. v. State of Karnataka,* (2006) 1 SCC 442, at page 457 : AIR 2006 SC 661.

Art. 131 provides a mechanism for settling inter-governmental disputes quickly and at the highest judicial level. There is a recurring possibility of such disputes arising in a Federal country like India which has a Central Government and a number of State Governments. Thus, the dispute ought to be one between two governments, and not between one government and a private party or an agency or authority of the other government.

DISPUTES

Under Art. 131, the Supreme Court can take cognisance of a dispute involving "any question (whether of law or fact) on which the existence or extent of a legal right depends." Thus, the dispute must involve assertion or vindication of a legal right of the Government of India or a State. "It is not necessary that the right must be a constitutional right. All that is necessary is that it must be a legal right."[44]

Further, the dispute should be in respect of legal rights and not disputes of a political character.[45] "The purpose of Art. 131 is to afford a forum for the resolution of disputes which depend for their decision on the existence or extent of a legal right. It is only when a legal, not a mere political, issue arises touching upon the existence or extent of a legal right that Art. 131 is attracted."[46]

The requirement of Art. 131 is that the dispute must involve a question whether of law or fact, on which the existence or extent of a legal right depends. It is this qualification which provides the true guide for determining whether a particular dispute falls within the purview of Art. 131. As BHAGWATI, J., has observed in *State of Karnataka v. Union of India*:[47]

> "The only requirement necessary for attracting the applicability of Article 131 is that the dispute must be one involving any question "on which the existence or extent of a legal right" depends, irrespective whether the legal right is claimed by one party or the other and it is not necessary that some legal right of the plaintiff should be infringed before a suit can be brought under that Article".

Further, BHAGWATI, J., has observed in *State of Karnataka v. Union of India* defining the scope of Art. 131.[48]

> "What has, therefore, to be seen in order to determine the applicability of Art. 131 is whether there is any relational legal matter involving a right, liberty, power or immunity qua the parties to the dispute. If there is, the suit would be maintainable but not otherwise."

The Supreme Court has power to give whatever reliefs are necessary for the enforcement of the legal right claimed in the suit if such legal right is established.[49] Art. 142 of the Constitution can also be invoked for the purpose.[50]

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44. BHAGWATI, J., in *State of Rajasthan v. Union of India,* AIR 1977 SC at 1402 : (1977) 3 SCC 592.

45. *State of Bihar v. Union of India,* AIR 1970 SC 1446, 1448. For discussion on the dichotomy between a legal dispute and a political dispute for purposes of justiciability and judicial review, see, *infra,* Ch. XL, under "Constitutional Interpretation".

46. *State of Rajasthan v. Union of India,* AIR 1977 SC 1361, 1395 : (1977) 3 SCC 592.

47. AIR 1978 SC 68 : (1977) 4 SCC 608.
See, *infra,* Ch. XIII, Sec. C, for further discussion on this case.

48. AIR 1978 SC at 131 : (1977) 4 SCC 608.

49. *State of Rajasthan v. Union of India, op. cit.*

50. For Art. 142, see, *infra,* Sec. G.

Not many cases have been filed under Art. 131. The significant cases filed so far have raised problems of constitutional law pertaining to federalism.

State of West Bengal v. Union of India

In *State of West Bengal v. Union of India*,[51] the State of West Bengal filed a suit against the Centre seeking a declaration that a Central law was unconstitutional, but the Court upheld the validity of the impugned law.[52]

State of Rajasthan v. Union of India

In *State of Rajasthan v. Union of India*,[53] arose the question whether the term 'state' in Art. 131(a) includes within its scope "State Government". There were general elections in the country for Lok Sabha in 1977 in which the Congress Party was badly defeated. At this time, there were Congress Ministries in several States. The Home Minister, Government of India, through a communication advised the Chief Ministers of these States to advise their Governors to dissolve the State Assemblies under Art. 174(2)(b) of the Constitution,[54] and seek a fresh mandate from the people.

These State Governments filed suits in the Supreme Court against the Central Government under Art. 131 seeking injunctions against dissolution of the State Legislative Assemblies under Art. 356 and holding fresh elections in the States because the ruling party had been defeated in the elections for the Lok Sabha in these States.

The Central Government raised several preliminary objections to the maintainability of the suit, *viz*.:

(1) Art. 131 covers disputes only between the Government of India and a 'State'. There is a distinction between a State and a "State Government";

(2) Art. 131 covers special kinds of disputes in which States, as such, may be interested and not merely Government of a State which may come and go;

(3) There was no denial of any constitutional right to any State.

(4) There was no legal point involved in the case which was based purely on political factors.

(5) The dispute related to the question whether the State Assemblies should be dissolved which did not involve any question on which the existence or extent of a legal right depended.

The Supreme Court rejecting all these contentions held that the matter fell within Art. 131. The Court refused to give a restrictive meaning to Art. 131. It ruled that Art. 131 includes a dispute between Central and State Governments involving a legal right. In the words of CHANDRACHUD J.: "The true construction of Art. 131(a), true in substance and true pragmatically, is that a dispute must arise between the Union of India and a State".[55]

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51. AIR 1963 SC 1241.
52. For fuller discussion on this case, see, *infra*, under Federalism, Ch. XI, Sec. J(ii).
53. AIR 1977 SC 1361 : (1977) 3 SCC 592.
54. See, *infra*, Ch. VI, Sec. E, for discussion on this Article.
55. AIR 1977 SC at 1395 : (1977) 3 SCC 592.

The dispute between the Union of India and a State cannot but be a dispute which arises out of the differences between the Government in office at the Centre and the Government in office in a State. It is not necessary for attracting Art. 131 that the plaintiff must assert a legal right in itself. Art. 131 contains no such restriction. It is sufficient for attracting Art. 131 that the plaintiff questions the legal or constitutional right asserted by the defendant, be it the Government of India or any other State. Such a challenge brings the suit within the terms of Art. 131 for, the question for the decision of the Court is not whether this or that particular legislative assesmbly is entitled to continue in office but whether the Government of India, which asserts the constitutional right to dissolve the assembly on the grounds alleged, possesses any such right.

A State has the *locus* and interest to contest and seek an adjudication of the claim set up by the Union Government. In a federation, the States are vitally interested in defining the powers of the Central Government, on the one hand, and their own, on the other.

In the instant case, asserted the Court, the States through their suits under Art. 131 had, directly and specifically, questioned the constitutional right of the Central Government to issue a directive to the State Governments to render a certain advice to the Governors. The States also questioned the constitutional right of the Central Government to dissolve State Legislatures under Art. 356.[56]

Accordingly, the Supreme Court ruled that "a legal, not a political issue" squarely arose "out of the existence and extent of a legal right" and, therefore, the suits filed by the State governments against the Central Government could not be thrown out as falling outside the purview of Art. 131.

In so far as the dispute related to the exercise of the Centre's power under Art. 356 *vis-a-vis* the State Legislature, it raised a question of legal right. The Court also clarified that under Art. 131, it would have power to give whatever reliefs are necessary for enforcement of the legal right claimed in the suit if such legal right is established.[57]

State of Karnataka v. Union of India

A question of interpretation and applicability of Art. 131 also arose in *State of Karnataka v. Union of India*.[58] The Government of India appointed a commission of inquiry under the Commissions of Inquiry Act, to inquire into certain allegations of corruption and misuse of power by the Chief Minister and a few other Ministers. The State of Karnataka brought a suit against the Centre under Art. 131 for issue of a declaration that the notification appointing the commission was illegal and *ultra vires*.

The main contention of the State was that the Commissions of Inquiry Act does not authorise the Central Government to constitute a commission of inquiry in regard to matters falling exclusively within the State's legislative and executive power. The crucial question thus raised was whether the Central Government

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56. See, *infra*, Ch. XIII, Sec. D, for discussion on this Article.

57. This was the majority view of four Judges; BEG, C.J. and CHANDRACHUD, BHAGWATI and GUPTA, JJ.
GOSWAMI, UNTWALIA and FAZL ALI, JJ., took a restrictive view of Art. 131. Their view accorded more or less with that of the Central Government.

58. AIR 1978 SC 68.

could appoint a commission to inquire into the conduct of the Chief Minister and other Ministers of a State in the discharge of their governmental functions. Needless, to say, the question had an intimate bearing on Centre-State relationship and, thus, on Indian Federalism.[59]

The Union of India raised a preliminary objection against the maintainability of the suit, *viz*., the dispute was not one between the Centre and the State; the inquiry was against the misdeeds of the State Ministers which does not affect the State as such as the Ministers and the State were distinct entities.

By a majority of 4 : 3, the Supreme Court ruled that the suit under Art. 131 by the State was competent and maintainable. The majority Judges were not prepared to take too restrictive a view of Art. 131. They were not prepared to distinguish between the 'State' and its 'Government'. The majority view was that there exists an intergal relationship between the State and its Government and what affects the Government or the Ministers in their capacity as Ministers raises a matter in which the State would be concerned. In the words of CHANDRACHUD, J.:

> "The object of Art. 131 is to provide a high-powered machinery for ensuring that the Central Government and the State Governments act within the respective spheres of their authority and do not trespass upon each other's constitutional functions or powers."

BHAGWATI, J., explained that the State Government is the agent through which the State exercises its executive powers. Therefore, any action which affects the State Government or the Ministers as Ministers, would raise a matter in which the State would be concerned. BHAGWATI, J., thus ruled:

> "...when any right or capacity or lack of it is attributed to any institution or person acting on behalf of the State, it raises a matter in which the State is involved or concerned."

It was also clarified that under Art. 131, it is not necessary that the plaintiff should have some legal right of its own to enforce, before it can file a suit. What is necessary is that the dispute must be one involving any question "on which the existence or extent of a legal right" depends. The plaintiff can bring the suit so long as it has interest in raising the dispute because it is affected by it, even if no legal right of it is infringed provided, of course, the dispute is relateable to the existence or extent of a legal right.

Therefore, a challenge by the State Government to the authority of the Central Government to appoint a commission of inquiry to inquire into the allegations against the State Ministers as regards the discharge of their functions in the State clearly involved a question on which the existence of extent of the legal right of the Central Government to appoint such a commission depended and that was enough to sustain the proceedings brought by the State under Art. 131.[60]

State of Bihar v. Union of India

The State of Bihar filed a suit against the Union of India claiming compensation from the railways for non-delivery of certain goods consigned by the State.

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59. For discussion on Commission of Inquiry, see, M.P. JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW, III, 2465-2644;* JAIN, *A TREATISE ON ADM. LAW, I.*

60. For further discussion on this case, see, *infra,* Ch. XIII, Sec. C., under "Emergency Provisions".

The Court ruled that this was a matter which did not fall under Art. 131 as it was not a dispute arising "in the context of the Constitution and the federalism it sets up. The matter arose out of the legal rights of a private consignor/consignee of goods and thus fell outside Art. 131 and was cognisable by a subordinate court."[61]

Union of India v. State of Rajasthan

A similar question arose again when the State of Rajasthan filed a suit in the ordinary civil court claiming damages for loss suffered by the State on account of damage caused to the goods transported through the railways. The Union of India was impleaded as a party. It was just a commercial contract under which an officer of the State of Rajasthan was entitled to claim delivery of goods consigned as any ordinary consignee. The Court ruled that the claim was one against the Railway Administration and was cognisable by ordinary courts. The Union of India was impleaded as a party only because it was the owner of the railways. It was not a matter to be decided exclusively by the Supreme Court under Art. 131.

The Court pointed out that Art. 131 is attracted only when a dispute arises between or amongst the States and the Union in the context of the constitutional relationship that exists between them and the powers, rights, duties, immunities, liabilities, disabilities, etc. flowing therefrom. "It could never have been the intention of the framers of the Constitution that any ordinary dispute of this nature would have to be decided exclusively by the Supreme Court."[62]

State of Karnataka v. State of Andhra Pradesh

A suit filed by the State of Karnataka against the State of Andhra Pradesh under Art. 131 raising a dispute relating to non-implementation of the binding decision rendered by the Krishna Water Disputes Tribunal constituted under s. 4 of the Inter-State Water Dispute Act, 1956, has been held to be maintainable.[63]

State of Haryana v. State of Punjab

The State of Haryana filed a case under Art. 131 against the State of Punjab and the Union of India seeking a mandatory injunction requiring completion of the Sutlej-Yamuna link canal pursuant to agreement between the two states for division of river waters.

It was argued that the suit was not maintainable in view of Art. 262.[64] But the court rejected the contention saying that there was no water dispute under Art. 262 as the states had already agreed to share river water.

The court issued a mandatory injunction directing the State of Punjab to complete the canal and make it functional within a year. The court also directed the Central Government to discharge its own constitutional obligation to ensure that the canal is completed as expeditiously as possible.[65]

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61. *State of Bihar v. Union of India, supra,* footnote 40.
62. *Union of India v. State of Rajasthan,* AIR 1984 SC 1675.
63. *State of Karnataka v. State of Andhra Pradesh,* AIR 2001 SC 1560.
Also see, Ch. XIV, Sec. E., *infra.*
64. See, *infra,* Ch. XIV, Sec. E.
65. *State of Haryana v. State of Punjab,* (2002) 2 SCC 507 : AIR 2002 SC 685; See also *State of Haryana v. State of Punjab,* (2004) 12 SCC 673 : (2004) 5 JT 72.

(c) OTHER FEATURES OF ART. 131

In the context of Art. 131, the phrase "cause of action" used in Order 23 Rule 6(a) of the Supreme Court Rules 1966, means that the dispute between parties referred to in clauses (a) to (c) of Art. 131 must involve a question on which the existence or extent of a legal right depends,[66] and a plaint which does not disclose such a "cause of action" or is *ex facie* barred by law, is liable to be rejected under Order 23 Rule 6(b) of those Rules.[67]

The Supreme Court observed in *State of Bihar v. Union of India*[68] that the distinguishing feature of Art. 131 is that the Court is not required to adjudicate upon the disputes in exactly the same way as ordinary courts of law are normally called upon to do for upholding the rights of the parties and enforcement of its orders and decisions. The Court is only concerned to give its decision on questions of law or of fact on which the existence or extent of a legal right claimed depends. Once the Court comes to its conclusion on the cases presented by any disputants and gives its adjudication on the facts or the points of law raised, the function of the Court under Art. 131 is over.

Article 131 does not prescribe that a suit must be filed in the Supreme Court for complete adjudication of the dispute envisaged therein, or the passing of a decree capable of execution in the ordinary way as decrees of other courts are. It is open to an aggrieved party to present a petition to the Supreme Court containing a full statement of the relevant facts and praying for the declaration of its rights as against other disputants. Once that is done, the function of the Supreme Court under Art. 131 is at an end.

This statement seemed to suggest that the only remedy which the Supreme Court could grant under Art. 131 was a declaration. This view was held to be erroneous in *State of Rajasthan v. Union of India.* It has now been held that the Supreme Court has power to grant whatever relief may be necessary for enforcement of the legal right claimed in the suit if such legal right is established.[69] The Court has ruled in *State of Karnataka v. State of Andhra Pradesh* that under Art. 131, the Court can pass any order or direction as may be found necessary to meet the ends of justice.[70]

In *State of Haryana v. State of Punjab,*[71] the Supreme Court issued a mandatory injunction directing the State of Punjab to complete the construction of a canal and make it functional within one year. If it did not do so, the Union of India was to get it done through its own agency.

(d) EXCLUSION OF ART. 131 JURISDICTION

Art. 131 opens with the words "subject to the provisions of this Constitution". Thus, the jurisdiction under Art. 131 may be excluded by other provisions of the Constitution.

The Constitution excludes the exclusive original jurisdiction of the Supreme Court under Art. 131 in the following matters:

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66. *State of Haryana v. State of Punjab,* (2004) 12 SCC 673, at p.690 : (2004) 5 JT 72.
67. *Ibid at* p. 703, 706.
68. *Supra,* footnote 61.
69. AIR 1977 SC at 1403.
70. See, *supra,* footnote 50.
71. **(**2002) 2 SCC 507 : AIR 2002 SC 685.

(1) According to the proviso to Art. 131, as mentioned above, the Court's jurisdiction does not extend to a "dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which having been entered into or executed *before* the commencement of the Constitution, continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute."[72]

Reference may also be made in this connection to Art. 363 which excludes the above-mentioned disputes from the jurisdiction-original or appellate—of the Supreme Court and all other courts.[73]

The President may, however, refer any dispute excluded from the Court's jurisdiction under Art. 131 to the Supreme Court for its advisory opinion under Art. 143.[74]

(2) Under Art. 262(2), Parliament may by law exclude Supreme Court's jurisdiction in adjudication of any dispute or complaint with respect to use, distribution or control of the waters in any inter-State river or river valley.

Parliament has enacted the Inter-State Water Disputes Act, 1956.[75] Sec. 11 of the Act provides that neither the Supreme Court nor any other court shall have jurisdiction in respect of any water dispute which could be referred to a Tribunal under the Act.

A Tribunal was appointed under the Act to decide upon the apportionment of Krishna River Water. The Tribunal evolved two schemes. The State of Andhra Pradesh filed a suit under Art. 131 against the States of Karnataka and Maharashtra and the Union of India for proper implementation of the schemes evolved by the Tribunal. It was objected that as the suit related to 'water disputes' it was barred under Art. 262(2) read with the Water Disputes Act. The Supreme Court overruled the objection saying that the suit did not relate to the settlement of a 'water dispute' but enforcement of the decision of the Tribunal. The suit was held maintainable under Art. 131.[76]

(iv) APPELLATE JURISDICTION

The Supreme Court is primarily a court of appeal and enjoys extensive appellate jurisdiction. This jurisdiction may be discussed under the following heads:

(a) CONSTITUTIONAL MATTERS

Under Art. 132(1), an appeal lies to the Supreme Court from any judgment, decree or final order, whether in a civil, criminal or other proceeding, of a High Court if it certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

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72. *State of Seraikella v. Union of India,* AIR 1951 SC 253 : 1951 SCR 474; *Umeg Singh v. State of Bombay,* AIR 1955 SC 540 : (1955) 2 SCR 164; *Jagannath v. Harihar,* AIR 1958 SC 239 : 1958 SCR 1067.

73. For discussion on Art. 363, see, Ch. XXXVII, Sec. E, *infra*.

74. For discussion on Art. 143, see, *infra,* Sec. F.

75. See, Ch. XIV, Sec. E, *infra,* under the heading "River Water Disputes".

76. *State of Andhra Pradesh v. State of Karnataka,* (2000) 6 JT 1 70 : AIR 2001 SC 1560 : (2000) 9 SCC 572*;* See also *Haryana v. State of Punjab,* (2002) 2 SCC 507 : AIR 2002 SC 685; *State of Haryana v. State of Punjab, (*2004) 12 SCC 673 : (2004) 5 JT 72*;* See also *Atma Linga Reddy v. Union of India, (*2008) 7 SCC 788, at page 790 : AIR 2009 SC 436.

According to Art. 132(3), where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question has been wrongly decided.

A very broad power is thus conferred on the Supreme Court to hear appeals in constitutional matters. No difficulty will be felt in bringing a constitutional controversy before the Court which has been made the final authority in the matter of interpretation of the Constitution.[77]

When the appeal is not competent under Art. 132, the Supreme Court will not hear it even if the High Court has granted the necessary certificate.[78]

The implication of Art. 132(3) is that the appellant who comes before the Supreme Court under this Article is not entitled to challenge the propriety of the decision appealed against on a ground other than that on which the High Court granted the certificate. If, however, on appeal, a question is sought to be raised before the Supreme Court, other than the one on which the High Court has granted the certificate, it is necessary to seek the permission of the Supreme Court.[79]

This means that the appellant should ordinarily confine himself to the constitutional law point involved.[80] Such a restriction is necessary so that the facility with which appeals in constitutional matters can reach the Supreme Court may not be misused by the appellant raising all sorts of extraneous pleas once his appeal has come before the Court on the ground that it involves a substantial question of constitutional law.[81]

This Article symbolises the Supreme Court as the final court of constitutional interpretation.[82] Questions of constitutional interpretation are thus placed in a special category irrespective of the nature of the proceedings in which they arise. Such questions can always be taken in appeal to the Supreme Court so that this Court may have the last say. As divergent interpretations of a constitutional provision by various High Courts would create difficulties for the people, it is desirable that such questions are decided authoritatively as soon as possible. Hence Art. 132 provides a machinery for this purpose. The Supreme Court has commented on Art. 132 as follows:[83]

> "The principle underlying the Article is that the final authority of interpreting the Constitution must rest with the Supreme Court. With that object the Article is freed from other limitations imposed under Arts. 133 and 134 and the right of the wildest amplitude is allowed irrespective of the nature of the proceedings in a case involving only a substantial question of law as to the interpretation of the Constitution."

An appeal lies to the Supreme Court after a High Court grants a certificate. Such a certificate can be granted if the following conditions are fulfilled:

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77. On 'Constitutional Interpretation', see, *infra*, Ch. XL.
78. *Syedna Taher v. State of Bombay*, AIR 1958 SC 253, 255 : 1958 SCR 1010.
79. *Darshan Singh v. State of Punjab*, AIR 1953 SC 83 : 1953 SCR 319; *Thansingh Nathmal v. Supdt. of Taxes*, AIR 1964 SC 1419, 1422 : (1964) 6 SCR 654; *State of Mysore v. Chablani*, AIR 1969 SC 325, 327.
80. *State of Bombay v. Jagmohandas*, AIR 1966 SC 1418 : (1966) 2 SCR 277.
81. Also see, *Hamdard Dawakhana v. Union of India*, AIR 1965 SC 1167 : (1965) 2 SCR 192; *Ajodhya Bhagat v. State of Bihar*, AIR 1974 SC 1886 : (1974) 2 SCC 501.
82. On Constitutional Interpretation, see, Ch. XL, *infra*.
83. *State of Jammu & Kashmir v. Ganga Singh*, AIR 1960 SC 356, 359.

(1) An appeal lies only from "any judgment decree or *final* order" of a High Court. No appeal lies from an *interim* order of a High Court. According to the explanation appended to Art. 132, the expression 'final order' includes an order deciding an issue which, "if decided in favour of the appellant, would be sufficient for the final disposal of the case".[84]

A person had a mining lease from the Orissa Government. The State Government cancelled the lease. The lessee could not file a suit against the Government immediately to establish his rights because under s. 80, CPC, he was required to give a two months' notice to the Government before filing the suit. He, therefore, filed a writ petition in the High Court. Without going into the merits of the case, the High Court ordered the Government to desist from disturbing the lessee's possession for three months. For the purpose of appeal under Art. 132, the Supreme Court treated the High Court order as 'final' as it finally disposed of the writ petition and the fact that the order was to operate for a limited duration would not make it other than a final order for the purpose of Appeal under Art. 132 against such order.[85]

(2) Article 132(1) uses the expression "civil, criminal or other proceeding". The purpose of referring to "other proceeding" is to emphasize that adjudications made in proceedings which cannot be included in the description of 'civil' or 'criminal' would still fall under Art. 132(1) in case they raise a substantial question of law as to the interpretation of the Constitution.

There are certain proceedings which may be regarded as neither civil nor criminal, *e.g.*, proceeding for contempt of court; for exercise of disciplinary jurisdiction against lawyers or other professionals, such as, chartered accountants.

Proceedings relating to taxation laws are not excluded. The object of taxation laws is to collect revenue for the state and such laws directly affect the civil rights of the taxpayers. If a tax is levied by the State not in accordance with law, any proceeding to obtain relief would be regarded as a civil proceeding.

Article 132 excludes no decision if it involves a substantial question of constitutional interpretations provided that the decision may be characterized as a "judgment, decree, or final order".[86]

(3) The case ought to involve a question of law as to interpretation of the Constitution. It means that decision on the question of constitutional law should be necessary for the proper decision of the case.

The question of interpretation can arise only if two or more possible constructions are sought to be placed on a constitutional provision—one party suggesting one construction and the other a different one. But where

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84. See, *Prem Chand v. State of Bihar,* AIR 1951 SC 14; *Jethanand & Sons v. State of Uttar Pradesh,* AIR 1961 SC 794 : (1961) 3 SCR 754; *Syedna Taher v. State of Bombay, supra.*

85. *State of Orissa v. Madan Gopal,* AIR 1952 SC 12 : 1952 SCR 28. See also *Tamilnadu Mercantile Bank Shareholder Welfare Assn. (2) v. S.C. Sekar,* (2009) 2 SCC 784 : (2008) 13 JT 49.

86. *Narayan Row v. Ishwarlal,* AIR 1965 SC 1818; *Ramesh v. Govindlal Motilal Patni,* AIR 1966 SC 1445, 1447.

the parties agree on the true interpretation of a constitutional provision, or do not raise any question in respect thereof, it is not possible to hold that a question of interpretation of the Constitution has arisen.[87]

(4) The question involved must be a "substantial question". A question is not 'substantial' when the law on the subject has been finally and authoritatively settled by the Supreme Court, and what remains to be done by the High Court is only to apply that interpretation to the facts before it.[88]

A 'substantial' question does not mean a question of general importance but a question regarding which there is a difference of opinion.

(b) OTHER FEATURES OF ART. 132

(1) Technically, the Supreme Court can hear an appeal under Art. 132(1) from the decision of a single High Court Judge on grant of the necessary certificate by him. But the Supreme Court has emphasized that this should be done "in very exceptional cases where a direct appeal is necessary and in view of the grave importance of the case an early decision of the case must in the larger interest of the public or similar reasons be reached".[89]

In ordinary circumstances, an appeal from a single judge should first be taken to a Division Bench of the High Court and then an appeal can be brought before the Supreme Court on grant of the necessary certificate by the Division Bench.

(2) If the High Court refuses to grant the necessary certificate, under Art. 132, the Supreme Court can still hear the appeal under Art. 136.[90]

(c) CIVIL MATTERS

Under Art. 133(1), an appeal lies to the Supreme Court from any judgment, decree or final order in a *civil* proceeding of a High Court if it certifies—

(*a*) that the case involves a substantial question of law of general importance; and

(*b*) that in the opinion of the High Court, the said question needs to be decided by the Supreme Court.

Before 1972, there was a right of appeal to the Supreme Court from a decision of a High Court if the subject-matter involved in the dispute was valued at Rs. 20,000 or more. This has now been changed. The change has been effected because valuation test is not a true yardstick for the right to appeal to the Supreme Court.

On the one hand, it is not necessary that important questions of law must be involved in every case valuing Rs. 20,000 or more. On the other hand, an impor-

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87. *State of Jammu & Kashmir v. Ganga Singh*, AIR 1960 SC 356, 359.

88. See, *T.M. Krishnaswami Pillai v. Governor-General in Council*, AIR 1947 FC 37; *State of Mysore v. Chablani*, AIR 1958 SC 325; *Bhagwan Swarup v. State of Maharashtra*, AIR 1965 SC 682 : (1964) 2 SCR 378.

89. *Union of India v. Jyoti Prakash Mitter*, AIR 1971 SC 1093, 1100 : (1971) 1 SCC 396. Also see, *R.D. Agrawala v. Union of India*, AIR 1971 SC 299 : (1970) 1 SCC 708.

90. See, *infra*, Sec. D., for discussion on Art. 136.

tant question of law can arise in any case whatsoever may be the value of the subject-matter involved. Now, an appeal may go to the Supreme Court in any case involving an important question of law even though the value of the subject-matter involved may not be large.

Article 133 discards the distinction between appellate and original jurisdictions of the High Court. Art. 133 deliberately uses words which are as wide as language can make them. It includes all judgments, decrees and orders passed in the exercised of appellate or ordinary original civil jurisdiction.

No appeal in a civil matter lies to the Supreme Court as a matter of right. An appeal can lie only on a certificate of the High Court which is issued when the above two conditions are satisfied.

Under Art. 133(2), any party appealing to the Supreme Court under Art. 133(1), may urge as a ground that a substantial question of law as to the interpretation of the Constitution has been wrongly decided.

Under Art. 133(3) unless Parliament provides otherwise, no appeal lies to the Supreme Court from the judgment, decree or final order of a single High Court Judge.

For purposes of Art. 133(1), the proper test to determine whether a question of law is substantial or not is whether it is of general public importance, or whether it directly and substantially affects the rights of the parties, and if so, whether it is either an open question in the sense that it is not finally settled by the highest court, or is not free from difficulty, or calls for discussion of alternative views.

A question of law which is fairly arguable, or when there is room for difference of opinion on it, or when the court thinks it necessary to deal with that question at some length and discuss alternative views, would be regarded as a substantial question of law. But, it would not be so if the question is practically covered by the decision of the highest court, or the general principles to be applied in determining the question are well-settled, and the only question is that of applying these principles to the particular facts of the case.[91]

The Supreme Court has emphasized that for grant of the certificate, the question, howsoever important and substantial, should also be of such pervasive import and deep significance that in the High Court's judgment it imperatively needs to be settled at the national level by the highest court, otherwise the Apex Court will be flooded with cases of lesser magnitude.[92]

The High Court must specify in the certificate the substantial question of law requiring determination by the Supreme Court and the reasons in support of issuance of the certificate.

A certificate on a question of law by the High Court is not bad because it does not specify the substantial question of law to be decided by the Supreme Court. The Court can hear the appeal if it is satisfied that the appeal involves substantial questions of law of great importance.[93]

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91. *Nathoo Lal v. Durga Prasad,* AIR 1954 SC 355 : (1955) 1 SCR 51; *Chunnilal Mehta v. Century Spinning & M. Co. Ltd.,* AIR 1962 SC 1314 : 1962 Supp (3) SCR 549; *Khas Busra Coal Concern v. Ram Nagina Singh,* AIR 1968 Cal. 391; *M. Gopaiah v. SMSLC Coop. Soc.,* AIR 1981 AP 182; *Durga Associates, Raipur v. State of U.P.,* AIR 1982 All. 490.

92. *State Bank of India v. N. Sundara Money,* AIR 1976 SC 1111 : (1976) 1 SCC 822.

93. *State of Kerala v. Attesee (Agro Industrial Trading Corp.),* AIR 1989 SC 222 : 1989 Supp (1) SCC 733.

The certificate granted by the High Court does not obligate the Supreme Court to hear the case, and it is entitled to determine whether the certificate was rightly granted, and whether the conditions pre-requisite to the grant were satisfied.

The grant of the certificate is within the discretion of the High Court but the discretion is a judicial one and it must be judicially exercised. Therefore, the certificate must show on its face that the High Court's discretion was invoked and exercised. If on the face of a High Court's order, it is apparent that the Court has misdirected itself and considered that its discretion was fettered when it was not, or that it had no discretion, then the Supreme Court will either remit the case to the High Court, or treat it as falling under Art. 136.[1]

When there is no justification for issuing the certificate by the High Court, the Supreme Court can always revoke it. In *Express Newspapers Ltd. v. State of Madras*,[2] the SupremeCourt revoked the certificate granted by the High Court as, in the opinion of the Supreme Court, on facts, no substantial question of law was involved.[3]

When the High Court has given such a certificate then the appeal before the Supreme Court is not limited only to the specific question of law, but the entire appeal will be before the Court.[4] In an appeal to the Supreme Court under Art. 133, a question of constitutional law may also be raised [Art. 133(2)].

No appeal lies to the Supreme Court, under Art. 133, from the decision of a single Judge of the High Court, but Parliament has power to provide otherwise [Art. 133(3)].

In exercising its jurisdiction under Article 133, the Supreme Court does not ordinarily interfere with findings of fact and it is all the more reluctant to do so when there are concurrent findings of the two courts below.[5] This, however, is not an absolute rule. The Court may interfere if findings of fact are unsupported by evidence on record, or are based on a misreading of evidence, or on non-advertence to material evidence bearing on the question and to the probabilities of the case, or where the appreciation of evidence by the court below has resulted in miscarriage of justice.[6]

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1. *Nar Singh v. State of U.P.,* AIR 1954 SC 457 : 1955 (1) SCR 238; *Ahmedabad Mfg. and Calico Printing Co. v. Ramtahel,* AIR 1972 SC 1598 : 1972 (1) SCC 898; *Biswabani Pvt. Ltd. v. Santosh Kumar,* AIR 1980 SC 226 : (1980) 1 SCC 185.

2. AIR 1981 SC 968 : (1981) 2 SCC 479. Also see, *M. Satyanarayana v. State of Karnataka,* AIR 1986 SC 1162 : (1986) 2 SCC 512.

3. *M. Satyanarayana v. State of Karnataka,* AIR 1986 SC 1162; *Biswani Pvt. Ltd. v. S.K. Dutta,* AIR 1980 SC 226 : (1980) 1 SCC 185; *M.M.Gupta v. State of J&K,* AIR 1982 SC 1579 : 1983 (3) SCC 412.

4. *V.T.S. Chandrasekhar Mudaliar v. Khulandaivelu Mudaliar,* AIR 1963 SC 185 : 1963 (2) SCR 440; *Raghavamma v. Chenchamma,* AIR 1964 SC 136 : (1964) 2 SCR 933; *Balai Chandra v. Shewdhari Jadav,* AIR 1978 SC 1062.

5. *Rajinder Chand v. Mst. Sukhi,* AIR 1957 SC 286 : 1956 SCR 889; *T.P. Daver v. Lodge Victoria,* AIR 1963 SC 1144 : 1964 (1) SCR 1; *Union of India v W.P. Factories,* AIR 1966 SC 395 : 1966 (1) SCR 580; *Ram Sharan Yadav v. Thakur Muneshwar Nath Singh,* AIR 1985 SC 24 : 1984 (4) SCC 649; *Bhupinder Singh v. State of Punjab,* AIR 1988 SC 1011 : 1988 (3) SCC 513; *State of Andhra Pradesh v. Kalva Suryanarayana,* AIR 1992 SC 797 : 1992 (2) SCC 732; *State of Himachal Pradesh v. Maharani Kam Sundri,* AIR 1993 SC 1162. *Gafar v. Moradabad Development Authority,* (2007) 7 SCC 614, at page 621 : (2007) 10 JT 196.

6. *D.C. Works Ltd. v. Saurashtra,* AIR 1957 SC 264; *Nathan v. S. V. Marthu Rao,* AIR 1965 SC 430; *Catholics v. Paulo Aviro,* AIR 1959 SC 31; *Ramji Dayawala & Sons Ltd. v. Invest Import,* AIR 1981 SC 2085 : (1981) 1 SCC 80; *Ganga Bishan v. Jai Narain,* AIR 1986 SC 441 : (1986) 1 SCC 75; *Kamu v. M. Muthayya,* AIR 1993 SC 1689 : 1993 Supp (2) SCC 135.

Except for exceptional circumstances, the Supreme Court would not allow a plea or a question to be raised for the first time before it, if the same has not been raised earlier in the courts below,[7] especially if it is a question of fact,[8] or a mixed question of law and fact,[9] but the Court may allow the contention to be raised if it goes to the root of the jurisdiction and authority of the concerned body.[10]

A new plea on a pure question of law not involving any investigation into facts may be raised for the first time in the Supreme Court.[11] Nor does the Supreme Court interfere with the discretion of the High Court unless the court has acted on some wrong principle, or committedsome error of law, or has failed to consider matters which demand consideration, or has ignored various relevant considerations.[12]

The Supreme Court has emphasized that judicial discretion is to be exercised according to the well established judicial principles, according to reason and fair play, and not according to whim and caprice. Judicial discretion means sound discretion governed by law. It must not be arbitrary, vague and fanciful.[13]

When the appellant/respondent applies for a larger relief, the Supreme Court has power to mould the relief and grant a smaller relief than what is prayed for.[14]

WHAT IS A CIVIL PROCEEDING?

Article 133 covers all civil proceedings. The term 'civil proceeding' includes all proceedings affecting civil rights which are not criminal.

Proceedings under Art. 226 are regarded as civil proceedings for purposes of Art. 133.

Does an appeal lie to the Supreme Court under Art. 133 from a decision of the High Court on a writ petition under Art. 226 pertaining to a revenue matter? It was argued, in the first place, that the writ proceeding before the High Court is not a 'civil proceeding' within the meaning of Art. 133. In the second place, even if a proceeding for the issue of a writ under Art. 226 may be characterised as a

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7. *K. Chettiar v. A.S.P.A Chettiar,* AIR 1967 SC 1395 : (1967) 1 SCR 275; *M.R.S.T Corp. v. S.T. Authority,* AIR 1972 SC 2110 : (1973) 4 SCC 222; *Bombay Municipality v. Advance Builders,* AIR 1972 SC 793 : (1971) 3 SCC 381; *Dalpat Abasaheb Solunke v. B.S. Mahajan,* AIR 1990 SC 434 : (1990) 1 SCC 305; *State Bank of Travancore v. E.J. Joseph,* AIR 1993 SC 1265 : 1993 Supp (2) SCC 530; *Kurukshetra University v. Jyoti Sharma,* AIR 1998 SC 3385 : (1998) 6 SCC 763.

In *Asstt. Collector of Central Excise, Guntur v. Ramdev Tobacco Company,* AIR 1991 SC 506 : (1991) 2 SCC 119, the Supreme Court entertained a pure question of law even if it was not raised before the High Court.

8. *M.O.H. Uduman v. M.O.H. Aslum,* AIR 1991 SC 1020 : (1991) 1 SCC 412.

9. *Shibji Khetshi Thacker v. Commissioner of Dhanbad Municipality,* AIR 1978 SC 836 : (1978) 2 SCC 167; *Uduman v. Aslum,* AIR 1991 SC 1020 : (1991) 1 SCC 412; *M.P. Electricity Board v. Vijaya Timber Co.,* AIR 1997 SC 2364 : (1997) 1 SCC 68.

10. *Municipal Board, Saharanpur v. Imperial Tobacco of India Ltd.,* AIR 1999 SC 264 : (1991) 1 SCC 566.

11. *Bombay Municipality v. Advance Builders,* AIR 1972 SC 793 : (1971) 3 SCC 381; *State of Punjab v. R.N. Bhatnagar,* AIR 1999 SC 647 : (1999) 2 SCC 380.

12. *Devendra Pratap v. State of U.P.,* AIR 1962 SC 1334 : 1962 Supp (1) SCR 315; *Union of India v. Kamalabai,* AIR 1968 SC 377 : (1968) 1 SCR 463; *Ramji Dayawala, infra,* footnote 13.

13. *Ramji Dayawala & Sons (P.) Ltd. v. Invest Import,* AIR 1981 SC 2085 : (1981) 1 SCC 80.

14. *Divisional Level Committee v. Harswarup Drug Udyog,* AIR 1999 SC 878 : (1999) 2 SCC 272.

'civil proceeding', it cannot be so treated when the aggrieved petitioner seeks relief against the levy of tax or revenue claimed to be due to the state.

The Supreme Court rejected the argument. The Court has defined a 'civil proceeding' as one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the state, and which, if the claim is proved, would result in the declaration-express or implied of the right claimed, and the relief, such as, payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status *etc*.

A proceeding for relief against infringement of a civil right of a person is a "civil proceeding" even if the infringement be in purported enforcement of a taxing statute. Through a writ petition, the extraordinary jurisdiction of the High Court to issue writs granting relief in special cases to persons aggrieved by the exercise of authority-statutory or otherwise-by public officers or authorities is invoked. The writ is "special and exclusive".

Where a revenue authority seeks to levy tax or threatens action in purported exercise of powers conferred by an Act relating to revenue, the primary impact of such an act or threat is on the civil rights of the party aggrieved. When relief is claimed in that behalf, it is a civil proceeding, even if a relief is claimed not in a suit but by resort to the extraordinary jurisdiction of the High Court to issue writs.[15]

(d) CRIMINAL MATTERS

The provisions in the Constitution (Art. 134) regulating criminal appeals to the Supreme Court are so designed as to permit only important criminal cases to come before it.

Article 134 confers a limited criminal appellate jurisdiction on the Supreme Court. The Supreme Court hears appeals only in exceptional criminal cases where justice demands interference by the Apex Court. It was necessary to restrict the flow of criminal appeals to the Supreme Court otherwise a large number of such appeals would have made it physically impossible for the Court to cope with them.

In the first place, under Art. 134(1)(*a*), an appeal lies to the Supreme Court from any judgment, final order or sentence of a High Court in a criminal proceeding if the High Court has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death.

The word 'acquittal' in this provision has been interpreted rather broadly. 'Acquittal' does not mean merely that the trial should have ended in a complete acquittal but would also include a case where an accused has been acquitted of the charge of murder and convicted of a lesser offence, and, on appeal, the High Court reverses the decision of the trial court and convicts the accused of murder; it would amount to reversing an order of acquittal and the accused is entitled to appeal to the Supreme Court.

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15. *Narayan Row v. Ishwarlal,* AIR 1965 SC 1818, 1822 : (1966) 1 SCR 190.
A**lso** see, *Arbind Kumar v. Nand Kishore,* AIR 1968 SC 1227 : (1968) 3 SCR 322.

In *Tarachand*,[16] the accused was charged for murder under s. 302, IPC. The trial court convicted him under s. 304, IPC, instead of s. 302. On appeal, the High Court reversed the order of the trial court and convicted him under s. 302, IPC, and sentenced him to death. The Supreme Court held that the accused was entitled to appeal under Art. 134(1)(*a*) as the word "acquittal" therein does not mean complete acquittal.

No appeal would lie under this provision if the High Court reverses an order of conviction of an accused and acquits him. Under Art. 134(1)(*a*) an appeal lies *as of right* to the Supreme Court.[17]

In the second place, under Art. 134 (1)(*b*), an appeal lies to the Supreme Court if the High Court has withdrawn for trial a case from a lower court and sentenced the accused to death.

Thirdly, under Art. 134(1)(*c*), the Supreme Court can hear an appeal in a criminal case if the High Court certifies that the case is a fit one for appeal to the Supreme Court.

Under Art. 134 (1)(*c*), *prima facie*, a High Court appears to enjoy an unqualified power to grant fitness certificates in criminal cases. But to control the flow of criminal appeals to itself, the Supreme Court has laid down certain guiding norms for the High Court to follow in granting such certificates. Generally, it is not to be granted as a matter of course on the mere ground that the impugned decision is erroneous. It is to be granted only when some exceptional or special circumstances exist, such as, infringement of essential principles of justice, or some difficult questions of law of great public or private importance, or when there has been in substance no fair trial.[18]

A certificate should be granted when a case involves a substantial question of law and not mere questions of fact.[19]

The Supreme Court has frequently impressed on the High Courts that they should exercise their discretion to grant the certificate not mechanically but judicially and after applying their mind.[20] The Supreme Court said in *Babu v. State of Uttar Pradesh*,[21] that the power under Art. 134(1)(*c*) conferred on the High Court is discretionary which is to be exercised on judicial principles.

The jurisdiction conferred on the Supreme Court is not that of an ordinary court of criminal appeal. Before granting a certificate, the High Court must be satisfied that it involves some substantial question of law or principle. The certificate itself should give an indication of what substantial question of law or principle is involved in the appeal to bring it within the scope of Art. 134(1)(*c*). The High Courts should exercise their discretion sparingly and with care.

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16. *Tarachand v. State*, AIR 1962 SC 130 : 1962 (2) SCR 775.
17. *Chandra Mohan Tiwari v. State of Madhya Pradesh*, AIR 1992 SC 891 : (1992) 2 SCC 105.
18. *Mohinder Singh v. State*, AIR 1953 SC 415; *State of Bihar v. Bhagirath*, AIR 1973 SC 2198 : (1973) 3 SCR 937; *Chittaranjan v. State of West Bengal*, AIR 1963 SC 1696 : (1964) 3 SCR 237; *Sidheswar v. State of West Bengal*, AIR 1958 SC 143 : 1958 SCR 749.
19. *Haripada Dey v. State of West Bengal*, AIR 1956 SC 757 : 1956 SCR 639; *Mohanlal v. State of Gujarat*, AIR 1968 SC 733 : (1968) 2 SCR 685.
20. *Narsingh v. State of Uttar Pradesh*, AIR 1954 SC 457.
21. AIR 1965 SC 1467.

The grant of a certificate by a High Court does not preclude the Supreme Court from determining whether it has been properly granted or not. Where the Apex Court has found that the certificate is not in compliance with the requirements of Art. 134(1)(*c*), it has declined to accept the certificate.

In *Baladin v. State of Uttar Pradesh*,[22] the Allahabad High Court, at the end of the judgment, just recorded the order "Leave to appeal to Supreme Court granted." Refusing to accept the appeal, the Supreme Court held that the High Court had exercised its discretion mechanically and not 'judicially'. The High Court's order did not show what had induced it to grant this leave, or what points of outstanding importance required to be settled. It was not enough to say "leave to appeal is granted".

In *State of Assam v. Abdul Noor*,[23] the Supreme Court declined to accept the certificate as it did not indicate any reason as to why the High Court granted the certificate.[24]

Under Art. 134(1)(*c*), the jurisdiction of the Apex Court is attracted by reason of the certificate granted by the High Court. Where the Supreme Court declines to accept the certificate under Art. 134(1)(*c*), it may permit the appellant to apply under Art. 136 in proper cases.[25]

Article 134(1)(*c*) is there to meet only extraordinary cases; normal right to appeal has been given by the other two clauses of Art. 134 (1). Under Art. 134(1)(*c*), the Supreme Court does not act as a general court of criminal appeal. It does not, therefore, go into pure questions of fact and weigh and appraise evidence afresh unless there are circumstances which make the Court feel that there has been a miscarriage of justice.[26] The main function of the Court is to see that the accused gets a fair trial on proper evidence.[27]

Generally, the Supreme Court does not interfere with the finding of fact arrived at after proper appreciation of evidence by the courts below. However, if such a finding is perverse, based on no evidence or based upon such evidence which is inadmissible or is the result of imaginative hypothesis, conjectures, illegal assumptions and presumptions, the Supreme Court is entitled to reappreciate the evidence to ascertain the decision of the lower court.[28]

Where the two courts below came to different conclusions, the Supreme Court appreciated the entire evidence to see whether the findings of the trial court were so unreasonable and unrealistic as to call for interference therewith. The Supreme

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22. AIR 1956 SC 181 : 1956 Cri LJ 345.
Also see, *Sunder Singh v. State of Uttar Pradesh*, AIR 1956 SC 411 : 1956 Cri LJ 801; *State of Assam v. Abdul Noor*, AIR 1970 SC 1365 : (1970) 3 SCC 10.

23. AIR 1970 SC 1365, 1366 : (1970) 3 SCC 10.

24. *Thakara v. State of Maharashtra*, (1969) 3 SCC 369.

25. *Baladin v. State of Uttar Pradesh*, AIR 1956 SC 181; *State of Assam v. Abdul Noor*, AIR 1970 SC 1365 : (1970) 3 SCC 10.
For Art. 136, see, *infra*, Sec. D.

26. *A.J. Peiris v. State of Madras*, AIR 1954 SC 616 : 1954 Cri LJ 1638; *Vijendrajit v. State of Bombay*, AIR 1953 SC 247; *Mohinder Singh v. State of Punjab*, AIR 1965 SC 79.

27. *Darshan Singh v. State of Punjab*, AIR 1953 SC 83 : 1953 SCR 319.

28. *Ramanbhai Naranbhai Patel v. State of Gujarat*, (2000) 1 SCC 358 : 2000 SCC (Cri) 113; *State of Punjab v. Jugraj Singh*, (2002) 3 SCC 234 : AIR 2002 SC 1083. See also *State of MP v. Dharkole*, (2004) 13 SCC 308 : AIR 2005 SC 44.

Court restored the conviction recorded by the trial court as the High Court decision, based as it was on insignificant and flimsy reasons, was not sustainable.[29]

The Supreme Court is very reluctant to interfere with concurrent findings of fact save in most exceptional cases, as for example, when facts have been arrived at disregarding legal principles, or where the conclusion arrived at by the courts below is improper and perverse, or where the evidence is such that no tribunal could legitimately infer from it that the accused is guilty, or when the accused has been convicted even though evidence is wanting on a most material part of the prosecution.[30]

Where in a serious charge of murder, conviction of the accused was based solely on the evidence of an eye-witness, the Court may examine his evidence to satisfy itself as to whether the courts below were justified in placing reliance upon the said testimony. In the instant case, after examining the evidence of the eye witness the Supreme Court reversed the conviction of the appellant and set him free.[31]

In a case where both the courts below instead of dealing with the intrinsic merits of the evidence of the witnesses, have acted perversely by summarily disposing of the case, ignoring the manifest errors and glaring infirmities appearing in the case, the Court thought it fit to interfere.[32]

Under Art. 134(2), Parliament is authorised to enlarge the criminal appellate jurisdiction of the Supreme Court. Accordingly, Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, further authorising the Supreme Court to hear appeals from a High Court in the following two situations:

(1) If the High Court has on appeal reversed an order of acquittal of an accused and sentenced him to imprisonment for life or for a period of not less than 10 years. In such a situation, appeal to the Supreme Court lies even on facts and as a matter of right.[33]

(2) The High Court has withdrawn for trial before itself any case from a subordinate court and has convicted the accused and sentenced him to imprisonment for life or for a period of not less than 10 years.

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29. *State of Uttar Pradesh v. Vinod Kumar,* AIR 1992 SC 1011. Also, *State of Uttar Pradesh v. Ravindra Prakash Mittal,* AIR 1992 SC 2045; *Sukhchain Singh v. State of Haryana,* (2002) 5 SCC 100 : 2002 SCC (Cri) 341.

30. *Damodaran v. T.C.,* AIR 1953 SC 462 : 1953 Cr LJ 1928; *Mathew v. T.C.,* AIR 1956 SC 241 : (1955) 2 SCR 1057; *Badri Rai v. State of Bihar,* AIR 1958 SC 953 : 1959 SCR 1141; *Janak Singh v. State of Uttar Pradesh,* AIR 1972 SC 1853 : (1973) 3 SCC 50; *Dadarao v. State of Maharashtra,* AIR 1974 SC 388 : (1974) 3 SCC 630; *Ajaib Singh v. State of Haryana,* (1992) Supp (2) SCC 338 : (1992) SCC (Cri) 941, *State of Uttar Pradesh v. Vinod Kumar,* AIR 1992 SC 1011 : (1992) 2 SCC 536; *Sudama Pandey v. State of Bihar,* (2002) 1 SCC 679 : AIR 2002 SC 293.

31. *Mohanlal v. State of Rajasthan,* AIR 2000 SC 3441 : (1999) 9 SCC 209.

32. *Narendra Pratap Narain Singh v. State of Uttar Pradesh,* AIR 1991 SC 1394 : (1991) 2 SCC 623.

33. *Podda Narayana v. State of Andhra Pradesh,* AIR 1975 SC 1252 : (1975) 4 SCC 153; *Ram Kumar Pande v. State of Madhya Pradesh,* AIR 1975 SC 1026 : (1975) 3 SCC 815; *Chandra Mohan Tiwari v. State of Madhya Pradesh,* AIR 1992 SC 891 : (1992) 2 SCC 105.

(e) ISSUE OF CERTIFICATE BY A HIGH COURT

Appeals to the Supreme Court in constitutional (Art. 132), civil (Art. 133), and criminal matters (Art. 134) lie on a certificate being granted by the concerned High Court. To facilitate the grant of such a certificate, and to reduce any delay in completing this formality, certain provisions have been made by Art. 134A.

A High Court may grant a certificate, if it deems fit to do so, on its own motion. In the alternative, an oral application can be made on behalf of the aggrieved party immediately after the judgment, decree, final order or sentence. The High Court can thereafter decide, as soon as may be, whether a certificate may be given in that case to take an appeal from its decision to the Supreme Court.[34]

The Supreme Court has emphasized that Art. 134A does not constitute an independent provision for issue of a certificate. Art. 134A has been enacted to make good the deficiencies in Arts. 132, 133 and 134 regarding the time and manner in which an application for a certificate under any of these Articles can be made before the High Court and as to the power of the High Court to issue a certificate *suo motu* under any of these Articles.

Article 134A is ancillary to Arts. 132(1), 133(1) and 134(1)(*c*). The High Court can issue a certificate only when it is satisfied that the conditions in Arts. 132, 133 or 134, as the case may be, are satisfied. A single judge granted a certificate under Art. 134A without referring to the article under which the appeal could be filed. The Supreme Court revoked the certificate as the case could fall under Art. 133(1), but such a certificate could not be granted because of the bar imposed by Art. 133(3). The Supreme Court however permitted the appellant to apply under Art. 136.[35]

D. APPEAL BY SPECIAL LEAVE : ART. 136

Over and above the constitutional provisions mentioned above regulating the Supreme Court's appellate jurisdiction, Art. 136(1) empowers the Supreme Court to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.[36]

Article 136 runs as follows:

> "Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in the territory of India."

Article 136(2) excludes from the scope of Art. 136(1) any judgement or order passed by a tribunal functioning under a law relating to the Armed forces.[37]

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34. *Keshava v. Ramachandra,* AIR 1981 Kant. 97 holds that a party which fails to make an oral application cannot make a written application later.

35. *State Bank of India v. S.B.I. Employees' Union of India,* AIR 1987 SC 2203 : (1987) 4 SCC 370.

36. This, however, is subject to Art. 363; see, *supra,* Sec. C(iii)(d).
Also see, Ch. XXXVII, Sec. E., *infra,* for discussion on Art. 363. See generally The Supreme Court Rules, 1956, Order XVI.

37. The Supreme Court has suggested that appeals be provided for from courts martial to the courts. "Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a country where a counterpart civilian convict can prefer appeal after appeal to hierarchy of courts", the Supreme Court has observed: see, *THE HINDU* (Int'l Ed.), Sept. 4, 1982 at p. 7.

Article 136 confers a special jurisdiction on the Supreme Court. It opens with a *non-obstante* clause, *viz.* "Notwithstanding anything in this chapter". This means that the power of the Supreme Court under Art. 136 is unaffected by Arts. 132, 133, 134 and 134(A).

The power given to the Supreme Court by Art. 136(1) is in the nature of residuary power. The power is plenary in the sense that there are no words in Art. 136 qualifying that power. It is a sweeping power, exercisable outside the purview of ordinary law to meet the pressing demands of justice. The Supreme Court has characterised its power under Art. 136 as "an untrammelled reservoir of power incapable of being confined to definitional bounds; the discretion conferred on the Supreme Court being subjected to only one limitation, that is, the wisdom and good sense of justice of the Judges".[38]

The Supreme Court has described the nature of its power under Art. 136 as follows:[39]

> "The exercise of jurisdiction conferred by Art. 136 of the Constitution on this Court is discretionary. It does not confer a right to appeal on a party to litigation; it only confers a discretionary power of widest amplitude on this Court to be exercised for satisfying the demands of justice. On the one hand, it is an exceptional power to be exercised sparingly, with caution and care and to remedy extraordinary situations or situations occasioning gross failure of justice; on the other hand, it is an overriding power whereunder the court may generously step in to impart justice and remedy injustice."

The Supreme Court has commented from time to time on the plenitude of its power under Art. 136. For example, in *Durga Shankar v. Raghu Raj*,[40] the Court has observed:

> "The powers given by Art. 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgment or order made by a court or tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way".

The power has been held to be plenary, limitless,[41] "adjunctive", and unassailable on the grounds of unconstitutionality.[42] A word of caution was sounded in *M.C. Mehta v. Union of India*[43] to the effect that judicial discretion has to be exercised in accordance with law and set legal principles. Also where an order was

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38. *Kunhayammed v. State of Orissa*, AIR 2000 SC 2587, 2593 : (2000) 6 SCC 359.

39. *Narpat Singh v. Jaipur Development Authority*, (2002) 4 SCC 666, at 674 : AIR 2002 SC 2036. *N. Suriyakala v. A. Mohandoss*, (2007) 9 SCC 196 : (2007) 3 JT 266.

40. AIR 1954 SC 520 : (1955) 1 SCR 267.

41. *Esher Singh v. State of A.P.*, (2004) 11 SCC 585, 603 : AIR 2004 SC 3030*; A.V. Papayya Sastry v. Govt. of Andhra Pradesh*, (2007) 4 SCC 221, 237 : AIR 2007 SC 1546.

42. *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 5 SCC 353 : AIR 2004 SC 3467.

43. (2004) 6 SCC 588, 613 : AIR 2004 SC 4618. See also *Ramakant Rai v. Madan Rai*, (2003) 12 SCC 395, 403 : AIR 2004 SC 77; *Aero Traders (P) Ltd.v. Ravinder Kumar Suri*, (2004) 8 SCC 307 : AIR 2005 SC 15*; Esher Singh v. State of A.P. (Supra)*

passed without jurisdiction by the Supreme Court, it was corrected in a subsequent SLP arising out of the same proceedings before the High Court.[44]

The Supreme Court has observed in *Pritam Singh v. The State*,[45] that the power under Art. 136—

> "is to be exercised sparingly and in exceptional cases only, and as far as possible, a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this Article. By virtue of this Article, we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals and in a variety of cases."

The Court has emphasized:

> "The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal in those cases where special circumstances are shown to exist."

In conclusion, the Court has said:

> "Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."

Despite earlier pronouncements that the jurisdiction under Art. 136 should be utilized for determining only substantial questions of law and not for redeeming injustice in individual cases, the power has been utilized increasingly to determine individual controversies because a case has "failed to receive the needed care, attention and approach…and the conscience of this Court pricks it or its heart bleeds for imparting justice or undoing injustice".[46]This element of emotional subjectivity in the assessment of what constitutes an "injustice" would necessarily result in greater uncertainty in the outcome of a proceeding before the Supreme Court. Matters are disposed of "as a one time measure without laying down any law or creating precedent".[47] The Court has, on occasion, while setting aside the judgment of the High Court not interfered with the relief granted having regard to the circumstances of the case and in the interest of justice.[48] Recently, such "individualized justice" was deprecated by a Constitution Bench[49]as sending out confusing signals and ushering in judicial chaos "highlighting the statement, that equity tends to vary with the Chancellor's foot". More recently, the Court reiterated that "Circumspection and circumscription must…induce the Court to interfere with the decision under challenge only if the extraordinary flaws or grave injustice or other recognised grounds are made out".[50]

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44. *Neeraj Munjal v. Atul Grover*, (III) (2005) 5 SCC 404 : AIR 2005 SC 2867.
45. AIR 1950 SC 169 : 1950 SCR 453.
46. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214, 244 : AIR 2004 SC 1815.
47. *Fokatlal Prabhulal Bhatt v. State of Gujarat*, (2004) 12 SCC 445, 447 : (2005) 5 SCALE 594; *Paramjit Gambhir v. State of M.P.*, (2003) 4 SCC 276 : AIR 2003 SC 1338.
48. *State of Punjab v. Savinderjit Kaur*, (2004) 4 SCC 58, 62 : AIR 2004 SC 1887*; Inder Prakash Gupta v. State of J&K*, (2004) 6 SCC 786, 799 : AIR 2004 SC 2523; *ONGC Ltd. v. Sendabhai Vastram Patel*, (2005) 6 SCC 454 : (2005) 7 JT 465.
49. *Secy., State of Karnataka v. Umadevi*, (2006) 4 SCC 1 26 : AIR 2006 SC 1806. See also under Art. 142 fn.
50. *Shivanand Gaurishankar Baswanti v. Laxmi Vishnu Textile Mills*, (2008) 13 SCC 323, at Page 347.

This means that once special leave is granted by the Court, and the matter is registered as an appeal, the Court does not take into cognisance all the points which may arise on appeal and decide them on merits.[51]

The Court has taken the stand that the discretionary power which is available to it at the stage of grant of special leave would be available to the Court even at the time of hearing the appeal. Thus, only those points can be urged at the final hearing of the appeal which were fit to be urged at the preliminary stage when leave to appeal was asked for. It would be illogical to adopt different standards at two different stages of the same case.[52] Even if leave is granted limited to a particular question, the Court is not bound to restrict itself to that question at the time of the final disposal of the appeal[53] provided notice of the additional questions to be determined is issued to the respondent who must also have been given an opportunity of being heard.[54]

Merely because a party has complied with the directions to give an undertaking as a condition for obtaining stay it cannot be presumed to create an impression on the other parties that he is, by such undertaking, giving up the statutory or constitutional remedies.[55]

The scope of Art. 136(1) is very comprehensive and it invests the Supreme Court with a plenary jurisdiction to hear appeals. Art. 136(1) is couched in the widest possible terms. Thus, where a criminal case arose out of a private dispute purely personal nature under commercial transaction and a settlement is arrived at by the parties to such transactions the Court was of the view that continuing the criminal proceedings would be a futile exercise and quashed the FIR and all consequent proceedings.[56] The broad and overriding nature of Art. 136 will be evident from its following features:

(1) Under Art. 136, in suitable cases, the Supreme Court can even disregard the limitations contained in Articles 132 to 134 on its appellate jurisdiction and hear appeals which it could not otherwise hear under these provisions.[57]

Arts. 132-134 provide for regular appeals from the High Courts to the Supreme Court. But there may still remain cases falling outside the purview of these Articles where it may appear necessary to hear appeals in the interest of justice. The power of the Supreme Court under Art. 136 is unaffected by Arts. 132, 133, 134 and 134A in view of the expression "notwithstanding anything in this Chapter" occurring in Art. 136.

(2) Articles 132 to 134 permit appeals only against decisions of the High Courts. Art. 136, on the other hand, does not impose any such restriction.

Art. 136 uses the phrase 'any court' and thus empowers the Supreme Court to hear appeals from judgments given not only by the High Courts but even by a subordinate court, if the situation demands that its order should be quashed or reversed even without going through the usual procedure of filing an appeal in

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51. See *infra*.
52. *Taherkhatoon v. Salambin Mohammad*, AIR 1999 SC 1104 : (1999) 2 SCC 635.
53. *Suresh Chandra v. State of UP*, (2005) 6 SCC 130 : AIR 2005 SC 3120.
54. *Punjab State Electricity Board v. Darbara Singh*, (2006) 1 SCC 121 : AIR 2006 SC 387.
55. *Southern Railway Officers Assn. v. U.O.I.*, (2009) 9 SCC 24; citing *P.R.Deshpande v. Maruti Balaram Haibatti*, (1998) 6 SCC 507 : AIR 1998 SC 2979.
56. *Jadish Chanana v. State of Haryana*, (2008) 15 SCC 704.
57. *Delhi Judicial Service Assn. v. State of Gujarat*, AIR 1991 SC 2176 : (1991) 4 SCC 406.

the High Court. Thus, in *Rajendra Kumar v. State*,[58] the Supreme Court heard an appeal from the decision of the Chief Judicial Magistrate. The appellant did not go to the High Court but came straight to the Supreme Court. The Supreme Court did however observe that it does not ordinarily entertain such petitions.

As the Supreme Court has stated in this connection:[59]

> "… the Court has special residuary power to entertain appeal against any order of any court in the country. The plenary jurisdiction of this Court to grant leave and hear appeals against any order of a court or tribunal, confers power of judicial superintendence over all courts and tribunals in the territory of India including subordinate courts of Magistrate and District Judge. This Court has, therefore, supervisory jurisdiction overall courts in India".

(3) The word 'order' in Art. 136(1) has not been qualified by the adjective 'final' as is the case in Arts. 132, 133 and 134. The Supreme Court thus has power to hear an appeal even from an interlocutory or an interim order. In practice, however, the Court does not ordinarily grant leave to appeal from an interlocutory order, but it can do so in an exceptional case.[60] Ordinarily, the parties are directed to approach the High Court for the recall, stay or modification of the interim order.[61] At times, the Supreme Court has, while dismissing such petitions requested the High Court to dispose of the matter preferably within a time frame. Use of imperative words such as "directed" and fixing a time frame within which the High Court "shall" dispose of a matter have, on occasion, led to a confrontation between the High Court and the Supreme Court.[62]

Where, for example, it appears *prima facie* that the order in question cannot be justified by any judicial standard, the ends of justice and the need to maintain judicial discipline require the Supreme Court to intervene.[63]

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58. AIR 1980 SC 1510 : (1980) 3 SCC 435.
Also see, *Usha K. Pillai v. Raj K. Srinivas*, AIR 1993 SC 2090 : (1993) 3 SCC 208, where the Supreme Court heard an appeal directly from a Magistrate's order. See also *Nawab Shaqafat Ali Khan v. Nawab Imdad Jah Bahadur,* (2009) 5 SCC 162 : (2009) 3 JT 652.

59. *Delhi Judicial Service Assn. v. State of Gujarat*, AIR 1991 SC 2176 at 2194 : (1991) 4 SCC 406.

60. *Union of India v. Swadeshi Cotton Mills*, AIR 1978 SC 1818 : (1978) 4 SCC 295; *United Commercial Bank v. Bank of India*, AIR 1981 SC 1426 : (1981) 2 SCC 766; *Joginder Nath Gupta v. Satish Chander Gupta*, (1983) 2 SCC 325; *U.P. Rajya Krishi Utpadan Mandi Parishad v. Sanjiv Rajan*, (1993) Supp. (3) SCC 483 : (1993) 2 LLJ 66; *Baby Samuel v. Tukaram Laxman Sable*, (1995) Supp (4) SCC 215; *Southern Petrochemical Industries Corp. v. Madras Refineries Ltd*., AIR 1998 SC 302 : (1998) 9 SCC 209; *Godfrey Phillips India Ltd. v. Girnar Food and Beverages (P.) Ltd.*, (1998) 9 SCC 531. *Hardesh Ores (P) Ltd. v. Timblo Minerals (P.) Ltd.*, (2004) 4 SCC 64 : AIR 2004 SC 1884.
See for example:*Videocon Properties Ltd v. Bhalchandra Laboratories (Dr),* (2004) 3 SCC 711, 718 : AIR 2004 SC 1787*; M. Gurudas v. Rasaranjan*, (2006) 8 SCC 367 : AIR 2006 SC 3275*; Deoraj v. State of Maharashtra*, (2004) 4 SCC 697 : AIR 2004 SC 1975; *Atma Ram Properties (P) Ltd. v. Federal Motors*, (2005) 1 SCC 705 : (2004) 10 JT 410*; M.P. Housing Board v. Anil Kumar Khiwani*, (2005) 10 SCC 796 : AIR 2005 SC 1863*; Kishor Kirtilal Mehta v. Lilavati Kirtilal Mehta Medical Trust*, (2007) 10 SCC 21 : (2007) 8 Scale 36; *Prakash Harishchandra Muranjan v. Mumbai Metropolitan Region Development Authority*, (2009) 3 SCC 432 : AIR 2009 SC 2082; *AIADMK v. Govt. of Tamilnadu*, (2009) 5 SCC 452 : (2007) 11 SCALE 607.

61. *Reserve Bank of India v. Sharada Devi*, (2005) 10 SCC 178.

62. *Spencer & Co v. Vishwadarshan Distributors(Pvt.) Ltd.*, (1995) 1 SCC 259*; Tirupati Balaji Developers (P) Ltd. v. State of Bihar*, (2004) 5 SCC 1 : AIR 2004 SC 2351.

63. *Union of India v. Era Educational Trust*, (2000) 5 SCC 57 : AIR 2000 SC 1573.

(4) The term 'determination' in Art. 136 signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal.

The expression 'order' also has a similar meaning except that it need not operate to end the dispute.

Determination or order must be judicial or *quasi*-judicial: a purely administrative or executive direction cannot be the subject matter of appeal to the Supreme Court. As the Supreme Court has observed:[64]

> "The essence of the authority of this Court being judicial, this Court does not exercise administrative or executive powers, *i.e.* character of the power conferred upon this court original or appellate, by its constitution being judicial, the determination or order sought to be appealed from must have the character of a judicial adjudication…"[65]

(5) Article 136(1) does not define the nature of proceedings from which the Supreme Court may hear appeals, and, therefore, it could hear appeals in any kind of proceedings whether civil, criminal, or relating to income-tax, revenue or labour disputes, *etc.*

(6) Article 136(1) confers on the Supreme Court power to hear appeals from orders and determination of any tribunal other than a military tribunal. This aspect of Art. 136(1) is very significant and is discussed in detail below.[66]

(7) Under Art. 136(1), the Supreme Court may hear appeal even though the ordinary law pertaining to the dispute makes no provision for such an appeal.

(8) Being a jurisdiction conferred by the Constitution, it cannot be diluted or circumscribed by ordinary legislative process: it can be curtailed or modified only by constitutional process.

(9) The Supreme Court may hear an appeal even where the Legislature declares the decision of a court or tribunal as final. Thus, in *Raigarh*,[67] the Supreme Court heard an appeal from an order of the Railway Rates Tribunal, Madras, in spite of s. 46A of the Railways Act, 1890, laying down that the decision of the tribunal shall be final.

(10) Under Art. 136(1), the Supreme Court has plenary jurisdiction to grant leave and hear appeals against any order of a court or tribunal. This confers on the Supreme Court power of judicial superintendence over all courts and tribunals in India including subordinate courts of magistrate and district judge.[68]

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64. *Union of India v. Era Educational Trust*, (2000) 5 SCC 57 : AIR 2000 SC 1573.

65. SHAH, J., in *Jaswant Sugar Mills v. Lakshmi Chand*, AIR 1963 SC 677 : 1963 Supp (1) SCR 242.

66. Sec. E, *infra.*

67. *Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy*, (2005) 1 SCC 481 : AIR 2004 SC 4289. In *Raigarh Jute Mills v. Eastern Rly*., AIR 1958 SC 525 : 1959 SCR 236. Also see, *Union Carbide Corporation v. Unon of India*, (1991) 4 SCC 584 : AIR 1992 SC 248; *Usha K. Pillai v. Raj K. Srinivas*, AIR 1993 SC 2090 : (1993) 3 SCC 208; *Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti*, (1995) Supp (2) SCC 539; *Union of India v. West Coast Paper Mills*, (2004) 2 SCC 747 : AIR 2004 SC 1596.

68. *Delhi Judicial Service Assn. v. State of Gujarat*, AIR 1991 SC 2176 : (1991) 4 SCC 406. See, *supra*, under "Court of Record", Sec. C(i)(b).

(11) The scope of this special appellate jurisdiction of the Supreme Court is very flexible. There are no words in Art. 136 itself qualifying the power of the Supreme Court. The matter lies within the complete discretion of the Supreme Court and the only limit upon it is the "wisdom and good sense of the Judges" of the Court.[69]

The Supreme Court has emphasized that Art. 136(1) does not confer on any one any right to appeal. It confers on the Supreme Court an overriding and extensive power to grant special leave to appeal which is in the discretion of the Court.[70] As the Supreme Court has stated: "By virtue of this article we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals, and any variety of other cases."[71]

Under Art. 136(1), the Supreme Court can hear appeals in cases which fall outside the scope of Arts. 132, 133 and 134. The Supreme Court can hear appeal even when the High Court has refused to grant the certificate of fitness either under Arts. 132, 133 or 134.[72] Appeals on the basis of incompetent certification by the High Court under Articles 134(1)(c) and 134-A may be treated as a proceeding arising under Art. 136.[73]

(12) Art. 136 confers no right of appeal upon any party; it only vests a discretion in the Apex Court to intervene by granting leave to a petitioner to enter in its appellate jurisdiction not open otherwise and as of right.

Article 136 involves two steps, *viz.*, (i) granting special leave to appeal; and (ii) hearing the appeal. A petition seeking grant of special leave to appeal and the appeal itself, though both these stages are dealt with by Art. 136, these are to distinctly separate stages. The first stage continues up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

At the first stage, while hearing the petition for special leave to appeal, the Supreme Court considers the question whether the petitioner should be granted such leave or not. At this stage, the Court does not exercise its appellate jurisdiction; it merely exercises its discretionary jurisdiction to grant or not to grant leave to appeal. If the petition seeking leave to appeal is dismissed, it only means that the Court feels that a case for invoking its appellate jurisdiction has not been made out. If leave to appeal is granted, then the appellate jurisdiction of the Court gets invoked. The appeal is then heard on merits.

(13) A special leave petition can be filed under Art. 136 by a person who is a party to the decision against which the appeal is sought to be filed. But a person who is not a party to the case, but is adversely affected thereby may also file the special leave petition.[74] It is within the Court's discretion to grant leave to appeal

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69. *Balakrishna Iyer v. Ramaswami Iyer*, AIR 1965 SC 195 : 1964 (7) SCR 838.

70. *Municipal Board v. Mahendran*, AIR 1982 SC 1493 : (1982) 3 SCC 331; *Laxman Marotrao Navakhare v. Keshavrao*, AIR 1993 SC 2596 : (1993) 2 SCC 270; *Hari Singh v. State of Haryana*, (1993) 3 SCC 114 : 1993 SCC (Cri) 631.

71. *Pritam Singh v. State*, AIR 1950 SC 169 : 1950 SCR 453.

72. *Achyut v. State of West Bengal*, AIR 1963 SC 1039 : (1963) 2 SCR 47; *Manickchand v. Elias*, AIR 1969 SC 751 : (1969) 1 SCC 206.

73. *State of Gujarat v. Salimbhai Abdulghaffar Shaikh*, (2003) 8 SCC 50, 54 : AIR 2003 SC 3224.

74. *See for example:State of Uttaranchal v. Sehnaz Mirza*,(2008) 6 SCC 726 : (2008) 7 JT 547.

to anyone. The Supreme Court has itself clarified the position in this respect in *Arunachalam*:[75]

> "Art. 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of the Supreme Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it."

(13a) Generally, an appeal by a person who was not a party to the proceedings is not entertained.[76] However it has been held that a State has the locus standi to file an appeal even for the limited purpose of expunging adverse remarks made by the High Court against the Chief Minister.[77] An appeal by the son of the deceased victim against the order of acquittal of the accused has also been held to be maintainable.[78] So also an appeal by a person who is not a party as such in the proceeding but against whom an adverse remark is made has been entertained and the offending remarks deleted.[79]

(13b) The exercise of appellate jurisdiction under Art. 136 not being dependent on Order 41 of the Code of Civil Procedure,[80] it has been held[81] that the respondent cannot file a cross –objection on the ground that no rules have been framed by the Supreme Court governing its own practice and procedure. "If the judgment of the High Court was partly against the respondent, it ..(should) have filed an application seeking leave to appeal".

This appears to be contrary to an observation in an earlier part of the same judgment that a " person who has entirely succeeded before a court or tribunal below cannot file an appeal solely for the sake of clearing himself from the effect of an adverse finding or an adverse decision on one of the issues as he would not be a … 'person aggrieved' ".[82]

(14) In what circumstances will the Supreme Court grant leave to appeal under Art. 136 is a question to which no precise or definite answer can be given. Nor has the Court ever attempted to define its ambit meticulously or exhaustively.

In *Dhakeswari,*[83] the Court has stated in this connection: "It is not possible to define.... the limitations on the exercise of the discretionary jurisdiction vested in the Court by Article 136. The limitations whatever they may be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in

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75. *Arunachalam v. P.S.R. Setharathnam,* AIR 1979 SC 1284 at 1287 : (1979) 2 SCC 297. Also see, *Food Corporation of India v. P.S.R. Setharathnam,* AIR 1979 SC 1406, 1409.

76. *Tirupati Balaji Developers (P) Ltd. v. State of Bihar,* (2004) 5 SCC 1 : AIR 2004 SC 2351.

77. *State of Maharashtra v. Public Concern for Governance Trust,* (2007) 3 SCC 587 : AIR 2007 SC 777.

78. *Esher Singh v. State of A.P.,* (2004) 11 SCC 585, 604 : AIR 2004 SC 3030.

79. *Samya Sett v. Sambhu Sarkar,* (2005) 6 SCC 767 : AIR 2005 SC 3309 for a full discussion on the subject.

80. *UBS AG V. State Bank of Patiala,* (2006) 5 SCC 416, 424 : AIR 2006 SC 2250.

81. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai,* (2004) 3 SCC 214, 244 : AIR 2004 SC 1815.

82. This is also contrary to the views expressed in other decisions on the expunging of adverse remarks. See Note (1B) under Note N.

83. *Dhakeswari Cotton Mills Ltd. v. CIT,* AIR 1955 SC 65 : 1955 (1) SCR 941.

special and extraordinary situations. Beyond that, it is not possible to fetter the exercise of this power by any set formula or rule."

What, however, the Court has stated is that it being a special power it is to be exercised only in those cases where special circumstances are shown to exist,[84] and that whenever there is an injustice done to a party in a proceeding before a court or tribunal, or there is a miscarriage of justice, or when a question of law of general public importance arises, or a decision shocks the conscience of the Court, this jurisdiction can always be invoked. Article 136 is the residuary power of the Supreme Court to do justice where the Court is satisfied that there is injustice.[85]

In *Commr., Central Excise & Customs v. M/s. Venus Castings (P) Ltd.*[86] the Supreme Court granted leave to appeal because of the uncertainty of law. The matter arose under the Central Excise Act, 1944, and the rules made thereunder. In the instant case, on the specific question of law, different High Courts had taken different views. Accordingly the Supreme Court observed : "when there is uncertainty as to the state of law, it is eminently proper for this court to grant leave in such a matter and settle the legal position."[87] Again an application which could have been dismissed on the ground that the appellant has no *locus* standi was entertained because the court felt that as a constitutional court "we felt it to be our duty to lay down the law correctly so that similar mistakes are not committed in future."[88] A point of law has been decided in an infructuous appeal because of the divergence of views expressed by different High Courts on the issue.[89] Again, an application which could have been dismissed on the ground that the appellant has no *locus standi* was entertained because the Court felt that as a Constitutional Court "we felt it to be our duty to lay down the law correctly so that similar mistakes are not commited in future".[90]

The Supreme Court is not only a court of law but a court of equity as well.[91]

The Court has stated in this connection:[92]

> "It is not the policy of this Court to entertain special leave petitions and grant leave under Article 136 of the Constitution save in those cases where some substantial question of law of general or public importance is involved or there is manifest injustice resulting from the impugned order or judgment".

It would be open to the Supreme Court to interfere with concurrent findings of fact, if the infirmity of excluding, ignoring and overlooking the abundant materials and the evidence, if considered in proper perspective would have led to a conclusion contrary to the one taken by courts below.[93]

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84. *Ibid.*
85. *C.C.E. v. Standard Motor Products,* AIR 1989 SC 1298 : (1989) 2 SCC 303.
86. AIR 2000 SC 1568 : (2000) 4 SCC 206.
87. *Ibid,* at 1571.
88. *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar,* (2008) 9 SCC 54, at page 74 : (2008) 9 JT 445.
89. *State of Delhi v. Sanjeev,* (2005) 5 SCC 181 : AIR 2005 SC 2080.
90. *Raju Ramsing Vasave v. Mahesh Deorao Bhivarpurkar,* (2008) 9 SCC 54 at page 74 : (2008) 9 JT 445.
91. *Chandra Bansi Singh v. State of Bihar,* AIR 1984 SC 1767 : (1984) 4 SCC 316.
92. *Kunhayammed v. State of Kerala,* AIR 2000 SC 2587, 2595 : (2000) 6 SCC 359. See also *Central Bank of India v. Madhulika Guruprasad Dahir,* (2008) 13 SCC 17 at page 175.
93. *Dubaria v. Har Prasad,* (2009) 9 SCC 346.

The reason for granting leave to appeal sparingly is that there is heavy backlog of cases in the Court and, therefore, it becomes necessary for the Court to restrict fresh intake of cases.

(15) A petition for grant of special leave to appeal may be rejected for several reasons, such as:

(i) the petition is time-barred;
(ii) defective presentation;[1]
(iii) petitioner lacks *locus standi* to file the petition;
(iv) conduct of the petitioner disentitles him to any indulgence by the court;[2]
(v) the question raised in the petition is not considered fit for consideration by the Court, or does not deserve to be dealt with by the Apex Court.

(16) Notwithstanding concurrent findings of trial court and High Court the lack of quality or credibility of evidence may call for interference.[3]

(17) After granting special leave to appeal under Art. 136, the Court can revoke the leave granted by it, if the respondent brings to the notice of the Court facts which would justify such revocation. The Court will do so in the interest of justice.[4]

(18) Generally speaking, under Art. 136, the Supreme Court hears an appeal from an adjudicatory order and not from an administrative order. An adjudicatory order is "an order that adjudicates upon the rival contentions of parties and it must be passed by an authority constituted by the state by law for the purpose in discharge of the State'' obligation to secure justice to its people."[5]

Accordingly, in the case noted below,[6] the court refused to hear appeal from an order made by the Chief Justice of India under S. 11 of the Arbitration and Conciliation Act, 1996, appointing an arbitrator. The order was characterised as non-adjudicatory.

This view of the Court was subsequently held to be erroneous by the majority of a larger Bench in[7] which was of the opinion that the power of appointment was judicial and therefore susceptible to appeal under Art. 136. Apart from the fact that the decision appears to be contrary to the express provisions of the statute, it is not clear what remedy would be available to a litigant against an order of the Chief Justice of India.[8] Interestingly, a single judge in Chambers has held that in deciding an issue under section 11, the Rules framed by the Supreme Court for

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1. *State of Punjab v. Ashok Singh Garcha,* (2009) 2 SCC 399 : (2009) 1 SCALE 367.
2. See for example *Prestige Lights Ltd. v. SBI*, (2007) 8 SCC 449, at page 462 : (2007) 10 JT 218.
3. *A. Subair v. State of Kerala,* (2009) 6 SCC 587 : (2009) 8 JT 415. See also *State of Punjab v. Sohan Singh*, (2009) 6 SCC 444 : AIR 2009 SC 1887, no interference if two views are possible and the one adopted by the High Court is plausible. See also *Devaki Antharjanam v. Sreedharan Namboodiri*, (2009) 7 SCC 798 : (2009) 5 SLT 374, no remand for re-determination of facts after 12 years on the Supreme Court approving executing court's determination.
4. *Penu Balakrishna M. Ariya v. Ramaswami Iyer,* AIR 1965 SC 195 : 1964 (7) SCR 49.
5. For further discussion on this point, see, Sec. E, *infra.*
6. *Konkan Rly. Corpn. Ltd. v. Rani Construction Pvt. Ltd.,* (2002) 2 SCC 388 : AIR 2002 SC 778.
7. *SBP & Co. v. Patel Engineering Ltd.,* (2005) 8 SCC 618 : AIR 2006 SC 450.
8. See minority view of C.K. THAKKER, J (*Ibid,* at page 687).

the hearing of matters by a bench of at least two judges did not apply as he was not functioning as a court.[9] The ratio in SBP has been distinguished in *Punjab Agro Industries Corpn. Ltd. v. Kewal Singh Dhillon*,[10] which said that the observation that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is only with reference to the orders made by the Chief Justice of a High Court or by the designate Judge of *that High Court* and do not apply to a subordinate Court functioning as designate of the Chief Justice. The distinction between "designates" has been made without reference to any legal principle and indicates perhaps that the decision in SBP requires reconsideration.

(17A) Although ordinarily the Supreme Court does not discuss the evidence, it may do so when it finds that crucial circumstances have escaped the notice of the courts below in order to prevent injustice being caused.[11]

(18) The Court has power to mould relief according to the circumstances of the case.[12]

(19) Generally the court after pointing out the legal error remands the matter back to the High Court, Tribunal or authority for ascertaining the facts or applying the law indicated by it to the ascertained facts. But this practice is not inflexible. Hence where a poor widow was fighting for about a decade to service benefits of her husband, the Supreme Court in order to give a quietus to the litigation decided the claim itself instead of remanding the matter to the High Court.[13]

(a) EFFECT OF DISMISSAL OF SPECIAL LEAVE PETITION

When a special leave petition is dismissed *in limine* by the Supreme Court, when the Court merely says "dismissed" without giving any reasons, all that the Court decides in such a situation is that it was not a fit case where special leave to appeal should have been granted under Art. 136; it would only mean that the court was not inclined to exercise its discretion in granting leave to file the appeal.[14] The Supreme Court says nothing about the merits of the case, or the correctness or otherwise of the order from which leave to appeal is sought. The requirement for appellate courts to give reasons when summarily dismissing an appeal, does not apply to the Supreme Court as it is the final court.[15]

This means that the order of the Apex Court creates no *res judicata;* it lays down no law for the purposes of Art. 141.[16] The mere rejection of special leave petition by the Supreme Court cannot by itself be construed as "the imprimatur"

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9. *Rodemadan India Ltd. v. International Trade Expo.Centre Ltd.,* (2006) 11 SCC 651 : AIR 2006 SC 3456.

10. (2008) 10 SCC 128, at page 131 : (2008) 9 JT 256.

11. *Pannayar v. State of Tamil Nadu by Inspector of Police,* (2009) 9 SCC 152.

12. *Koluthara Exports Ltd. v. State of Kerala,* (2002) 2 SCC 459 : AIR 2002 SC 973; *Om Construction Co. v. Ahmedabad Municipal Corpn.,* (2009) 2 SCC 486 : AIR 2009 SC 1944.

13. *Basanti Prasad v. Chairman, Bihar School Examination Board,* (2009) 6 SCC 791 : (2009) 8 JT 243.

14. *Saurashtra Oil Mills Assn. v. State of Gujarat,* (2002) 3 SCC 202 : AIR 2002 SC 1130. *Hemalatha Gargya v. CIT,* (2003) 9 SCC 510 : (2002) Supp (4) SCR 382*; Narcotics Control Bureau v. Dilip Prahlad Namade,* (2004) 3 SCC 619 : AIR 2004 SC 2950.

15. *Bolin Chetia v. Jogadish Bhuyan,* (2005) 6 SCC 81 : AIR 2005 SC 1872. See also *A. Rajendra Kumar v. Registrar, Supreme Court of India,* (2005) 13 SCC 443.

16. For Art. 141, see, *Infra,* Sec. J.

of the Supreme Court on the correctness of the decision sought to be appealed against. As the Supreme Court has observed in the case mentioned below:[17]

> "It is true that the said Special Leave Petitions were dismissed summarily but that would not mean that this Court approved the view that was taken by the High Court".

When the Supreme Court summarily dismisses a special leave petition under Art. 136, by such dismissal, the Court does not lay down any law, as envisaged by Art. 141 of the Constitution, nor does it constitute a vinding precedent. [18]

The main High Court decision does not merge with the order of the Apex Court. The aggrieved party may pursue any statutory remedy which may be open to him to challenge the decision in question. For instance, he may move a writ petition in the High Court under Art. 226 to challenge the decision,[19] or may move a petition in the High Court to review its own decision.[20]

If the order of the High Court had been obtained by practising fraud on the Court, the High Court can recall that order despite the fact that the SLP against that order may have been dismissed.[21] If a special leave petition from an order is dismissed, no leave will be granted to challenge a refusal to review the original order. A subsequent petition challenging the refusal of the lower court to review its earlier order has also been held to be not maintainable.[22]

Benches of the Supreme Court are bound to respect earlier orders coordinate or "co-equal" benches and the summary dismissal of a Special Leave Petition by one bench concludes the issues raised in such petition *inter partes*,[23] but not as far as other similarly placed petitioners were concerned.[24]

The view expressed in *Batiarani Gramiya Bank v. Pallab Kumar*[25] that an earlier Special Leave petition in an identical matter being dismissed without be-

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17. *Commr. of Income Tax v. Manjunatheswar Packing Products and Champhor Works*, AIR 1998 SC 1478 : (1998) 1 SCC 598.

18. For Art. 141, see, *infra*, Sec. J. See *Union of India v. Jaipal Singh*, (2004) 1 SCC 121 : AIR 2004 SC 1005.

19. *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust*, AIR 1978 SC 1283 : (1978) 3 SCC 119; *Indian Oil Corporation v. State of Bihar*, AIR 1986 SC 1780. Also see, *infra*, Ch. VIII, for Art. 226.

20. *Indian Oil Corporation Ltd. v. State of Bihar*, AIR 1986 SC 1780 : 1986 Supp SCC 527; *M/s. Rup Diamonds v. Union of India*, AIR 1989 SC 674 : (1989) 2 SCC 356; *Supreme Court Employees' Welfare Association v. Union of India*, AIR 1990 SC 334 : (1989) 4 SCC 187; *Yogendra Narayan Chowdhary v. Union of India*, AIR 1996 SC 751 : (1996) 7 SCC 1; *V.M. Salgaocar & Bros. v. I.T. Commr.*, AIR 2000 SC 1623; *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587 : (2000) 6 SCC 359, *Govt. of West Bengal v. Tarun K. Roy*, (2004) 1 SCC 347, 510 : (2003) 9 JT 130.

The Court has overruled its earlier view expressed to the contrary in several cases *e.g.*, *Sree Narayana Dharma Sanghom Trust v. Swami Prakasananda*, (1997) 6 SCC 78 : (1997) 5 JT 100; *Maharashtra v. Prabhakar Bhikaji Ingle*, AIR 1996 SC 3069 : (1996) 3 SCC 463.

For review power of the High Court, see, *infra*, Ch. VIII, Sec. C.

21. *A.V. Papayya Sastry v. Govt. of Andhra Pradesh*, (2007) 4 SCC 221 : AIR 2007 SC 1546.

22. *Shanker Motiram Nale v. Shiolalsingh Gannusingh Rajput*, (1994) 2 SCC 753; *M.N.Haider v. Kendriya Vidyalaya Sangathan*, (2004) 13 SCC 677.

23. *Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju*, (2006) 1 SCC 212 : AIR 2006 SC 543; See also *Gurdev Singh v. State of Punjab*, (2003) 7 SCC 258 : AIR 2003 SC 4187.

24. *HMT Ltd. v. P. Subbarayudu*, (2003) 10 SCC 156 : AIR 2004 SC 3280.

25. (2004) 9 SCC 100.

ing admitted, need not be mentioned in a subsequent Special Leave Petition,[26] appears to be inconsistent with this view.[27]

The situation is somewhat different when the special leave petition is dismissed through a reasoned or speaking order. Whatever the Supreme Court says in its dismissal order amounts to law for the purposes of Art. 141 and this is binding on the parties as well as the courts and tribunals below. [28]Beyond this, the Court gives no decision on merits and, therefore, the decision appealed against can be challenged through a writ petition, or a review petition in the High Court or the tribunal concerned. The Apex Court has observed in the *Supreme Court Employees' Welfare Association*:[29]

> "When Supreme Court gives reasons while dismissing a special leave petition under Article 136, the decision becomes one which attracts Article 141".

In another case,[30] the Court has observed:

> "An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed".

Once a special leave petition filed against a High Court decision is withdrawn without obtaining leave from the Supreme Court to file another special leave petition, a fresh special leave petition against the same decision is not maintainable. The ban on filing a fresh special leave petition is based on public policy.[31] Similarly, when a special leave petition is dismissed by the Supreme Court, a second special leave petition for appeal is not maintainable. The principle of *res judicata* comes into play in such a context,[32] unless the earlier order of the Supreme Court is established to be contrary to an existing law.[33]

(b) COURT'S DISCRETION

It is a well established principle that even though the Court may grant special leave to appeal, the discretionary power vesting in the Court at that stage continues to remain with the Court even at the time of hearing the appeal on merits. This principle is applicable to all kinds of appeals admitted by special leave un-

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26. *Ibid* at page 111.

27. See in this connection *Union of India v. Shantiranjan Sarkar,* (2009) 3 SCC 90 : (2009) 1 JT 467.

28. *Union of India v. All India Services Pensioners Ass.,* AIR 1988 SC 501 : (1988) 2 SCC 580.

29. *Supra,* footnote 20.

30. *Kunhayammed v. State of Kerala,* AIR 2000 SC 2587, at 2600 : (2000) 6 SCC 359.
Also, *K. Rajamouli v. A.V.K.N. Swamy,* AIR 2001 SC 2316 : (2001) 5 SCC 37.

31. *Upadhyay & Co. v. State of Uttar Pradesh,* (1999) 1 SCC 81 : AIR 1999 SC 509; *Union of India v. Sher Singh,* AIR 1997 SC 1796 : (1997) 3 SCC 555; *Yogendra Narain Chowdhury v. Union of India,* AIR 1996 SC 751 : (1996) 7 SCC 1.

32. *M.N. Haider v. Kendriya Vidyalaya Sangathan,* (2004) 13 SCC 677. After dismissal of a special leave petition on merits by the Supreme Court, the High Court cannot review the self-same order. The court observed : "After the dismissal of the special leave petition by this Court, on contest, no review petition could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case was an affront to the order of this Court."
Abhai Maligai Partnership Firm v. K. Santhakumaran, AIR 1999 SC 1486 : (1998) 7 SCC 386.

33. *Neeraj Munjal v. Atul Grover (III), (*2005) 5 SCC 404 : AIR 2005 SC 2867.

der Art. 136, irrespective of the nature of the subject-matter.[34] This means that only those points could be urged at the final hearing of the appeal which were fit to be urged at the preliminary stage when leave for appeal was asked for, as it would be illogical to adopt different standards at two different stages of the same case. Also, the Court after declaring the correct legal position, may still say that it would not exercise its discretion to decide the case on merits and that it would decide on the basis of equitable considerations in the fact situation of the case and "mould the final order".[35]

The Supreme Court has observed on this point in *Taherakhatoon*:[36]

> "… even though we are now dealing with the appeal after grant of special leave, we are not bound to go into merits and even if we do so and declare the law or point out the error—still we may not interfere if the justice of the case on facts does not require interference or if we feel that the relief could be moulded in a different fashion…"

In the instant case, the Supreme Court while pointing out the errors committed by the High Court in its decision, nevertheless, refused to interfere with the decree passed by the High Court. The Supreme Court declared that "in the peculiar circumstances referred to above, this is not a fit case for interference" and moulded relief in favour of the plaintiff.[37]

The width of the discretion may extend to a situation where although the appeals are found to be not maintainable, yet having regard to arguments being advanced at length including submissions on merit, the Supreme Court may decide on the merit of the appeals.[38]

In an appeal from an order condoning delay in preferring first appeal the Court awarded costs of Rs.10,000 while dismissing the appeal.[39]

(c) DISMISSAL OF APPEAL

After the Supreme Court grants leave to appeal, the Court hears the appeal on merits. After hearing the arguments of the parties, the Court gives its decision.

The Court may dismiss the appeal with or without giving reasons for the same, or the Court may pass an order of reversal, modification or merely affirmation of the decision of the lower court or tribunal. In any such situation, the decision appealed against gets merged with the decision of the Apex Court. This means that after the Supreme Court, the original decision appealed against cannot be challenged through a writ petition under Art. 226 in a High Court. Nor can the lower court or tribunal review its decision against which the Supreme Court has disposed of the appeal.[40]

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34. See, *Pritam Singh v. The State*, AIR 1950 SC 169 : 1950 SCR 453; *M/s. Bengal Chemical & Pharmaceutical Works Ltd. v. Their Workmen*, AIR 1959 SC 633 : 1959 Supp (2) SCR 136.
35. *Municipal Board, Pratapgarh v. Mahendra Singh Chawla*, AIR 1982 SC 1493 : (1982) 3 SCC 331.
36. *Taherakhatoon v. Salmabin Mohammad*, AIR 1999 SC 1104, 1110 : (1999) 2 SCC 635.
37. See also *ONGC Ltd. v. Sendhabhai Vastram Patel*, (2005) 6 SCC 454 : (2005) 7 JT 465.
38. *Villianur Iyarkkai Padukappu Maiyam v. U.O.I.*, (2009) 7 SCC 561 : (2009) 8 JT 339.
39. *C.K. Prahalada. v. State of Karnataka*, (2008) 15 SCC 577.
40. *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587 : (2000) 6 SCC 359.

(d) RESTRICTIONS

Article 136 imposes no restriction or limitation on the power of the Supreme Court to hear appeals. The constitutional provision confers a plenary jurisdiction on the Court. Nevertheless, the Court has sought to impose on itself some restrictions in exercising this vast appellate jurisdiction. This has been done with a view to reduce the flow of appeals to itself so that it is not faced with a huge backlog of cases.

EXHAUSTION OF REMEDIES

The Court has imposed on itself a restriction that before invoking the jurisdiction of the Court under Art. 136, the aggrieved party must exhaust any remedy which may be available under the law before the lower appellate authority or the High Court.[41]

Ordinarily, the Supreme Court does not hear an appeal from the decision of a single judge of the High Court, as such an appeal ought to go to the Division Bench of the High Court. This, however, is a self-imposed restriction and not a matter ousting jurisdiction of the Supreme Court. When in a case, the High Court Judge committed patent error, the Supreme Court heard an appeal from the single judge.[42]

DELAY

An appeal must be filed without undue delay although Art. 136 prescribes no period of limitation for the purpose. But the Court does not like stale claims to be raked up.

The Court has power to condone delay in approaching it to enable it to do substantial justice to the parties concerned.[43] The Court shows a liberal attitude in condoning delay when the government is the appellant. One reason for such an approach is that bureaucratic delay is proverbial. Secondly, the Court feels that if the state is denied an opportunity to appeal because of delay, it may be the loss of the society as a whole.[44]

CONCILIATION

To curtail wasteful expenditure of public monies on litigation between the State and Public Sector Undertakings or between public sector undertakings inter se, the Supreme Court has directed the Government of India and the State Governments to set up a Committee to monitor disputes between them to ensure that no litigation comes to Court or to a Tribunal without the matter having been first

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41. *Nirma Ltd. v. Lurgi Lentges Energietechnik Gmbh* (2002) 5 SCC 520 : AIR 2002 SC 3695. For a detailed discussion this point, see, *infra.*

42. *State of Uttar Pradesh v. Harish Chandra,* AIR 1996 SC 2173 : (1996) 9 SCC 309. *Dipak Chandra Ruhidas v. Chandan Kumar Sarkar,* (2003) 7 SCC 66 : AIR 2003 SC 3701*; Virender Kumar Rai v. Union of India,* (2004) 13 SCC 463.

43. *Union of India v. Cynamide India Ltd.,* AIR 1987 SC 1802 : (1987) 2 SCC 720; *Harsharan Varma v. Union of India,* AIR 1987 SC 1969 : 1987 Supp SCC 310; *State of Uttar Pradesh v. Rafiquddin,* AIR 1988 SC 162; *Madurai Kamraj University v. K. Rajayyan,* AIR 1988 SC 385 : 1988 Supp SCC 97.

44. *Chief G.M. Telecom v. G. Mohan Prasad,* (1999) 6 SCC 67; *State of Bihar v. Kameshwar Prasad Singh,* AIR 2000 SC 2306 : (2000) 9 SCC 94.

examined by the Committee and cleared it for litigation. The Court has also directed that:

"It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with"[45] and further wherever appeals, petitions, etc. are filed without the clearance of the High-Powered Committee so as to save limitation, the appellant or the petitioner, as the case may be, shall within a month from such filing, refer the matter to the High-Powered Committee, After such reference to the High-Powered Committee is made, the operation of the order or proceedings under challenge shall be suspended till the High-Powered Committee resolves the dispute or gives clearance to the litigation. If the High-Powered Committee is unable to resolve the matter for reasons to be recorded by it, it shall grant clearance for the litigation.

The machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee and does not in any way efface the statutory remedies of the State or the statutory corporations.[46] It has recently been clarified that the emphasis on one month's time was only to show the urgency needed and merely because there is some delay in approaching the Committee that does not make the action illegal[47].

CONSISTENCY IN REVENUE APPEALS

If the Revenue accepts the decision on a point of law in the case of one assessee without challenging it further by way of an appeal, it is not open to the Revenue to challenge its correctness in the case of other assessees without just cause.[48]

(e) RELIEF

Under Art. 136, the Supreme Court can give whatever relief may be necessary and proper in the facts and circumstances of the specific case. The Court has power to mould relief according to the circumstances of the specific case.[49] The Court can also invoke its power under Art. 142 for this purpose.[50]

A few instances of moulding relief may be cited here.

A police officer was promoted to the post of Deputy Superintendent of Police in 1975 under directions issued by the High Court to that effect. The State ap-

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45. *Oil and Natural Gas Commission v. CCE,* 1995 Supp (4) SCC 541 : (1992) 61 ELT 3.

46. *Mahanagar Telephone Nigam Ltd. v. Chairman, Central Board, Direct Taxes,* (2004) 6 SCC 431 : AIR 2004 SC 2434; *Oil & Natural Gas Commission v. CCE,* (2004) 6 SCC 437, at page 438 : (1994) 70 ELT 45.

47. *CIT v. Oriental Insurance Co. Ltd.*, (2008) 9 SCC 349 : (2008) 10 SCALE 253.

48. *Berger Paints India Ltd. v. CIT,* (2004) 12 SCC 42, 47 : (2004) 4 JT 252; *C.K. Gangadharan v. CIT,* (2008) 8 SCC 739, 744 : (2008) 10 SCALE 426.

49. *Collector of Customs & Central Excise v. Oriental Timber Industries,* AIR 1985 SC 746 : (1985) 3 SCC 85; *Dipak Kumar Biswas v. Director of Public Instruction,* AIR 1987 SC 1422 : (1987) 2 SCC 252; *Municipal Board of Pratabgarh v. Mahendra Singh Chawla,* AIR 1982 SC 1493 : (1982) 3 SCC 331; *Divisional Manager A.P. SRTC v. P. Lakshmoji Rao,* (2004) 2 SCC 433, 441 : AIR 2004 SC 1503.

50. See, *infra*, under Art. 142: "Power to do Complete Justice", Sec. G.

pealed to the Supreme Court under Art. 136. In the year 2000, the Supreme Court ruled that the decision of the High Court was not sustainable. The Supreme Court however ruled that the benefit conferred on the concerned officer under the High Court direction should not be withdrawn.[51]

In *Badrinath v. Govt. of Tamil Nadu,*[52] the appellant was appointed in the junior scale in IAS in 1957 and was promoted to the selection grade in 1972. Thereafter, he was not promoted to the super-time scale. His appeal to the Government was rejected. He filed a writ petition is the High Court which was rejected. He then filed an appeal in the Supreme Court under Art. 136. The Court held that the refusal to promote him was not justified.

The Court then had to decide what relief to give him. Should the Court send the matter to the State Government for reconsideration in the light of its decision, or should the Court itself issue a *mandamus* to the State Government to promote him? In view of "the special and peculiar circumstances of the case", the Court itself issued *mandamus* to the State Government to promote the appellant to super-time scale with effect from the date his promotion was due.

The Court asserted that it can mould relief to meet the peculiar and complicated requirements of a case to enable it to reach justice wherever found necessary. "The power of this Court to mould relief in the interests of Justice in extraordinary cases cannot be doubted".[53]

The power has been used for various purposes such as issuing directions for recording/registering marriages[54] expunging adverse remarks made in the judgment against the subordinate courts[55] and imposing exemplary costs of Rs. 5 lakhs on the Union of India for having illegally retained possession of property for 32 years.[56]

(f) APPEALS IN CONSTITUTIONAL/CIVIL CASES

Under Article 136, the Supreme Court can hear appeal in a case involving substantial question of constitutional law if the High Court refuses to grant the necessary certificate under Art. 132.[57] Similarly, the Supreme Court may entertain appeal in a civil case where substantial question of law is involved but which is not covered by Article 133, as for example, when the High Court may have refused to grant a fitness certificate.[58]

Ordinarily, the Supreme Court does not entertain an appeal against an exercise of discretion by the court below if it has been exercised along sound judicial lines. But if the discretion is exercised arbitrarily or unreasonably, or is based on a misunderstanding of the principles that govern its exercise, or the order has been passed without jurisdiction, or if there is a patently erroneous interpretation of law by the High Court, the Supreme Court would intervene if there has been a

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51. *State of Bihar v. Kameshwar Prasad Singh,* AIR 2000 SC 2306 : (2000) 9 SCC 94.
52. (2000) 8 SCC 395 : AIR 2000 SC 3243.
53. *Ibid,* at 434. For *Mandamus,* see, Ch. VIII, *infra.*
54. *Seema v. Ashwini Kumar,* (2005) 4 SCC 443 : (2005) 11 JT 97.
55. *Kailasbhai Shukharam Tiwari v. Jostna Laxmidas Pujara,* (2006) 1 SCC 524 : AIR 2006 SC 741.
56. *Union of India v. Raja Mohd. Amir Mohd. Khan,* (2005) 8 SCCC 696 : AIR 2005 SC 4383. See also *Suman Kapur v. Sudhir Kapur,* (2009) 1 SCC 422 at page 441 : AIR 2009 SC 589.
57. *Supra,* Sec. C(iv)(a).
58. *Supra,* Sec. C(iv)(e).

resultant failure of justice.[59] So also if the court below acts without jurisdiction, or in violation of principles of natural justice[60] or without a proper appreciation of material on record or the submissions made[61] interference under Art. 136 is warranted.

Ordinarily, the Supreme Court does not appreciate evidence, or go behind the findings of fact arrived at by the courts below, much less concurrent findings, unless there is sufficient ground for doing so.[62] The Court can, however, appreciate evidence on record to avoid miscarriage of justice.[63] If in giving the findings the lower court ignored or misread and misconstrued certain important pieces of evidence, and the Supreme Court comes to the conclusion that, on the evidence taken as a whole, no court could properly, as a matter of legitimate inference, arrive at the conclusion that the lower court has arrived,[64] or where the two lower courts of appeal were under a clear misapprehension as to the findings of fact by the trial court, or where the lower courts arrive at the findings not on proper consideration of the law on the subject, or where appreciation of evidence by the courts below on the face of it appears to be erroneous causing miscarriage of justice, the court would examine the evidence itself.[65] The position however is different if it is a mixed question of law and fact.[66]

Order XVI Rule 4(b) of the Supreme Court Rules which provides that

> "SLPs shall be confined only to the pleadings before the Court/Tribunal whose order is challenged. However, the petitioner may, with due notice to the respondent, and with the leave of the Court urge additional grounds, at the time of hearing".

Thus a new plea put forward for the first time in the form of written submissions after the hearing was concluded was not entertained.[67]

Neverthless the Supreme Court is extremely reluctant to entertain an entirely new plea, not raised earlier before the lower courts, but being raised for the first

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59. *Santosh v. Mul Singh,* AIR 1958 SC 321 : 1958 SCR 1211: *Baldota Bros. v. Libra Mining Works,* AIR 1961 SC 100; *Syed Yakoob v. Radhakrishnan,* AIR 1964 SC 477 : 1964 (5) SCR 64; *Ajit Singh v. State of Punjab,* AIR 1967 SC 856 : 1967 (2) SCR 143.

60. *National Organic Chemical Industries Ltd. v. Miheer H. Mafatlal,* (2004) 12 SCC 356, 359 : AIR 2004 SC 3933*; Divine Retreat Centre v. State of Kerala,* (2008) 3 SCC 542, at page 565 : AIR 2008 SC 1614.

61. *Panchanan Mishra v. Digambar Mishra,* (2005) 3 SCC 143 : AIR 2005 SC 1299.

62. *Barsay v. State of Bombay,* AIR 1961 SC 1762 : 1962 (2) SCR 195; *Surasaibalini v. Phanindra Mohan,* AIR 1965 SC 1364 : 1965 (1) SCR 861; *Tatayya v. Jagapathiraju,* AIR 1967 SC 647 : 1962 Supp (3) SCR 324; *Chettiar v. Chettair,* AIR 1968 SC 915 : 1968 (2) SCR 897; *Digvijay Singh v. Pratap Kumari,* AIR 1970 SC 137; *Parle Praducts v. J.P. & Co.,* AIR 1972 SC 1359 : (1972) 1 SCC 618; *Banwari Lal v. Trilok Chand,* AIR 1980 SC 419 : (1980) 1 SCC 349; *Vasudha Srivastava v. Kamla Chauhan,* AIR 1992 SC 1454 : (1992) 1 SCC 645; *Union of India v. Rajeshwari & Co.,* AIR 1986 SC 1748 : (1986) 3 SCC 426.

63. *Shashi Jain (SMT) v. Tarsem Lal (DEAD),* (2009) 6 SCC 40 : AIR 2009 SC 2617.

64. *White v. White,* AIR 1958 SC 441; *A.P. State Financial Corp. v. Vajra Chemicals,* AIR 1997 SC 3059 : (1997) 7 SCC 76.

65. *Heramba Brahma v. State of Assam,* AIR 1982 SC 1595 : (1982) 3 SCC 351; *D.V. Shanmugham v. State of Andhra Pradesh,* AIR 1997 SC 2583 : (1997) 5 SCC 349.

66. *Suresh Kumar Jain v. Shanti Swarup Jain,* AIR 1997 SC 2291, at 2298 : (1997) 9 SCC 298.

67. *State of Rajasthan v. H.V.Hotels (P) Ltd.,* (2007) 2 SCC 468, 475 : AIR 2007 SC 1122; *K.A. Nagamani v. Indian Airlines,* (2009) 5 SCC 515 : (2009) 4 JT 674.

time in appeal before it, especially when the new plea is founded on facts.[68] For example, the Supreme Court did not permit the plea of *mala fides* being raised before it for the first time as it being essentially a question of fact needed to be supported by relevant material.[69] Again whether there is a novation or alteration of a contract is a mixed question of law and fact and cannot be raised before the Supreme Court for the first time.[70] A document which is produced by the respondent for the first time at the stage of arguments can be considered if it forms the basis of the petitioner's claim.[71]

If, however, a point of fact plainly arises on the record, or a point of law is relevant and material and can be decided on the basis of material on record without any further evidence being taken,[72] or the plea was urged before the trial court and was rejected but was not then repeated before the High Court, or if it is a question of considerable importance likely to arise in similar suits, or if it goes to the jurisdiction of the lower court, the Supreme Court may permit the plea to be raised.[73] If it is a pure question of law going to the root of the case, the plea may be allowed to be raised with the permission of the Court.[74]

In one case, the Supreme Court permitted the question of constitutional validity of the relevant statute to be raised for the first time before it. Accordingly, the

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68. *R.J. Singh Ahluwalia v. Delhi,* AIR 1971 SC 1552 : (1970) 3 SCC 451; *Chinta Lingam v. Union of India,* (1970) 3 SCC 768 : AIR 1971 SC 474. *Deputy Custodian General of Evacuee Property v. Daulat Ram,* AIR 1973 SC 1381 : (1973) 3 SCC 621; *S.N. Mathur v. R.K. Mission,* AIR 1974 SC 2241 : (1974) 2 SCC 730; *Surendra Kumar Aggarwal v. Satya Varshneya,* AIR 1981 SC 1234 : (1979) 4 SCC 750; *K.L. Malhotra v. Smt. Prakash Mehra,* AIR 1991 SC 99 : (1991) 4 SCC 512; *State of Madhya Pradesh v. Nandlal Jaiswal,* AIR 1987 SC 251 : (1986) 4 SCC 566.

69. *Jindal Industries Ltd. v. State of Haryana,* AIR 1991 SC 1832 : 1991 Supp (2) SCC 587. Also, *Bhandara Distt. Central Coop. Bank Ltd. v. State of Maharashtra,* AIR 1993 SC 59 : 1993 Supp (3) SCC 259; *Municipal Commr. Chinchwad New Township Municipal Council v. Century Enka Ltd.,* (1995) 6 SCC 152 : AIR 1996 SC 187. See also *Ramesh Chand Ardawatiya v. Anil Panjwani,* (2003) 7 SCC 350 : AIR 2003 SC 2508; *State of Punjab v. Darshan Singh,* (2004) 1 SCC 328 : AIR 2003 SC 4179; *Sopan Sukhdeo Sable v. Asst. Charity Commr.,* (2004) 3 SCC 137, 151 : AIR 2004 SC 1801*; State. v. V. Jayapaul,* (2004) 5 SCC 223, 229 : AIR 2004 SC 2684*; Durgo Bai v. State of Punjab,* (2004) 7 SCC 144, 148 : AIR 2004 SC 4170*; CCE v. J.K. Udaipur Udyog Ltd.,* (2004) 7 SCC 344, 352 : AIR 2004 SC 4437*; Sidheshwar Sahakari Sakhar Karkhana Ltd. v. CIT,* (2004) 12 SCC 1, 24 : AIR 2004 SC 4716*; Vividh Marbles (P.) Ltd. v. Commercial Tax Officer,* (2007) 3 SCC 580, 586 : (2007) 4 JT 448.

70. *Shakti Tubes Ltd. v. State of Bihar,* (2009) 7 SCC 673, 684 : (2009) 9 JT 386.

71. *Ramashray Singh v. New India Assurance Co. Ltd.,* (2003) 10 SCC 664 : AIR 2003 SC 2877.

72. *State of Rajasthan v. K.C. Thapar,* AIR 1965 SC 913; *State of Uttar Pradesh v. Anupam Gupta,* AIR 1992 SC 932 : 1993 Supp (1) SCC 594; *Bhanwar Lal v. T.K.A. Abdul Karim,* AIR 1992 SC 2166 : 1993 Supp (1) SCC 626; *National Insurance Co. Ltd. v. Swaranlata Das,* AIR 1993 SC 1259. *M. Gurudas v. Rasasanjan, (*2006) 8 SCC 367 : AIR 2006 SC 3275.

73. *B.K. Bhandar v. Dhamangaon Municipality,* AIR 1966 SC 249 : 1965 (3) SCR 499; *Chandrika v. Bhaiyalal,* AIR 1973 SC 2391 : (1973) 2 SCC 474; *Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma,* AIR 1995 SC 2001 : 1995 Supp (4) SCC 286; *Vasant Kumar Radhakisan Vora v. Board of Trustees of the Port of Bombay,* AIR 1991 SC 14 : (1991) 1 SCC 761; *Union of India v. Baleshwar Singh,* (1994) Supp (2) SCC 587 : 1994 SCC (L&S) 1158.

74. *Vimal Chandra Grover v. Bank of India,* (2000) 5 SCC 122, at 134 : AIR 2000 SC 2181; *Kunal Singh v. Union of India,* (2003) 4 SCC 524: AIR 2003 SC 1623*; Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.,* (2003) 6 SCC 315 : AIR 2003 SC 2998*; Union of India v. Upper Ganges Sugar & Industries Ltd.,* (2005) 1 SCC 750 : AIR 2005 SC 778*; Ajit Kumar Nag v. General Manager (PJ) Indian Oil Corporation,* (2005) 7 SCC 764 : AIR 2005 SC 4217*; Pushpa Devi Bhagat v. Rajinder Singh,* (2006) 5 SCC 566, 575 : AIR 2006 SC 2628.

Supreme Court set aside the High Court's judgment and sent the matter back to it so that it may decide the question of constitutional validity of the Act.[75]

In a preventive detention case, the Court allowed a new plea to be raised, *viz*., non-consideration of detenu's representation by the government, because the plea was important as it was fatal to detention and it could be determined on the material available to the Court.[76]

(g) APPEALS IN CRIMINAL CASES

The Scope of Article 134 providing for appeals to the Supreme Court in criminal matters is limited. On the other hand, Article 136 is very broad-based and confers a discretion on the Court to hear appeals "in any cause or matter." Therefore, criminal appeals may be brought to the Supreme Court under Article 136 when these are not covered by Article 134,[77] or when the High Court refuses to grant a fitness certificate, or the certificate has not been granted properly, or when the matter falls outside the Act of Parliament extending criminal appellate jurisdiction of the Supreme Court.

It is in the area of criminal cases that the residuary jurisdiction of the Supreme Court is very frequently invoked. The Supreme Court, however, does not grant leave to appeal in criminal matters liberally. It does so only when exceptional and special circumstances exist, substantial and grave injustice has been done, and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against, or there has been a departure from legal procedure such as vitiates the whole trial, or if the findings of fact "were such as were shocking" to the judicial conscience of the Court.[78]

As under Article 134(1)(*c*), so under Article 136, the Supreme Court does not act as an ordinary court of criminal appeal to which every High Court judgment in a criminal case can be brought up for scrutiny of its correctness. The Court does not, generally speaking, allow facts to be reopened, or act as a court to review evidence.[79] These rules are not, however, absolute; these rules constitute a self-imposed restriction by the Court, and may be relaxed whenever there has been a failure of justice.

If the trial is vitiated by some illegality or irregularity of procedure, if it "shocks the conscience of the Court," or if "by disregard to the forms of legal process or some violation of the principles of natural justice or otherwise" sub-

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75. *M/s Noorulla Ghazanfarulla v. Municipal Board of Aligarh,* AIR 1981 SC 2176 : (1982) 1 SCC 484.

76. *Harish Pahwa v. State of Uttar Pradesh,* AIR 1981 SC 1126 : (1981) 2 SCC 710. Also see, *K.P.M. Basheer v. Union of India,* AIR 1992 SC 1353 : (1992) 2 SCC 295.

77. *Supra,* Sec. C(iv)(d).

78. *Pritam Singh v. State,* AIR 1950 SC 169 : 1950 SCR 453; *Sadhu Singh v. Pepsu,* AIR 1954 SC 271 : 1954 Cr LJ 727; *Haripada Dey v. State of West Bengal,* AIR 1956 SC 757 : 1956 SCR 639; *Ram Jag v. State of Uttar Pradesh,* AIR 1974 SC 606 : (1974) 4 SCC 201; *State of Uttar Pradesh v. Ballabh Das,* AIR 1985 SC 1384 : (1985) 3 SCC 703; *State of Uttar Pradesh v. Ram Swarup,* AIR 1988 SC 1028 : 1988 Supp SCC 262; *State of U.P. v. Pheru Singh,* AIR 1989 SC 1205 : 1989 Supp (1) SCC 288; *Mahesh v. Delhi,* (1991) Cr LJ 439; *State of U.P. v. Anil Singh,* AIR 1988 SC 1998 : 1988 Supp SCC 686.

79. *Mohinder Singh v. State of Punjab*, AIR 1965 SC 79 : 1965 (1) Cr LJ 112; *Gokul v. State of Rajasthan*, AIR 1972 SC 209 : (1972) 4 SCC 812; *Krishan Lal v. State of Haryana*, AIR 1980 SC 1252 : (1980) 3 SCC 159*; Sheonandan Paswan v. State of Bihar*, AIR 1987 SC 877; *Suresh Chandra Bahri v. State of Bihar*, AIR 1994 SC 2420; *Arjun v. State of Rajasthan*, AIR 1994 SC 2507.

stantial and grave injustice has been done, or there is no evidence to support the findings of fact, or the conclusions of the High Court are manifestly perverse, are based on surmises and conjectures and are unsupportable by evidence, the Supreme Court may go behind the findings of fact arrived at by the courts below.[80]

The Court does not interfere with concurrent findings "unless the findings are vitiated by errors of law, or the conclusions reached by the courts below are so patently opposed to well-established principles as to amount to miscarriage of justice," or where the interest of justice so requires.[81] In *Mathura Prashad v. State of Madhya Pradesh*,[82] the Supreme Court interfered with concurrent findings of fact of the courts below on the ground that the findings "suffer from the vice of perversity".

The Supreme Court does not permit a fresh plea, not raised before any court earlier, to be raised before it in a special appeal. But it may permit a jurisdictional point, or a point of pure law which goes to the root of the case, to be raised before it.[83] In *R.J. Singh v. Delhi*,[84] prosecution of the appellant under the Prevention of Corruption Act was sanctioned by the Ministry of Industrial Development. Under the Business Allocation Rules, it should have been sanctioned by the Home Ministry. The Supreme Court permitted challenge to the validity of the sanction even though it had not been raised earlier. The Court sustained the objection and, consequently, the prosecution failed.

The accused claimed for the first time before the Supreme Court that he was aged below 18 years on the date of occurrence of the offence and so he was entitled to the benefits of the State Children Act.[85] Ordinarily the Supreme Court would not entertain such a fact based new plea. But the Court deviated from this technical rule in the instant case having regard to the underlying intendment and beneficial provisions of the socially progressive statute read with Art. 39(*b*) of the Constitution.[86]

The Supreme Court does not interfere with the sentence passed by the lower courts unless there is an illegality in it, or it is harsh or unjust in the facts and cir-

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80. *Nihal Singh v. State of Punjab*, AIR 1965 SC 26; *Rahim Beg v. State of Uttar Pradesh*, AIR 1973 SC 343; *Balak Ram v. State of U.P.*, AIR 1974 SC 2165; *State of Uttar Pradesh v. Babul Nath*, (1994) 6 SCC 29 : 1994 SCC (Cri) 1585; *Dukhmochan Pandey v. State of Bihar*, (1997) 8 SCC 405; *Meena v. State of Maharashtra*, (2000) 7 SCC 21 : 2000 CrLJ 2273.

81. *Budhsen v. State of Uttar Pradesh*, AIR 1970 SC 1321; *State of U.P. v. Sheo Ram*, AIR 1974 SC 2267; *Dulichand v. Delhi Administration*, AIR 1975 SC 1960; *Rafiq v. State of Uttar Pradesh*, AIR 1981 SC 559; *Indira Kaur v. Sheo Lal Kapoor*, AIR 1988 SC 1074; *Balak Ram v. State of Uttar Pradesh*, AIR 1974 SC 2165; *Lala Ram v. State of Uttar Pradesh*, AIR 1990 SC 1185; *Nain Singh v. State of Uttar Pradesh*, (1991) 2 SCC 432; *Ranbir Yadav v. State of Bihar*, AIR 1995 SC 1219; *Lal Mandi v. State of West Bengal*, AIR 1995 SC 2265; *Ram Sanjiwan Singh v. State of Bihar*, (1996) 8 SCC 552; *S. Gopal Reddy v. State of Andhra Pradesh*, AIR 1996 SC 2184; *Nayudu Srihari v. State of Andhra Pradesh*, (1996) 10 SCC 393; *State of Punjab v. Jugraj Singh*, JT 2002 (2) SC 147 : (2002) 3 SCC 234; *Sukhbir Singh v. State of Haryana*, (2002) 3 SCC 327 : AIR 2002 SC 1168.

82. AIR 1992 SC 49. Also see, *State of Uttar Pradesh v. Dan Singh*, AIR 1997 SC 1654; *Ramanbhai Naranbhai Patel v. State of Gujarat*, (2000) 6 SCC 359 : AIR 2000 SC 2587; *Orsu Venkat Rao v. State of A.P.*, (2004) 13 SCC 243 : AIR 2004 SC 4961.

83. *Sahib Singh Mehra v. State of Uttar Pradesh*, AIR 1965 SC 1451; *Asst. Collector v. N.T.Co. of India*, AIR 1972 SC 2563; *B.C. Goswami v. Delhi Administration*, AIR 1973 SC 1457 : (1974) 3 SCC 85.

84. AIR 1971 SC 1552 : (1970) 3 SCC 451.

85. *Gopinath Ghosh v. State of West Bengal*, AIR 1984 SC 237 : 1984 Supp SCC 228.

86. For Art. 39(b), see, Ch. XXXIV, *infra*.

cumstances of the case, or it is unduly lenient, or it involves any question of principle, or where the High Court does not exercise its discretion judicially on the question of sentence.[87] Although the Court will not ordinarily make an order placing the appellant in a more disadvantageous position had the appeal not been preferred[88] in a criminal appeal by an accused against the sentence imposed by the High Court, the sentence was in fact enhanced.[89]

The Supreme Court does not interfere with the High Court's finding of acquittal unless that finding is clearly unreasonable, or unsatisfactory, or perverse, or manifestly illegal, or grossly unjust, or is vitiated by some glaring infirmity in the appraisal of evidence,[90] or the High Court completely misdirects itself in reversing the order of conviction by the trial court, or it results in gross miscarriage of justice.[91] The fact that another view could also have been taken of the evidence on record would not justify interference with the judgment of acquittal.[92] And though in criminal matters ordinarily the Court does not interfere with concurrent findings of fact but can in an appropriate case it may do so for the ends of justice.[93]

In *Arunachalam v. P.S.R. Setharatnam* ,[94] the Supreme Court considered an important question having a bearing on criminal appeals under Art. 136. A was acquitted of murder charge on appeal by the High Court. The State did not file an appeal against this decision, but the brother of the deceased got leave to appeal to the Supreme Court on appraisal of evidence, the Court set aside the order of acquittal and convicted A. Objections raised on behalf of the accused relating to the maintainability of the special leave petition under Art. 136 were rejected. CHINNAPPA REDDY, J., speaking for the Court laid emphasis on the plenary appellate jurisdiction of the Supreme Court under Art. 136 and observed:

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87. *State of Maharashtra v. M.H. George,* AIR 1965 SC 722 : 1965 (1) SCR 123; *Nathusingh v. State of Madhya Pradesh,* AIR 1973 SC 2783 : (1974) 3 SCC 584; *Kodavandi v. State of Kerala,* AIR 1973 SC 467 : (1973) 3 SCC 469.

88. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai,* (2004) 3 SCC 214, 244 : AIR 2004 SC 1815.

89. *Deo Narain Mandal v. State of UP,* (2004) 7 SCC 257 : AIR 2004 SC 5150. See also *Gir Prasad v. State of UP.,* (2005) 13 SCC 372 : (2006) 2 SCC (Cr) 250.

90. *Deputy Chief Controller v. Kosalram,* AIR 1971 SC 1283; *State of Uttar Pradesh v. Sahai,* AIR 1981 SC 1442 : (1982) 1 SCC 352; *State of U.P. v. Hari Ram,* AIR 1983 SC 1081 : (1983) 4 SCC 453; *Rajesh Kumar v. Dharamvir,* (1997) 4 SCC 496 : 1997 CRLJ 2242; *Satbir v. Surat Singh,* AIR 1997 SC 1160; *State of Uttar Pradesh v. Abdul,* AIR 1997 SC 2512 : (1997) 10 SCC 135; *Anvaruddin v. Shakoor,* AIR 1990 SC 1242 : (1990) 3 SCC 266; *Gauri Shankar Sharma v. State of Uttar Pradesh,* AIR 1990 SC 709 : 1990 Supp SCC 656; *State of U.P. v. Banne,* (2009) 4 SCC 271 : (2009) 3 JT 552. For Art. 39(b), see, Ch. XXXIV, *infra.*

91. *State of Uttar Pradesh v. Ashok Kumar Srivastava,* AIR 1992 SC 840 : (1992) 2 SCC 86; *State of Rajasthan v. Narayan,* AIR 1992 SC 2004 : (1992) 3 SCC 615; *State of Uttar Pradesh v. Anil Singh,* AIR 1988 SC 1998; *Appabhai v. State of Gujarat,* AIR 1988 SC 696.

92. *State of Uttar Pradesh v. Harihar Bux Singh,* AIR 1974 SC 1890 : (1975) 3 SCC 167; *State of U.P. v. Jashoda Nandan Singh,* AIR 1974 SC 753; *Mohan Lal Hargovind Dass v. Ram Narain,* AIR 1980 SC 1743; *State of Andhra Pradesh v. P. Anjaneyulu,* AIR 1982 SC 1598; *Mool Chand v. Jagdish Singh Bedi,* (1993) (2) SCC 714 : 1993 SCC (Cri) 767; *State of Uttar Pradesh v. Dan Singh,* AIR 1997 SC 1654 : (1997) 3 SCC 747; *State of Maharashtra v. Ashok Chotelal Shukla,* AIR 1997 SC 3111; *State of Punjab v. Karnail Singh,* 2003 11 SCC 271 : AIR 2003 SC 3609; *Shri Gopal v. Subhash,* (2004) 13 SCC 174, 180 : AIR 2004 SC 4900.

93. *S.V.L.Murthy v. State represented by CBI, Hyderabad,* (2009) 6 SCC 77.

94. AIR 1979 SC 1284 : (1979) 2 SCC 297.

> "It is now the well established practice of this Court to permit the invocation of the power under Art. 136 only in very exceptional circumstances, as and when a question of law of general public importance arises or a decision shocks the conscience of the Court. But, within the restrictions imposed by itself, this Court has undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal or conviction, if the High Court, in arriving at those findings, has acted "perversely or otherwise improperly".

Of special significance are the observations of the Court on the question whether a private party, distinguished from the state, could invoke the Court's jurisdiction under Art. 136. The Court observed on this point:

> "Appellate power vested in the Supreme Court under Art. 136 of the Constitution is not to be confused with ordinary appellate power exercised by appellate courts and appellate tribunals under specific statutes…. It is a plenary power 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice… Art. 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of the Supreme Court or inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it."

Therefore A moved a petition in the Supreme Court challenging the constitutional validity of these proceedings *vis-a-vis* Art. 21. In *P.S.R. Sadhanantham v. Arunachalam,*[1] the main question to consider was: Did the brother of the deceased have *locus standi* to file the appeal? The Supreme Court refused to hold that the brother of the deceased could be regarded as an "officious meddler" who had no business nor grievance when the commission of a grievous crime was going unpunished. Art. 136 is a "special jurisdiction"; it is a "residuary power" "extraordinary in its amplitude". The Court advocated a liberalisation of the traditional, narrow, rule of *locus standi*.

This case establishes the position that the powers of the Supreme Court in appeals under Art. 136 are not restricted by the appellate provisions contained in the Criminal Procedure Code, or any other statute. When exercising appellate jurisdiction, the Supreme Court has power to pass any order.[2]

The power has also been utilized *suo motu* to direct retrial and to transfer criminal trials outside a State [3]to transfer proceedings pending before the High Court to itself;[4]to transfer an undertrial prisoner to another jail;[5]to direct an enquiry by the Registrar General of the Supreme Court to assess whether a witness had been coerced into giving contradictory evidence and if so who coerced her.[6]While allowing the appeal of an accused, an order of acquittal was recorded in favour of a non- appealing co-accused[7] and in respect of a co-accused whose

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1. AIR 1980 SC 856 : (1980) 3 SCC 141.
2. *Delhi Judicial Service Association v. State of Gujarat,* (1991) 4 SCC 2176 : (1991) 4 SCC 406; *Chandrakant Patil v. State,* AIR 1998 SC 1165 : (1998) 3 SCC 38.
3. *Zahira Habibullah Sheikh v. State of Gujarat,* (2004) 4 SCC 158 : AIR 2004 SC 3114.
4. *Kalyan Chandra Sarkar v. Rajesh Ranjan,* (2005) 1 SCC 801 : 2005 SC (Cr) 449.
5. *Ibid.*
6. *Zahira Habibullah Sheikh v. State of Gujarat,* (2005) 4 SCC 292 : 2005 SCC (Cr) 931.
7. *Gurucharan Kumar v. State of Rajasthan,* (2003) 2 SCC 698; *Pawan Kumar v. State of Haryana,* (2003) 11 SCC 241 : AIR 2003 SC 2987*; Anjlus Dungdung v. State of Jharkhand,* (2005) 9 SCC 765 : AIR 2005 SC 1394.

special leave petition had been dismissed[8] and the sentence imposed had been undergone.[9]

E. APPEALS FROM TRIBUNALS UNDER ART. 136

An outstanding feature of Article 136(1) is that it empowers the Supreme Court to hear appeals not only from courts but also from tribunals in any cause or matter.

In the modern era of 'social welfare' state, there is a vast extension in governmental operations, activities and responsibilities so much so that it is known as the administrative age. Many functions undertaken by a modern government give rise to opportunities for adjudication and, thus, India along with other democratic countries has come to have a host of varied adjudicatory bodies outside the regular judicial hierarchy.[10]

Though the Indian Constitution makes provisions for a well-ordered and well-regulated judicial system, yet it will be wrong to assume that the courts monopolise the entire business of adjudication. Side by side with the courts, a plethora of bodies and officials also carry on adjudicatory functions under powers conferred on them by legislation and determine innumerable classes of applications, claims and controversies between the administration and individuals, or between the individuals themselves. Most of these adjudicatory bodies are characterised as "*quasi-judicial*", indicating thereby that these are not courts "pure and simple", butpartake of some features of both courts as well as the administration. '*Quasi-judicial*' indicates a process which is both judicial as well as administrative at one and the same time.[11]

In this context, the use of the word 'tribunal' in Article 136 assumes a special significance, for it indicates that the Supreme Court can hear appeals from the decisions of such bodies as may not be courts in the traditional sense. The word 'tribunal' has been used in Art. 136 in contradistinction to 'courts'. While all courts are tribunals, all tribunals are not courts. As innumerable adjudicatory bodies function outside the judicial hierarchy, it is extremely desirable that there be some forum to correct any misuse of power or procedural irregularities committed by such bodies. This function is now discharged by the Supreme Court under Article 136. To leave these innumerable adjudicatory bodies outside the pale of any judicial control would be to create innumerable little despots which could misuse their powers, or exercise them improperly, and thus negate the concept of Rule of Law.

The statutes creating these bodies may at times provide for some form of judicial control over them, but many a time, the statutes provide for no such control; on the other hand, some statutes even go to the extent of declaring decisions by these bodies "final," thus barring a recourse to courts, under ordinary legal processes, by an individual suffering from a sense of grievance against a decision of

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8. *Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra,* (2003) 2 SCC 708 : 2005 SCC (Cr) 931.

9. *Lella Srinivasa Rao v. State of A.P.,* (2004) 9 SCC 713, 719 : AIR 2004 SC 1720.

10. On Administrative Adjudication, see, JAIN, *TREATISE ON ADMINISTRATIVE LAW, I,* Ch. XIV; JAIN, *CASES AND MATERIALS ON INDIAN ADMN. LAW, II,* Ch. XIII.

11. For discussion on the Tribunal system in India, see, JAIN, *A TREATISE ON ADMN. LAW,* I, Ch. XIII; JAIN, *INDIAN ADMN. LAW—CASES AND MATERIALS,* II, Chs. XII.

such an adjudicatory body. The great merit of Article 136 is that, irrespective of any statutory provision to the contrary, the Supreme Court can control these adjudicatory bodies by hearing appeals from their decisions and pronouncements. Without some kind of judicial control there is a danger that tribunals might degenerate into arbitrary bodies, which would be foreign to a democratic constitution. This is the heart of the matter and the reason why the Supreme Court should exercise jurisdiction over tribunals.

(a) WHAT IS A TRIBUNAL?

Regarding the exercise of the Supreme Court's jurisdiction over tribunals, the first relevant question to answer is : what is a 'tribunal'?

Whether a body would be deemed to be a 'tribunal' or not under Art. 136, is a question full of difficulties. Definitive norms have not yet been laid down to answer the same with certainty, and the result has not always been rational. As for example, the Central Board of Revenue exercising appellate power under s. 190, and the Central Government exercising power under s. 191 of the Sea Customs Act have been held to be tribunals, but not the customs officers even though they also exercise some judicial powers.[12]

First and foremost, for a body to be a tribunal it should be a *quasi*-judicial body, exercising some judicial function. This in itself is quite a difficult question to answer and a full discussion on it can be had more properly under Administrative law.[13]

No body which is purely administrative or executive or legislative in nature without exercising any judicial functions would fall under the purview of Art. 136.[14]

For a body to fall under the purview of Art. 136, it does not have to be a fullfledged court; it is sufficient if it exercises *quasi*-judicial functions.[15] But then, while most of the *quasi*-judicial bodies may be held to be tribunals, it is not necessary that each and every such body may be so characterised.

The very first case which came before the Supreme Court calling for characterization of the term 'tribunal' in Art. 136 was *Bharat Bank v. Employees of Bharat Bank*.[16] The question which arose before the Supreme Court in the instant case was whether the Supreme Court could entertain an appeal under Art. 136 against an award of an industrial tribunal.

MUKHERJEA, J., who was in the minority expressed a negative view on this question. He took the view that the tribunal's function was merely an extended form of the process of collective bargaining and was more akin to administrative rather than to judicial functions. In his view, therefore, the Supreme Court could not grant special leave to appeal from an award of an industrial tribunal. On the other hand, the majority took an affirmative view. The majority view was that

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12. *Indo-China Steam Navigation v. Jasjit Singh,* AIR 1964 SC 1140 : (1964) 6 SCR 594.

13. JAIN, *A TREATISE ON ADMN. LAW*, I, Ch. IX; JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW*, I, Ch. VIII. Also, *infra,* Ch. VIII under "*Certiorari*".

14. *Bharat Bank v. Employees of Bharat Bank, supra; Express Newspapers v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12.

15. *B.K. Bhandar v. Dhamangaon Manicipality*, AIR 1966 SC 249 : 1965 (3) SCR 499; *Chandrika v. Bhaiyalal,* AIR 1973 SC 2391 : (1973) 2 SCC 474.

16. AIR 1950 SC 188 : 1950 SCR 459.

while the tribunal was not a court, its functions and duties, nevertheless, were of the same nature as those of a body discharging judicial functions. According to the tribunal rules, evidence is taken, witnesses are examined, cross-examined and re-examined.

According to MAHAJAN, J., the industrial tribunal has all the necessary attributes of a court of justice. It discharges no other function except that of adjudicating a dispute. Such a tribunal could be characterised as a *quasi*-judicial body because it is outside the regular judicial hierarchy. Nevertheless, it discharges functions which are basically judicial in nature. Accordingly, it was held that the Supreme Court could grant special leave to appeal under Art. 136 against an award of an industrial tribunal.

The Supreme Court observed in *Bharat Bank*:[17]

> "The intention of the Constitution by the use of the word 'tribunal' in the article seems to have been to include within the scope of Article 136 tribunals adorned with similar trappings as court but strictly not coming within that definition."

This was an epoch-making decision as it gave an expansive orientation to Art. 136 and at the same time brought the vast net-work of *quasi*-judicial bodies under judicial control which would promote Rule of Law in the country. It clarified that the expression "tribunal" as used in Art. 136 does not mean a court, but includes within its ambit all adjudicatory bodies, provided they are constituted by the state and are invested with judicial, as distinguished from purely administrative or executive, functions.

In *Jaswant Sugar Mills v. Lakshmi Chand*,[18] a conciliation officer acting under the Industrial Disputes Act, 1950, while granting or refusing permission to alter the terms of employment of the workmen at the instance of the employer, was held to be not a tribunal, although he acts in a *quasi*-judicial capacity in the matter. To be a tribunal, a body, besides being under a duty to act judicially, should be one which has been constituted by, and invested with a part of the judicial function of, the state. An order passed by the Chief Justice of the High Court at Allahabad transferring case from the Lucknow Bench to the Allahabad Bench was held to be a judicial order passed by a tribunal justifying interference under Art. 136.[19]

In deciding whether an authority acting judicially and dealing with the right of the citizens is a tribunal or not, the principal incident is the investiture of the 'trappings of a court', such as, authority to determine matters in cases initiated by parties, sitting in public, power to compel attendance of witnesses and to examine them on oath, duty to follow fundamental rules of evidence (though not the strict rules of the Evidence Act), provision for imposing sanctions by way of imprisonment, fine, damages, or mandatory or prohibitory orders to enforce obedience to their commands. The list is illustrative; some, though not necessarily all such trappings, will ordinarily make the authority which is under a duty to act judicially, a 'tribunal'.

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17. AIR 1950 SC 188, 195 : 1950 SCR 459.
18. AIR 1963 SC 677 : 1963 Supp (1) SCR 242.
19. *Manju Varma (Dr.) v. State of U.P.*, (2005) 1 SCC 73 : (2004) 9 JT 569.

As regards the conciliation officer, no procedure is prescribed for the investigation to be made by him; he is not required to sit in public; no formal pleadings are tendered; he is not empowered to compel attendance of witnesses. He does not deliver a determinative judgment or makes an award affecting the rights and obligations of the parties. He is not constituted to adjudicate on industrial disputes. His order merely removes a statutory ban in certain eventualities laid upon the common law right of an employer to dismiss, discharge or alter the terms of employment according to contract between the parties. Thus, not invested with the judicial power of the state, a conciliation officer cannot be regarded as a 'tribunal'.

Similarly, the Court refused to hear an appeal from an arbitrator appointed under s. 10A of the Industrial Disputes Act. He has been held not to be a tribunal because he lacks the basic, the essential, the fundamental requisite of being a tribunal, *viz*., of being invested with the inherent judicial power of the state. The appointment of an arbitrator is based on the agreement of the parties concerned and he is, thus, a nominee not of the state but of private parties. To be a tribunal, the power of adjudication must be derived from a statute or statutory rule and not from an agreement of parties.[20]

Following *Jaswant Sugar*, the Supreme Court has ruled in *Meenakshi*,[21] that the appropriate Government or authority while granting or refusing permission for retrenchment of workmen under section 25-N of the Industrial Disputes Act, 1947, is not a tribunal. The power of the Government is not very different from that of a conciliation officer. The Court has also ruled that the decision taken by the Government under section 25-N permitting retrenchment of workers is not final as it could lead to an industrial dispute.

Whether a body is a 'tribunal' or not can be decided by applying several tests:

(i) it should not be an 'administrative' body pure and simple, but a '*quasi*-judicial' body as well;
(ii) it should be under an obligation to act 'judicially';
(iii) it should have some 'trappings of a court';
(iv) it should be constituted by the state;
(v) the state should confer on it its inherent judicial power, *i.e*., power to adjudicate upon disputes.

These criteria are not exhaustive but 'illustrative'. A body does not have to fulfil all these criteria to be characterised as a tribunal. How much of each of these criteria should a body possess before being characterised as a 'tribunal' has been left vague and indefinite.

The fact is that many of the statements made by the Supreme Court in the two cases, *viz. Jaswant Sugar Mills* and *Hind Cycles*, describing the characteristics of a tribunal are tautological and circular, and some of the tests are overlapping, or of not much substance. For example, to insist that a body should not be 'administrative' but '*quasi*-judicial' and, further, to insist that it should have inherent judicial power of the state, appear to be tautological, for how can a body be 'judicial' or '*quasi*-judicial' without having the state's judicial power. The fact that

20. *Engineering Mazdoor Sabha v. Hind Cycles*, AIR 1963 SC 874 : 1963 Supp (1) SCR 625.
21. *Workmen of Meenakshi Mills Ltd. v. Meenakshi Mills Ltd.*, AIR 1994 SC 2696, 2717 : (1992) 3 SCC 336.

a body is *quasi*-judicial and thus adjudicates upon disputes shows that it has some inherent judicial power. Similarly, to lay too much emphasis on 'trappings of a court' to judge whether a body has judicial power or not is to make external forms, rather than intrinsic nature of its function, determinative of the nature of the body.

In many cases cited above, *e.g*., *Hari Nagar Sugar Mills* and *Indo-China Steam Navigation*, the Central Government, or the Board of Revenue have been held to be 'tribunals' even though these bodies hardly exhibit any trappings of a court. And, in many cases, the Court has first decided whether the body is '*quasi*-judicial' or not, and then proceeded to see whether it has followed principles of 'natural justice' or not.[22]

It is common knowledge that statutes create adjudicatory bodies without prescribing the procedure they have to follow and, in such cases, courts insist that these bodies follow natural justice which guarantees the minimal basic features of a judicial procedure. There is thus no need to insist, nor has it been done invariably in every case, that a body should follow a more elaborate procedure than natural justice to be called a tribunal.

Insisting too much on external features would result in a large number of adjudicative bodies becoming free from judicial review, resulting in a negation of the Rule of Law on which the Court itself has laid so much emphasis from time to time. Perhaps, it may be more rational and simpler to put the matter in a different perspective.

What the Court appears to be saying in substance in the *Jaswant Sugar Mills* case, shorn of all verbiage, is that a conciliation officer, although he follows a *quasi*-judicial procedure of hearing the parties, *etc*., before he makes some orders, is not actually performing an adjudicatory function, as he does not seek to decide on the rights and wrongs of a labour-management controversy. What he seeks to do is to bring the contesting parties together and iron out differences between them by the process of persuasion and negotiation. This implies that even though he acts in a non-partisan and impartial manner, and in some matters after hearing the parties concerned, in the totality of his functioning he is only seeking to promote a compromise between the parties and is not himself engaged in adjudication upon the dispute.

A distinction can certainly be drawn between a *quasi*-judicial adjudicatory body and one which, though following a *quasi*-judicial procedure, is non-adjudicatroy in nature. Looked at from this angle, *Jaswant Sugar Mills* case raises no difficulty.

As regards *Hind Cycles*, this author had said in a previous edition:[23]

> The ruling in the *Hind Cycles* case is somewhat difficult to support on logical grounds, apart from policy considerations (which the Court might have had), of discouraging questions of labour-management relations from coming to it very often. Essentially, an arbitrator under s. 10A of the Industrial Disputes Act, derives his powers from the state-made statute, performs the same task as an industrial tribunal, *viz*., that of adjudication (and not reconciliation), follows a *quasi*-judicial procedure and gives a binding and enforceable award. He does

22. *Siemens Eng. & Mfg. Co. v. Union of India*, AIR 1976 SC 1785 : (1976) 2 SCC 981.
23. JAIN, *INDIAN CONSTITUTIONAL LAW*, 138 (1987).

> not fundamentally differ from a labour tribunal, and the parties only decide as to 'who' should act as an arbitrator and on what matter would he adjudicate and for the rest he functions within the four walls of the Act. The Court has itself accepted that his position is higher than that of an ordinary arbitrator under the Arbitration Act. All these attributes are, therefore, sufficient to make him a tribunal.

Since then, in *Gujarat Steel Tubes Ltd. v. Its Mazdoor Union*,[24] the Supreme Court has held that an arbitrator appointed under s. 10A of the I.D.A can be regarded as a 'tribunal' for purposes of s. 11A of the same Act. The Court has said that the arbitrator under s. 10A has power to bind even those who are not parties to the reference and the source of the force of the arbitrator's award derives from the parent statute. This ruling makes it possible to hold that such an arbitrator is a 'tribunal' for the purposes of Art. 136 as well.[25] Perhaps, one can say that *Hind Cycles* is no longer tenable in view of *Gujarat Steel*.

In the previous edition, this author had suggested:[26]

> It is, however, suggested that it would be simpler if the Court generally adopts the rule that it would hear appeals under Art. 136 from *quasi*-judicial bodies. Being a discretionary jurisdiction, the Court may refuse to grant leave to appeal in cases which raise no important issue, or may confine the appeal to such points as in its view need its thoughtful pronouncements. To draw a distinction between *quasi*-judicial bodies and tribunals, and that, too, by applying vague criteria, is only to make an already complicated law all the more difficult and uncertain.

The Supreme Court has now come very close to this position. Under Art. 324 of the Constitution read with the Election Symbols (Reservation and Allotment) Order, 1968, the Election Commission has power to adjudicate upon disputes with regard to recognition of political parties, or rival claims to a particular symbol for purposes of election. In *A.P.H.L. Conference, Shillong v. W.A. Sangma*,[27] the Supreme Court had to decide the question concerning the character of the Election Commission while adjudicating upon the dispute with regard to the recognition of political parties or rival claims to a particular symbol for purposes of election. The question was whether the Supreme Court could hear an appeal from the Election Commission while adjudicating upon such a dispute, which raised the question whether the Commission could be regarded as a 'tribunal' for purposes of Art. 136?

The Court answering in the affirmative pointed out that in previous decisions, several tests have been laid down to determine whether a particular body is a 'tribunal' or not for purposes of Art. 136. These tests are not exhaustive in all cases and not all these tests need be present in a given case. While some tests may be present others may be lacking. For a body to be a 'tribunal' it is absolutely necessary that it must be "constituted by the state" and it must be "invested" with "ju-

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24. AIR 1980 SC 1896 : (1980) 2 SCC 593.

25. This appears to be implicit in *Royal Education Society v. LIS (India) Construction Co. (P.) Ltd.*, (2009) 2 SCC 261 : AIR 2009 SC 1650 in which an award of an Arbitral Tribunal was modified.

26. JAIN, *INDIAN CONSTITUTIONAL LAW*, 138 (1987).

27. AIR 1977 SC 2155 : (1977) 4 SCC 161.

dicial as distinguished from purely administrative or executive functions". This is an 'unfailing' test. According to the Court:[28]

> The principal test which must necessarily be present in determining the character of the authority as tribunal is whether that authority is empowered to exercise any adjudicating power of the state and whether the same has been conferred on it by any statute or a statutory rule.

The Court found that this test is fulfilled when the Election Commission is required to adjudicate a dispute between two parties. The Commission exercises a part of the State's judicial power which is conferred on it through Art. 324 and the rules made thereunder. In deciding this dispute, the Commission exercises a judicial function and has a duty to act judicially. Hence the Election Commission is a 'tribunal' while acting as such. Although the Commission has various administrative functions to discharge, but that does not mean that while adjudicating upon a dispute it does not exercise a judicial power conferred on it by the state.

It is not necessary for a body that the only function discharged by it ought to be adjudicatory before it can be characterised as a tribunal. A body may be regarded as administrative for certain purposes but *quasi*-judicial for other purposes. The question needs to be determined keeping in view the exercise of power with reference to the particular subject-matter although in some other matters the exercise of functions may be of a different kind. The Commission is created by the Constitution and is invested by law with not only administrative powers but also with certain judicial power of the state, however, fractional the same may be.[29]

The Supreme Court has held in *Income-tax Commissioner, Calcutta v. B.N. Bhattacharya*,[30] that the Settlement Commission established under the Income-tax Act is a 'tribunal' for the purpose of Art. 136. Its proceedings have been declared to be judicial as the Commission has considerable powers and its determinations affect the rights of the parties; its obligations are *quasi*-judicial. "When a body is created by statute and clothed with authority to determine rights and duties of partics and to impose pains and penalties on them it satisfies the test laid down in *Associated Cement Co.* case."[31]

Under Art. 136, the Supreme Court has heard appeals, among others, from the following adjudicatory bodies holding them to be tribunals:

(1) Industrial Tribunal functioning under the Labour Disputes Act, 1947;[32]

(2) Central Administrative Tribunal;[33]

(3) Election Commission and election tribunals;[34]

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28. *Ibid*, at 2163.

29. For Election Commission, see, Ch. XIX, *infra.*
The main function of the Commission is to organise and supervise elections in the country which basically is an administrative function.

30. AIR 1979 SC 1724 : (1980) 3 SCC 54.

31. *A.C. Companies v. P.N. Sharma*, AIR 1965 SC 1595 : 1965 (2) SCR 366; see, footnote 44, *infra.*

32. *Bharat Bank v. Employees of Bharat Bank*, AIR 1950 SC 188 : 1950 SCR 459; *J.K. Iron and Steel Co. v. Mazdoor Union*, AIR 1956 SC 231 : 1955 (2) SCR 1315.

33. *CSIR v. K.G.S. Bhatt*, (1989) 4 SCC 635 : AIR 1989 SC 1972.

34. *Durga Shankar v. Raghu Raj Singh*, AIR 1954 SC 520 : 1955 (1) SCR 267.

(4) Railway Rates Tribunal;[35]

(5) Income-tax Appellate Tribunal[36] and Settlement Commission;[37]

(6) Custodian General acting under s. 27 of the Administration of Evacuee Property Act;[38]

(7) Authority under the Payment of Wages Act;[39]

(8) Central Government acting under section 111(3) of the Companies Act, 1956, while deciding a dispute regarding registration of shares between a company and the person who has purchased these shares;[40]

(9) Central Government exercising powers of revision under s. 30 of the Mines and Minerals (Regulation & Development) Act, 1957.[41]

(10) Central Government hearing appeals in customs matters;[42]

(11) State Government engaged in revisional proceedings under s. 7(F) of the U.P. (Temporary) Control of Rent and Eviction Act;[43]

(12) State Government acting under Rule 6(6) of the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952, issued under the Factories Act, 1948;[44]

(13) Board of Revenue, Rajasthan.[45]

It can be seen from the above list that the Supreme Court has held that even the government while exercising adjudicatory powers under various statutes may be treated as a 'tribunal' and appeals heard therefrom.

At this stage, it is necessary to clarify one point. In Administrative Law, the term 'tribunal' is usually used for an adjudicatory body which is autonomous and independent of the Administration.[46]

But the significance attached to 'tribunal' in Art. 136 is much broader a concept as autonomy of the adjudictory body from the Administration is never an issue under Art. 136. This is evidenced by the fact that even the government acting in an adjudicatory capacity has been held to be a tribunal for purposes of Art. 136.

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35. *Raigarh Jute Mills v. Eastern Railway,* AIR 1958 SC 525 : 1959 SCR 236; *S.S. Light Railway Co. v. U.D. Sugar Mills Ltd.,* AIR 1960 SC 695 : 1960 (2) SCR 926.
36. *Dhakeswari Cotton Mills Ltd. v. Commr. of Income-tax,* AIR 1955 SC 65 : 1955 (1) SCR 941; *Sovachand v. Commr., Income-tax,* AIR 1959 SC 59.
37. *CIT v. Bhattacharjee,* AIR 1979 SC 1725 : (1979) 4 SCC 121.
38. *Indira Sohan Lal v. Custodian,* AIR 1956 SC 76; *Purshotamlal v. Chamanlal,* AIR 1961 SC 1371 : 1962 (1) SCR 297; *Bishambhar Nath Kohli v. State of Uttar Pradesh,* AIR 1966 SC 573 : 1966 (2) SCR 158.
39. *Works Manager v. C.M. Pradhan,* AIR 1959 SC 1226 : 1960 (1) SCR 137.
40. *Harinagar Sugar Mills v. Shyam Sunder Jhunjhunwala,* AIR 1961 SC 1669 : 1962 (2) SCR 339.
41. *M.P. Industries Ltd. v. State of India,* AIR 1966 SC 671; *Shivji Nathubhai v. State of India,* AIR 1960 SC 606 : 1960 (2) SCR 775.
42. *Dunlop India Ltd. v. Union of India,* AIR 1977 SC 597; *Ahura Chemical Products v. Union of India,* AIR 1981 SC 1782 : (1981) 4 SCC 277.
43. *Shri Bhagwan v. Ram Chand,* AIR 1965 SC 1767 : 1965 (3) SCR 218.
44. *A.C. Companies v. P.N. Sharma,* AIR 1965 SC 1595 : 1965 (2) SCR 366.
45. *Delhi Cloth & General Mills v. State of Rajasthan,* AIR 1980 SC 1552 : (1980) 4 SCC 71.
46. See, footnote 13, cited on p. 338, *supra.*

The Speaker acting under the X Schedule to the Constitution (known as the Anti-Defection Law),[47] deciding a question of disqualification of a member of the Legislature arising as a result of his defection has been held to be a 'tribunal'.[48] But the Inquiry Committee under the Judges (Inquiry) Act[49] cannot be treated as a tribunal for the purposes of Art. 136 because the report of the Committee finding a Judge guilty of misbehaviour is merely in the nature of recommendation for his removal which may or may not be acted upon by Parliament. As the Committee's report holding that the Judge is guilty of any misbehaviour is not "final and conclusive", "it is legally not permissible to hold that the Committee is a tribunal under Art. 136." It is true that the Committee is to act judicially while investigating into the charges framed against the Judge. But its report is in the nature of a recommendation on which further action may or may not be taken by Parliament.[50]

The Court has maintained that one of the considerations to hold a statutory body as a tribunal under Art. 136 is 'finality' or 'conclusiveness' and the "binding nature of the determination by such authority".

On this basis, as discussed earlier, the committee appointed by the Speaker of the Lok Sabha/Chairman of the Rajya Sabha to inquire into the conduct of a Supreme Court Judge is not a tribunal for purposes of Art. 136.

The district judge has power to take disciplinary action against ministerial servants. It has been held that the High Court while exercising appellate power from the district judge does not act as a 'tribunal', but acts purely administratively since it does not resolve any dispute or controversy between two adversaries; it only exercises its power of control over the subordinate judiciary.[51] The Supreme Court has observed:

> "In certain matters even Judges have to act administratively and in so doing may have to act *quasi*-judicially in dealing with the matters entrusted to them. It is only where the authorities are required to act judicially either by express provisions of the statute or by necessary implication that the decision of such an authority would amount to a *quasi*-judicial proceeding. When Judges in exercise of their administrative functions decide cases it cannot be said that their decisions are either judicial or *quasi*-judicial decisions.... In the appeal before the High Court, the High Court was following its own procedure, a procedure not normally followed in judicial matters. The High Court was not resolving any dispute or controversy between two adversaries. In other words, while deciding this appeal there was no lis before the High Court. The High Court was only exercising its power of control while deciding this appeal...."[52]

It is submitted that the above observation is based on some confusion of ideas. According to the principles of Administrative Law, an administrative function discharged according to the principles of natural justice is characterised as *quasi*-judicial. There are many bodies which though do not decide any 'lis' yet act according to natural justice and are thus characterised as *quasi*-judicial. The High Court in hearing an appeal from district judge in disciplinary proceedings may

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47. *Supra*, Ch. II.
48. *Kihota Hollohon v. Zachilhu,* AIR 1993 SC 412 : 1992 Supp (2) SCC 651.
49. *Supra*, Sec. B
50. *Sarojini Ramaswami v. Union of India,* AIR 1992 SC 2218, 2248 : 1991 Supp (2) SCC 723; *supra*, Sec. B.
51. *Infra*, Ch. VIII, sec. F.
52. *Dev Singh v. Registrar, Punjab & Haryana High Court,* AIR 1987 SC 1629 : (1987) 3 SCC 169.

not follow the provisions of the Civil Procedure Code, but it still has to follow natural justice.[53] There are any number of judicial pronouncements in which disciplinary proceedings against students, employees, government servants have been held to be *quasi*-judicial. Many bodies held to be tribunals (see the list above) do not decide any 'lis'. On this view, there is no reason why the district judge as well as the High Court in the above situation cannot be regarded as tribunals for purposes of Art. 136.

In contrast to the above, reference may be made to *Commissioner of Police v. Registrar, Delhi High Court*,[54] where the Supreme Court heard an appeal from a decision of the Administrative Committee of the Delhi High Court. The factual matrix in which the case arose was as follows: former Prime Minister Narasimha Rao was summoned to appear before a criminal court on a charge of bribing a few members of Parliament.[55] Narasimha Rao being entitled to proximate security under the Special Protection Group Act, 1988, the Commissioner of Police, Delhi, and the Director of the Special Protection Group applied to the Delhi High Court for permission to shift the venue of the trial from the Tis Hazari Complex to some other safe place in Delhi for security reasons. The Administrative Committee of five Judges of the High Court refused to concede the point. An appeal was then filed before the Supreme Court under Art. 136 read with Art. 142. The Court accepted the request of the Commissioner and quashed the decision of the High Court. Rejecting the objection that the kind of order passed by the Administrative Committee of the High Court being an administrative order, was not amenable to the Supreme Court's Jurisdiction under Art. 136,[56] the Court observed that its jurisdiction under Art. 136 "is plenary in nature and this Court can determine its own jurisdiction and its effort in that regard would be final." The Court also justified hearing the appeal in the instant case by stating that the appeal was filed not only under Art. 136 but under Art. 142 as well.

The case is an exception to the rule as here an acknowledged administrative decision has been held subject to an appeal to the Supreme Court under Art. 136. It is difficult to envisage what impact is this pronouncement going to have on the future growth of case-law in India under Art. 136. Will this case be treated, because of the delicacy of the matter involved, as a one time exception to the general rule that under Art. 136, the Supreme Court hears appeals only from *quasi*-judicial decisions, or will its lead to a relaxation of this rule, and give a new dimension to Art. 136 in the near future.

Then, the relevance of Art. 142 in this connection is not very clear. Art. 142 does not confer any additional appellate jurisdiction on the Supreme Court as such. Art. 142 enables the Court to make an order to do complete justice in the matter it is hearing in exercise of its jurisdiction. Art. 142 does not seem to expand the jurisdiction of the Supreme Court. It does however enhance the power of the Court to give relief in a matter it is deciding. This means that the matter in question should otherwise fall within its jurisdiction.[57]

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53. JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, Chs. IX, XIII; JAIN, *CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW*, Chs. VIII, XII.

54. AIR 1997 SC 95.

55. See, Ch. II, *supra*, under "Parliamentary Privileges", Sec. L.

56. Reference was made in this connection to *Dev Singh v. Registrar, P&H High Court*, *supra*, footnote 52.

57. For discussion on Art. 142, see, *infra*, Sec. G.

Although the earlier view was that an order passed by the Chief Justice nominating an arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 was not appealable because the Chief Justice does not act as a tribunal[58], it has now been held that an order passed by the Chief Justice appointing an arbitrator is a judicial order[59] and hence is appealable[60].

(b) EXHAUSTION OF ALTERNATIVE REMEDIES

Another limitation imposed by the Supreme Court on itself is that it does not usually entertain appeals against an order of a tribunal unless the appellant has exhausted the alternative remedies provided by the relevant law. As for example, the Court has discouraged the practice, at times resorted to by the appellants, of seeking to move the Supreme Court straightaway from the tax tribunal without first taking recourse to the available technique of the tribunal making a reference to the High Court.[61]

The Court has imposed this restriction in view of the heavy rush of cases.

The rule of exhaustion of remedies, however, is not inflexible or rigid as it is a self-imposed restriction. This means that the Supreme Court may relax it if special circumstances are present.[62] Some examples of relaxation of this rule are given below:

(i) The Supreme Court heard an appeal from the C.T.O.'s order, without the appellant exhausting all his remedies. In the instant case, the C.T.O. instead of exercising his own judgment in the matter of assessment, followed, even against his own judgment, the instructions given to him by his superior officer. The assessee had not been given an opportunity to meet the point made against him by the superior officer. The assessment was thus made behind the assessee's back and there was thus breach of natural justice.[63]

(ii) The Supreme Court heard an appeal from the Income-tax Tribunal's order as there was breach of natural justice and the tribunal had refused to state a case to the High Court; the High Court had also refused to ask the tribunal to state a case to it.[64]

(iii) The Court heard an appeal from the Income-tax tribunal as the assessee had lost his remedy of reference to the High Court from the tribunal by one day's delay without his fault.[65]

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58. *Konkan Railway Corporation Lit. v. Rani constructions Pvt. Ltd.*, (2002) 2 SCC 388 : AIR 2002 SC 778.

59. *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618 : AIR 2006 SC 450.

60. *Jain Studios Ltd. v. Shin Satellite Public Co Ltd.*, (2006) 5 SCC 501 : AIR 2006 SC 2686; See also *Punjab Agro Industries Corpn. Ltd. v. Kewal Singh Dhillon*, (2008) 10 SCC 128, at page 132 : (2008) 9 JT 256.

61. *Ballabhdas v. State of Bihar*, AIR 1966 SC 814 : 1962 Supp (2) SCR 967; *C.I.T. v. K.W. Trust*, AIR 1967 SC 844 : 1967 (2) SCR 7.

62. *Bal Ram Prasad Rawat v. State of Uttar Pradesh*, AIR 1981 SC 1575 : (1981) 3 SCC 249; *S.G. Chemicals & Dyes Trading Employees' Union v. S.G. Chemicals & Dyes Trading Ltd*., (1986) 2 SCC 624 : 1986 (2) SCR 126; *M.V. "Vali Pero" v. Fernandeo Lopez*, AIR 1989 SC 2206 : (1989) 4 SCC 671.

63. *Mahadayal Premchandra v. C.T.O.*, AIR 1958 SC 667 : 1959 SCR 551.

64. *Dhakeshwari Mills'* case, AIR 1955 SC 65 : 1955 (1) SCR 941.

65. *Baldeo Singh v. C.I.T.*, AIR 1961 SC 736. Also, *C.I.T. v. National Finance*, AIR 1963 SC 835 : 1962 Supp (2) SCR 865.

(iv) The Supreme Court heard an appeal directly from the order of the Collector of Customs, without exhausting the statutory remedies available, as it raised some important points of law.[66]

(v) The Supreme Court granted special leave to appeal from the order of the Asst. Sales Tax Commissioner, without exhaustion of the remedies under the law. It would have been futile for the assessee to go to the High Court as on the point in issue it had already given a ruling in another case which was adverse to the assessee. The Supreme Court felt that it was one of those extraordinary cases where ends of justice would be better served by granting appeal and thus avoid a circuitry of action.[67]

(vi) It is not mandatory for an appellant under Art. 136 to have exhausted the remedy under Art. 226, the reason being that the High Court's jurisdiction under Art. 226 is discretionary and its scope is rather limited and so an appeal under Art. 136 cannot be thrown out on the ground that the appellant did not exhaust Art. 226.[68]

(vii) In the case mentioned below,[69] the Supreme Court heard an appeal directly against an assessment order made by the commercial tax officer without the assessee exhausting departmental remedies and the procedure by way of writ petition under Arts. 226 and 227.[70] The reason was that in another case, the High Court had already decided the law point against the assessee and there was, therefore, no point in again bringing the same law point before the High Court.

(c) GROUNDS FOR APPEAL

On what grounds does the Supreme Court hear appeals from the tribunals?

The matter has been considered by the Court in a large number of cases. While some general guidelines have been laid down in this connection, there emerges no specific general formula pertaining to it.

Art. 136(1) empowers the Supreme Court to grant special leave to appeal in its discretion. The provision is couched in very wide terms. The constitutional provision lays down no norms to regulate Court's discretion in the matter of hearing appeals. The Supreme Court's approach has been conditioned by two main considerations, *viz.*:

(*i*) the Court's power under Art. 136 is extraordinary and discretionary and should, therefore, be used in exceptional circumstances; and,

(*ii*) this power should be exercised whenever there is a miscarriage of justice.

Though wide and undefinable with exactitude is the power of the Court under Art. 136, yet the pre-requisites or its interference to set right the decisions of tribunals can generally be categorised as follows:

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66. *Indo-China Steam Navigation Co. v. Jasjit*, AIR 1964 SC 1140 : 1964 (6) SCR 594.
67. *Lakshmi Rattan Engg. Works v. Asst. Commr*., (1968) II SCJ 1.
68. *Master Construction Co. v. State of Orissa*, AIR 1966 SC 1047 : 1966 (3) SCR 99; *P.D. Sharma v. State Bank of India*, AIR 1968 SC 985 : 1968 (8) SCR 91. For discussion on Art. 226, see *infra*, Ch. VIII, sec. C.
69. *Onkar Nandlal v. State of Rajasthan*, AIR 1986 SC 2146 : (1985) 4 SCC 404.
70. For discussion on Arts. 226 and 227, see, Ch. VIII, *infra.*

(1) The tribunal acts in excess of its jurisdiction conferred on it by the parent law;

(2) The tribunal fails to exercise a patent jurisdiction;[71]

(3) The tribunal has acted illegally;[72]

(4) The tribunal has erroneoulsy applied well-accepted principles of jurisprudence;

(5) The order of tribunal is erroneous;[73]

(6) The tribunal acts against the principles of natural justice,[74] or has approached the question in a manner likely to result in injustice, *e.g.,* if it has denied a hearing to a party, or has refused to record his evidence, or has acted in an arbitrary or despotic fashion, or has not given a fair deal to a litigant;[75]

(7) There is a patent error of law in the tribunal decision'[76]

(8) The tribunal order is unjust.[77]

These categories are not exhaustive but are merely illustrative. As the Court's jurisdiction under Art. 136 is discretionary, its parameters cannot be exhaustively defined. Generally, the main consideration on which the Supreme Court acts is that under Art. 136, it is its duty to see that injustice is not perpetrated or perpetuated by the tribunals.[78]

When an award of the industrial tribunal regarding bonus was challenged under Art. 136, the Court held that it would interfere only where the award passed by the tribunal was wholly unreasonable and was the result of the failure of the tribunal to take into account the necessary relevant facts.[79]

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71. *J.K. Iron & Steel Co. v. Mazdoor Union*, AIR 1956 SC 231 : 1955 (2) SCR 1315; *Clerks of C.T. Co. v. C.T. Co.,* AIR 1957 SC 78; *D.C. Works v. Dharangdhara Municipality,* AIR 1959 SC 1271 : 1960 (1) SCR 388. *Chief Administrator-cum-Jt. Secretary, Govt. of India v. D.C. Dass*, AIR 1999 SC 186 : (1999) 9 SCC 53.

For further discussion on this topic, see, *infra,* Ch. VIII, sec. D, under *Certiorari*.

72. *Sangram Singh v. Election Tribunal* , AIR 1955 SC 425 : 1955 (2) SCR 1.

73. *Bhikaji Keshao v. Brij Lal Nandlal,* AIR 1955 SC 610; *Siemens Eng. & Mfg. Co. v. Union of India,* AIR 1976 SC 1785 : (1976) 2 SCC 981.

74. *Dhakeshwari Cotton Mills v. Commr. of Income-tax,* AIR 1955 SC 65 : 1955 (1) SCR 941; *Bhagat Ram v. State of Himachal Pradesh,* AIR 1983 SC 454; *J.K. Iron and Steel Co. v. Iron & Steel Co. Mazdoor,* AIR 1956 SC 231 : 1955 (2) SCR 1375; *Clerks and Depot Cashiers of the Calcutta Tramways v. Calcutta Tramways,* AIR 1957 SC 78 : 1956 SCR 772; *H.H. Industries v. F.H. Lala,* AIR 1974 SC 526; *City Corner v. P.A. to Collector,* AIR 1976 SC 143 : (1976) 1 SCC 124.

For further discussion on 'Natural Justice', see, *infra,* Ch. VIII under '*Certiorari*'; JAIN, *A TREATISE ON ADMINISTRATIVE LAW I,* Chs. IX-XII; JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW,* I, Chs. VIII-XI.

75. *Municipal Board v. State Transport Authority,* AIR 1965 SC 458 : 1963 Supp (2) SCR 373; *Mohan Lal v. Bharat Electronics Ltd.,* AIR 1981 SC 1253 : (1981) 3 SCC 225.

76. *Kays Concern v. Union of India,* AIR 1976 SC 1525; *Hindustan Antibiotics v. Workmen,* AIR 1967 SC 948 : 1967 (1) SCR 652; *Mohan Lal v. Management, Bharat Electronics,* AIR 1981 SC 1253 : (1981) 3 SCC 225.

For discussion on the concept of 'Patent Error of Law' see, *infra,* Ch. VIII, sec. D, under '*Certiorari*'.

77. *Manoj Kumar Rai v. Union of India,* AIR 1993 SC 882 : 1993 Supp (2) SCC 355.

78. *D.C. Mills v. C.I.T.,* AIR 1955 SC 65 : 1955 (1) SCR 941; *Mohan Lal v. Management, Bharat Electronics Ltd.,* AIR 1981 SC 1253 : (1981) 3 SCC 225.

79. *Standard Vacuum Refining Co. v. Workmen,* AIR 1961 SC 895 : 1961 (3) SCR 536.

In *Dunlop India Ltd. v. Union of India*,[80] the Supreme Court set aside a decision of the Appellate Collector of Customs holding that V.P. Latex be classified under item 39 of the Indian Tariff Act insead of under item 82(3), thus subjecting it to a much higher duty. The Collector's order was set aside under Art. 136 because "the order is *ex facie* based on an irrelevant factor....." The Collector had assessed the duty on the basis of the "ultimate use" of the commodity which is absolutely irrelevant. Under the Act, the taxing event is importing into or exporting from India, and the condition of the article at the time of import is a material factor to determine the classification of the head under which the duty would be leviable.

The Central Administrative Tribunal issued directions re-fixing seniority amongst officers in class A of the Indian Defence Services. The Government of India filed special leave to appeal to the Supreme Court against the tribunal decision, "not for sake of justice or injustice, legality or illegality of any provision but because it may have to pay few thousands, may be few lakhs more." The Supreme Court refused to interfere with the tribunal decision with the remark; "Effect of Tribunal's order is that it cured the injustice perpetrated due to absence of exercise of power by the Government [under the Rules]. Substantial justice being one of the guidelines for exercise of power by this Court the order is not liable to interference..... Justice is alert to differences and sensitive to discrimination. It cannot be measured in terms of money. The government of a welfare state has the gruelling task of being fair and just and so being justice oriented in its approach and outlook."[81]

The Supreme Court does not interfere with the conclusion arrived at by the Tribunal if it has taken all the relevant factors into consideration and there has been no misapplication of the principles of law.[82]

The Supreme Court invariably insists that the tribunal ought to give a reasonable opportunity of being heard to the parties concerned.[83] The State Administrative Tribunal cancelled the appointment of a person in a proceeding in which that person was not impleaded as a party. The Supreme Court set aside the tribunal order as it amounted to a grave error of law.[84]

The Court has spelled out of Art. 136 an obligation on tribunals to give reasons for their decisions on the plea that the Court could not effectively exercise its appellate jurisdiction if tribunals fail to give reasons for their orders. Therefore, in the absence of reasons, tribunal's order may be quashed and it may be directed to rehear the matter and dispose it according to law.[85]

The Court does not usually interfere with a tribunal's findings of fact.[86] The Court's attitude is to concern itself with seeing "whether a tribunal of reasonable

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80. AIR 1977 SC 597 : (1976) 2 SCC 241.

81. *India v. M.P. Singh*, AIR 1990 SC 1098 : 1990 Supp SCC 701.

82. *C.I.T. v. H. Hock Larsen,* AIR 1986 SC 1695; *D.C.M. v. Union of India,* AIR 1987 SC 2414 : (1988) 1 SCC 86.

83. *Municipal Board v. State Transport Authority*, AIR 1965 SC 458; *M.P. Industries v. Union of India*, AIR 1966 SC 671; *Bhagat Ram v. State of Himachal Pradesh*, AIR 1983 SC 454 : (1983) 2 SCC 442. Also see, *infra*, under High Courts, Ch. VIII, sec. D.

84. *J. Jose Dhanapaul v. S. Thomas*, (1996) 3 SCC 587 : 1996 (2) LLJ 646.

85. *Harinagar Sugar Mills v. Shyam Sunder*, AIR 1961 SC 1669 : 1962 (2) SCR 339; *Travancore Rayons v. Union of India,* AIR 1971 SC 862 : 1969 (3) SCC 868.

86. *Kays Constructions Co. v. Its Workmen*, AIR 1959 SC 208 : 1958 (2) LLJ 660; *Hindustan Antibiotics v. Workmen,* AIR 1967 SC 948; *Hansraj Gupta and Co. v. Union of India,* AIR 1973 SC 2724 : (1973) 2 SCC 637; *Chief Administrator-cum-Jt. Secretary to the Govt. of India v. Dipak Chandra Das,* AIR 1999 SC 186.

and unbiased men could judicially reach such a conclusion".[87] It would, therefore, interfere with the findings of fact only if there are special circumstances, *e.g*., absence of all legal evidence to support the same;[88] the findings are based on irrelevant considerations;[89] the tribunal has spoken in two voices and has given inconsistent and conflicting findings;[90] the conclusion is pure speculation and not one which any reasonable mind could judicially reach on the data set out;[91] when the findings are perverse and that no reasonable person can come to such findings on the materials before the tribunal;[92] or inconsistent with the evidence on record;[93] or are tainted with serious infirmity;[94] or when the relief given by it is wrong.[95] It would not interfere with the tribunal's findings of fact merely on the ground that these are erroneous and based on a misappreciation of evidence.[96]

The Drug Controller found that the appellant's renewed license was forged and fabricated. The High Court affirmed the finding in a writ petition. In the appeal before the Supreme Court under Art. 136, the orders of the Drug Controller and that of the High Court were challenged as erroneous by producing a certificate by the licensing authority that the renewed certificate bore his signature. This certificate had not been produced before the Drug Controller or the High Court. The Supreme Court refused to take the certificate into consideration. The Court also refused to interfere with the findings of the Drug Controller "being essentially a finding of fact" based on material placed before him.[97]

Normally, in exercising its jurisdiction under Art. 136, the Supreme Court does not interfere with the findings of fact concurrently arrived at by the tribunal and the High Court unless there is a clear error of law or unless some important piece of evidence has been omitted from consideration.[98]

When a tribunal arrives at its decision in effect by considering material which is irrelevant to the inquiry, or bases its decision on material which is partly relevant and partly irrelevant, or bases its decision partly on evidence and partly on conjectures, surmises and suspicions then it raises an issue of law and the Supreme Court can go into this matter.[99]

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87. *Jamuna Pd. Mukhariya v. Lachhi Ram,* AIR 1954 SC 686 : 1955 (1) SCR 608.
88. *Workmen of the Motipur Sugar Factory v. Motipur Sugar Factory,* AIR 1965 SC 1803 : 1965 (3) SCR 588; *Bhagat Ram, supra*; *Shaw Wallace v. Workmen,* AIR 1978 SC 977 : (1978) 2 SCC 45; *Radhakrishna Dash v. Administrative Tribunal,* AIR 1988 SC 674 : (1988) 2 SCC 229.
89. *Dhirajlal Girdharilal v. I.T. Commr*., AIR 1955 SC 271.
90. *P.S. Mills v. P.S. Mills Mazdoor Union,* AIR 1957 SC 95, 192 : 1956 SCR 872.
91. *Jamuna v. Lachhi, supra; L. Michael v. Johnson Pumps Ltd*., AIR 1975 SC 661 : (1975) 1 SCC 574.
92. *National Engineering Industries v. Hanuman,* AIR 1968 SC 33 : 1968 (1) SCR 54; *Bank of India v. Degala Suryanarayana,* AIR 1999 SC 2407 : (1999) 5 SCC 762.
93. *Macropollo v. Macropollo,* AIR 1958 SC 1012.
94. *Oil & Natural Gas Commission v. Workmen,* AIR 1 973 SC 968 : (1973) 3 SCC 535.
95. *India v. K.N. Sivdas,* AIR 1997 SC 3100 : (1997) 7 SCC 30.
96. *Tata Iron & Steel v. Modak,* AIR 1966 SC 380; *National Seeds Corp. Ltd. v. Prem Prakash Jain,* (1998) 8 SCC 500; *Mohan Amba Prasad Agnihotri v. Bhaskar Balwant Aher,* AIR 2000 SC 931 : (2000) 3 SCC 190.
97. *Medimpex (India) Pvt. Ltd. v. Drug Controller-cum-Chief Licensing Authority,* AIR 1990 SC 544 : 1989 Supp (2) SCC 665.
98. *Mehar Singh v. Shri Moni Gurudwara Prabandhak Committee,* AIR 2000 SC 492 : (2000) 2 SCC 97.
99. *Dhiraj Láal Girdharilal v. C.I.T.* AIR 1955 SC 271.

The Court does not also interfere with the exercise of discretion by a tribunal in a matter which falls within its discretion under the relevant law, unless there are some special reasons for such interference,[1] *e.g.*, when a tribunal does not exercise its discretion thinking that it has none, or exercises discretion on irrelevant considerations.[2]

A question is not allowed to be raised for the first time in an appeal before the Supreme Court.[3] It would refuse a question to be developed before it when it had neither been urgedbefore the High Court nor before the Appellate Tribunal.[4] But if it is a question of law arising on admitted facts, the Court may allow it to be argued before it even if it was not raised before the court below.[5] In the following case, the Supreme Court set aside the award of the industrial tribunal on the ground that it "acted in total oblivion of the legal position as propounded by this Court in various judgments".[6]

The power of the Supreme Court to grant special leave to appeal under Art. 136(1) is not denuded even when it is declared in the parent statute under which the tribunal functions that its decision is final.[7]

It may be interesting to note that so far the Supreme Court has been rather liberal in granting leave to appeal from labour tribunals. In case of these tribunals, the Court has not confined itself to questions of jurisdiction, of natural justice or patent error of law, but has assumed somewhat wider fuction to settle important principles of industrial law.[8] The reasons for this approach have been that a large number of such tribunals function in the country to settle labour-management relations under the Industrial Disputes Act, 1947. The Legislature while laying down procedural norms has not yet codified the entire body of substantive legal principles applicable to these controversies, and has left the same to be developed from case to case. The labour tribunals thus enjoy enormous discretion to decide matters and they do not merely interpret a body of rules and apply the same to concrete factual situations, but also perform the much more creative function of building a corpus of rules, according to their notion of socioeconomic justice, and such a delicate task could not be left finally to industrial tribunals. There exists no provision for appeals to any court or tribunal from the decisions of the labour tribunals, and, therefore, the aggrieved parties usually invoke the Supreme Court's jurisdiction.

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1. *Registrar of Trade Marks v. Ashoka Chandra,* AIR 1955 SC 558 : 1955 (2) SCR 252; *Bishambar Nath v. State of Uttar Pradesh,* AIR 1966 SC 573 : 1966 (2) SCR 158.

2. *Sangram Singh v. Election Tribunal,* AIR 1955 SC 425 : 1955 (2) SCR 1; *N.E. Industries v. Workmen,* AIR 1968 SC 538 : 1968 (1) SCR 779; *Hindustan Steels Ltd. v. A.K. Roy,* AIR 1970 SC 140 : (1969) 1 SCC 825.

3. *U.C. Bank v. Secy., State of U.P. Bank Union,* AIR 1953 SC 437; *Nain Singh Bhakuni v. Union of India,* AIR 1998 SC 622 : (1998) 3 SCC 348.

4. *Bharat Fire & Gen. Ins. Ltd. v. C.I.T.,* AIR 1964 SC 1800; *Moulin Rouge Pvt. Ltd. v. Commercial Tax Officer,* AIR 1998 SC 219; *Padmavati Jaikrishna v. Addl. C.I.T.,* AIR 1987 SC 1723 : (1987) 3 SCC 448.

5. *State Bank, Hyd. v. V.A. Bhide,* AIR 1970 SC 196; *Asst. Collector, Central Excise v. N.T. Co.,* AIR 1972 SC 2563 : (1972) 2 SCC 560.

6. *Workmen v. Management of R.B. Co. Ltd.,* AIR 1992 SC 504 : (1992) 1 SCC 290.

7. *Durga Shankar Mehta v. Raghuraj Singh,* AIR 1954 SC 520 : 1955 (1) SCR 267.

8. *A.C.C. Ltd. v. Cement Workers Union,* AIR 1972 SC 1552 : (1972) 4 SCC 23; *The Management of Kirloskar Electric Co. v. Their Workmen,* AIR 1973 SC 2119 : (1973) 2 SCC 247.

The Supreme Court has taken the view that certainty in the area of labour law is very essential as it is a significant factor in the socioeconomic development of the country. If the numerous labour tribunals are left free to interpret and apply the law, great uncertainty would arise as there is no central forum to introduce uniformity of approach amongst these bodies. So the Supreme Court has taken upon itself the task of defining, ascertaining, refining and laying down a uniform system of labour law. Though the Court takes the formal position that it does not sit as a regular court of appeal over labour tribunals,[9] yet the fact remains that, in practice, it has emerged as the supreme law-maker, and a senior policy-making partner, in the area of substantive industrial law.[10]

The Supreme Court has not played a similar role under Art. 136 with respect to any other branch of tribunal adjudication. It was because of the Supreme Court decision in *Bharat Bank*[11] that over time the Supreme Court has come to play such a significant role in adjudication of labour disputes. Had the Supreme Court refused to hear appeal from an industrial tribunal, the development of labour law might have taken an entirely different course.

F. ADVISORY JURISDICTION

The Supreme Court has been given an advisory jurisdiction as well.

According to Art. 143(1), when it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance, that it is 'expedient' to obtain the opinion of the Supreme Court upon it, he may refer it to the Court for its consideration. The Court then *may*, after such hearing as it thinks fit, report to the President its opinion thereon.

Under Art. 143(2), a matter which is excluded from the Supreme Court's jurisdiction under Art. 131 may be referred to it for opinion and the Court *shall*, after such hearing as it thinks fit, report to the President its opinion thereon.[12]

A report under the above provisions is to be made by the Court in accordance with an opinion delivered in open court [Art. 145(4)] with the concurrence of the majority of Judges [Art. 145(5)]. A Judge who does not concur has liberty to deliver a dissenting opinion [Art. 145(4)]. The reference is to be heard by a Bench of not less than five Judges [Art. 145(3)]. Thus, the procedure in respect of the exercise of the advisory jurisdiction has, as far as possible, been approximated to a judicial hearing.

The scope of Art. 143(1) is quite broad. There is no condition that the President can refer only such questions as pertain to his powers, functions and duties or those of the Central Government. The President can seek the opinion of the

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9. The Court has stated in *Shaw Wallace v. Workmen*, AIR 1978 SC 977, that its jurisdiction under Art. 136. "can be invoked ordinarily only when there is a manifest injustice, fundamental flaw in law or perverse findings of fact."

In the instant case, the Court dismissed the special leave to appeal from the labour court decision as there was some basis, some material, to validate the award, and there was supportive testimony for findings of fact.

10. For a critique of this role of the Supreme Court see, Solomon E. Robinson, Supreme Court and s. 33 of the Industrial Disputes Act, 1947, 3 *JILI* 161, 182; Law Commission, XIV Report, I, 50.

11. *Supra*, footnote 96 : AIR 1950 SC 188

12. On Art. 131, see, *supra*, under 'Original Jurisdiction', Sec. C (iii)(d).

Supreme Court on any question of law or fact which appears to him to be of such a nature and of such public importance that it is expedient to obtain the Court's opinion. Of course, in this matter, the President acts on the advice of the Cabinet. Thus, questions relating to constitutional validity of the proposed legislation,[13] or 'powers, privileges and immunities' of State Legislatures[14] have been referred to the Supreme Court for opinion.

It is not necessary that only a question which has actually arisen may be referred to the Court for its opinion. The President may make a reference even at an anterior stage, namely, when the question is likely to arise in future. It is a matter essentially for the President to decide whether the question is of such a nature and of such public importance that it is expedient to seek the Court's opinion thereon.

The President is entitled to refer to the Supreme Court for its opinion any question of law or fact whether or not it has any relation to the entries in Lists I and III,[15] or whether it falls in the Central sphere or in the State sphere. What Art. 143(1) requires is the President's satisfaction that—(*i*) a question of law or fact has arisen or is likely to arise, and (*ii*) the question is of such a nature and of such public importance that it is expedient to obtain the Court's opinion on it. The satisfaction of the President on both these counts would justify reference to the Supreme Court. Questions regarding the validity of a statute in force or a proposed Bill may be referred to the Court as Art. 143(1) contemplates reference of a question of law which is 'likely to arise'.

The phraseology of the constitutional provision is quite broad to cover all types of references. The Court has stated recently that it is "well within its jurisdiction to answer/advise the President in a reference made under Art. 143(1) of the Constitution of India if the questions referred are likely to arise in future or such questions are of public importance or there is no decision of this Court which has already decided the question referred:[16]

The Court has now clarified that it cannot be asked, under Art. 143(1) to reconsider any of its earlier decisions. The President can refer only such legal question as has not been decided by the Court earlier. The Court has reasoned that when in its adjudicatory jurisdiction, it has pronounced an authoritative opinion on a question of law, there neither remains any doubt about the question of law nor does it remain *res integra* so as to require the President to know what the true position of law on the question is. The Court can review its earlier decision only under Art. 137.[17]

The Supreme Court has rejected the contention that under Art. 143, the President can ask the court to reconsider any of its previous decisions. The Court has observed that under the Constitution, the Court enjoys no appellate jurisdiction over itself. The Court cannot convert its advisory jurisdiction into an appellate one. "Nor is it competent for the President to invest us with an appellate jurisdiction over the said decision through a Reference under Article 143 of the Constitution". To interpret Art. 143(1) as conferring on the executive power to ask

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13. *Re The Special Courts Bill, 1978, infra.*
14. *Re The Powers, Privileges and Immunities of State Legislatures, infra.*
15. *Infra*, Chs. X and XI.
16. *Gujarat Assembly Election Matter*, (2002) 8 JT 389, 404, 405.
17. For discussion on Art. 137, see, *infra*, Sec. H.

the Supreme Court to revise its own decision, would cause a serious inroad into the independence of the judiciary.[18]

The Supreme Court has to confine itself to the questions referred to it by the President; it cannot travel beyond the reference. The circumstances that the President has referred only some questions regarding the validity of a Bill or an Act, and not others which also appear to arise, is no good reason for declining to entertain the reference.[19]

As has been stated by A.N. RAY, C.J., in *Re Presidential Poll* :[20]

> "This Court is bound by the recitals in the order of reference under Art. 143(1). We accept the statement of facts set out in the reference. The truth or otherwise of the facts cannot be enquired or gone into nor can this Court go into the question of *bona fides* or otherwise of the authority making the reference. This Court cannot go behind the recital. This Court cannot go into disputed questions of fact in its advisory jurisdiction under Art. 143(1)."

In Art. 143(1), the use of the word 'may' indicates that the Supreme Court is not obligated to express its opinion on the reference made to it. It has a discretion in the matter and may, in a proper case, for good reasons, decline to express any opinion on the question submitted to it. Such a situation may perhaps arise if purely socio-economic or political questions having no constitutional significance are referred to the Court, or a reference raises hypothetical issues which it may not be possible to answer without a full setting of facts in which the issues are to operate. It is to ensure against such a contingency that the Article uses the word 'may' and enables the Supreme Court to refuse to answer questions if it is satisfied that it should not express its opinion having regard to the questions and other relevant facts and circumstances.

The Court has emphasized that 'abstract' or speculative or hypothetical or too general questions should not be referred to it for advisory opinion. The Court has asserted that if a reference made to it is "vague and general", or if for any appropriate reason, the Court considers it "not proper or possible" to answer the reference, the Court may return it by pointing out the impediments in answering it. The Court has said that the plain duty and function of the Court is to consider the question on which the President has made the reference and report to the President its opinion. If for any reason, the Court considers it not proper or possible to answer the question, it would be entitled to return the reference by pointing out the impediments.[21]

The Court has refused to answer a reference in Special Reference No. 1 of 1993.[22]

However, in Art. 143(2), the use of the word 'shall' indicates that the Supreme Court has to give its opinion on a reference made thereunder.[23] There is a reason

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18. In *the Matter of Cauvery Water Disputes Tribunal,* AIR 1992 SC 522, 553, 554 : 1993 Supp (1) SCC 96(2).
Also see, *infra,* Ch. XIV, Sec. E.

19. *In re The Kerala Education Bill,* 1957, AIR 1958 SC 956 : 1959 SCR 995; see, *infra,* p. 357.

20. See, *supra,* Ch. III, Sec. A(i)(a); also, *infra,* p. 359.

21. See, *Re The Special Courts Bill, infra,* p. 359.

22. (1994) 1 SCC 680. For details, see below.
Also see, *M. Ismail Faruqui v. Union of India,* (1994) 6 SCC 360 : AIR 1995 SC 605.

23. *In re The Kerala Education Bill,* 1957, AIR 1958 SC 956 : 1959 SCR 995; *Keshav Singh's* case. AIR 1965 SC 745 : 1965 (1) SCR 413.

for this dichotomy between Arts. 143(1) and 143(2). Whereas it may be possible to agitate before the courts the matters falling under Art. 143(1) by adopting suitable procedures and techniques, the matters referred to in Art. 143(2) are banned from judicial scrutiny of the Supreme Court, High Court or any other court because of the operation of Arts. 131 and 363[24] and there is no other way to get a judicial verdict on these matters, if it ever becomes necessary, except through the machinery of Art. 143(2). Hence the Supreme Court is constitutionally obligated to give its opinion if ever it is sought on the type of questions referred to in Art. 143(2).

Before the advent of the Supreme Court, the Federal Court exercised an advisory jurisdiction under s. 123 of the Government of India Act, 1935.[25] Art. 143(1) is a close replica of s. 213, one major difference being that while only a question of law could be referred to the Federal Court, both questions of law or of fact can now be referred to the Supreme Court for advice.

Some of the principles of constitutional interpretation which the Federal Court laid down in its advisory opinions in relation to the interpretation of the federal provisions of the Government of India Act, 1935, have very well stood the test of time and remain valid and controlling even to-day in interpreting the Constitution.[26] Its opinion in *In re Levy of Estate Duty,*[27] has influenced the shaping and formulation of the entries regarding estate duty and succession duty in the Constitution.[28] Its opinion on the validity of the Hindu Women's Rights to Property Act, 1937, by interpreting it restrictively and confining its operations to such property as fell within the Central sphere, saved the great measure of social reform which had been achieved after years of hard toil on the part of the social reformers.[29]

During the last fifty years since the Constitution came into force, several references have been made to the Supreme Court under Art. 143(1), but none under Art. 143(2). These references are:

(1) *In re the Delhi Laws Act,* in 1951;[30]
(2) *In re the Kerala Education Bill,* in 1958;[31]
(3) *In re Berubari,* in 1960;[32]
(4) *In re the Sea Customs Act,* in 1962;[33]
(5) *Keshav Singh's* case in 1965;[34]
(6) *In re Presidential Poll,* in 1974;[35]
(7) *In re the Special Courts Bill,* in 1978;[36]

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24. *Supra,* Sec. C(iii)(c) and (d); *infra,* Ch. XXXVII, Sec. F.
25. AIR 1960 SC 845 : 1960 (3) SCR 250; *infra,* Sec. I(b).
26. *In re The C.P. Petrol Tax* case, 1939 FCR 18; *infra,* Ch. X.
For federal Court, see, Sec. I(b), *infra.*
27. 1944 FCR 317.
28. *Infra,* Ch. XI.
29. *In re The Hindu Women's Rights to Property Act,* 1937, 1941 FCR 12.
30. AIR 1951 SC 332; *supra,* Ch. II.
31. AIR 1958 SC 996; *infra,* Ch. X.
32. AIR 1960 SC 845; Ch. V.
33. AIR 1963 SC 1760; *infra,* Ch. XI.
34. AIR 1965 SC 745; *supra,* Ch. II, Sec. I.
35. AIR 1974 SC 1682; *supra,* Ch. III.
36. AIR 1979 SC 478, *infra,* Ch. XXI.

(8) *Re In the matter of Cauvery Water Disputes Tribunal*, in 1992;[37]

(9) *Re In the matter of Ram Janmabhoomi;*[38]

(10) *Reference on the Principles and Procedure regarding appointment of Supreme and High Court Judges in 1998.*[39]

(11) Gujarat Assembly Election Matter.[40]

(12) In re the Gujarat Gas Act[41]

A brief description of each of these cases is given below:

(a) Delhi Laws Act

The Supreme Court's pronouncement in the *Delhi Laws Act* case gave timely guidance to the Central Executive regarding the scope and extent of its legislative power under the Delhi Laws Act.[42] It thus avoided embarrassment to the Central Government and difficulties to the people which might have arisen had any Act extended to Delhi or any other Part C State were to be declared *ultra vires*.

(b) Berubari

In re Berubari gave timely guidance to the Central Government as to how it should implement the Indo-Pakistan Boundary Agreement between the Prime Ministers of India and Pakistan. Had the agreement been implemented in the way the government was contemplating (through an Act of Parliament), great embarrassment would have been caused to it had the Act been declared unconstitutional later, as it was bound to be in view of the Supreme Court's opinion.[43]

(c) Kerala Education Bill

In re The Kerala Education Bill sought the Supreme Court's opinion on the constitutional validity of certain provisions of the Kerala Education Bill which had been reserved by the Governor for the President's consideration.[44] The public opinion in Kerala was greatly agitated because of the Bill. Reference of the matter to the Court saved the Central Government from political embarrassment as well as mollified public opinion and helped in the removal of the lacunae in the Bill which the Supreme Court pointed out in its opinion.[45]

In its advisory opinion in this case, the Court settled the following two significant points concerning the scope of Art. 143(1).

(1) The Court rejected the contention that what was referred to the Court for its opinion was not a statute already put into force, but a Bill which was yet to be enacted. The Court argued that Art. 143(1) does contemplate the reference of a question of law that is "likely to arise".

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37. AIR 1992 SC 522. For details, see, *infra*, Ch. XIV, Sec. E.
38. (1993) 1 SCC 642; Ch. III, *supra.*
39. AIR 1999 SC 1; see, *supra*, Sec. B(d).
40. (2002) 8 SCC 237 : (2002) 8 JT 389.
41. In re Special Reference No. 1 of 2001:(2004) 4 SCC 489 : AIR 2004 SC 2657.
42. *Supra*, Ch. I, sec. K.
For detailed discussion on this case, see, JAIN, *A TREATISE ON ADM.*, I, 61, 62; *CASES & MATERIALS ON INDIAN ADM. LAW*, I, 38-46.
43. For details of case, see, *infra*, Ch. V, under "Cession of Territory".
44. See, *infra*, Ch. VI, sec. D.
45. *Infra*, Chs. XXI and XXIX.

(2) It was argued that questions about the validity of some other provisions of the Bill also arose but these were not referred to the Court. Hence, the reference was an incomplete one and the Court should not entertain such a reference. The Court rejected the argument saying that "it is for the President to determine what questions should be referred and if he does not entertain any serious doubt on the other provisions it is not for any party to say that doubts arise also out of them" and the Court "cannot go beyond the reference and discuss those problems".

The circumstance that the President has not thought fit to refer other questions regarding constitutional validity of other provisions of the Bill cannot be a good or cogent reason for declining to entertain this reference and answer the questions touching matters over which the President does entertain some doubt.[46]

(d) Sea Customs

In re The Sea Customs Act, the President forwarded for the Supreme Court's opinion questions regarding the validity of provisions of a draft Bill seeking to amend certain provisions of the Sea Customs Act, 1878, and the Court was thus able to clarify a knotty problem of Centre-State relationship.[47]

(e) Keshav Singh

Keshav Singh's case fully justified the institution of advisory opinion. A complete deadlock was reached between the U.P. Legislature and the Allahabad High Court over the relative Court-Legislature role in the matter of legislative privileges. The matter could not go to the Supreme Court in appeal as the U.P. Legislature would not invoke the Court's appellate jurisdiction after having once taken the position that courts have nothing to do with the legislature's power to commit a person for its contempt.[48] Momentous issues had thus arisen threatening the very basis of the Constitution and resort to the advisory opinion technique proved a satisfactory way out of the impasse.

An objection was raised in *Keshav Singh* against the validity of the reference. It was argued that the questions referred to the Court did not relate to any entry in List I or List III and, as such, they did not concern with any of the persons, duties or functions conferred on the President. The Court rejected the argument saying that the words of Art. 143(1) are of wide amplitude to empower the President to forward to the Court for its advisory opinion any question which in his opinion is of such a nature or of such public importance that it is expedient to obtain the opinion of the Court thereon. "*Prima facie*, the satisfaction of the President on both these counts would justify the reference".[49]

The Court also expressed the view, referring to the use of the word 'may' in Art. 143(1) in contrast with the use of the word 'shall' in Art. 143(2), that under Art. 143(1), the Court is not bound to give advisory opinion in every case if it feels that it would be inadmissible for it to express its advisory opinion having regard to the nature of the questions forwarded to it and having regard to other relevant facts and circumstances. In the words of the Court:[50]

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46. AIR 1958 SC at 965.
47. *Infra*, Ch. XI, Sec. C.
48. *Supra*, Ch. II, Sec. 1.
49. AIR 1965 SC at 756.
50. *Ibid.*

> "In other words, whereas in the case of reference made under Art. 143(2) it is the constitutional obligation of this Court to make a report on that reference embodying its advisory opinion, in a reference made under Art. 143(1) there is no such obligation. In dealing with this latter class of reference, it is open to this Court to consider whether it should make a report to the President giving its advisory opinion on the questions under reference."

(f) Presidential Poll

On April 29, 1974, the Central Government referred to the Court an important question for advice. The term of the President was coming to an end on August 24, 1974. The State of Gujarat was at this time under the presidential rule and its legislature had been dissolved.[51] The main question for consideration in *In re Presidential Poll* was whether the election of the President could be held in the absence of an elected State Assembly.[52]

The Central Government was of the opinion that on a true and correct interpretation of Arts. 54, 55, 56 and 71 of the Constitution, the election could be held. But, as a controversy had been raised on the question both within and outside Parliament, the Government thought it fit to seek the advice of the Supreme Court so that all doubts might be set at rest. It is for the Supreme Court to decide upon the validity of the election of the President. It was, therefore, advisable that the opinion of the Court be sought beforehand so that any future embarrassment could be avoided in case the Court later declared the President's election invalid on the ground of non-existence of a State Legislature.

(g) Special Courts

After the emergency during 1975-77,[53] the newly installed Janata Government decided to try certain persons holding high political offices during the emergency (1975-77), and to expedite their trial it decided to set up special courts. The Special Courts Bill was referred to the Court for advice on its constitutionality and the Court suggested that some modifications be made therein. These modifications were duly incorporated into the Bill when it was enacted in an Act later.[54]

During the hearing of the reference before the Court, the following several significant questions were raised regarding the scope of Art. 143(1) and the maintainability of the reference.

(1) The reference was hypothetical and speculative because the Bill was yet to become an Act.

Rejecting the contention, the Court argued that it was a fact that the Bill was pending before Parliament. There was nothing speculative about the existence of the Bill and there was nothing hypothetical about its contents. The Bill could undergo changes in course of time but that would not make it speculative. The Court observed in this connection:[55]

> "The Special Courts Bill is there in flesh and blood for anyone to see and examine. That sustains the reference, which is founded upon the satisfaction of the President that a question as regards the constitutional validity of the Bill is

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51. On Emergency, see, *infra*, Ch. XIII, Sec. B.
52. *Supra*, Ch. III, Sec. A.
53. On the Emergency of 1975-1977, see, *infra*, Ch. XXXIII, Sec. F.
54. *Infra*, Ch. XXI.
55. AIR 1979 SC at 491.

> likely to arise and that the question is of such a nature and of such public importance that it is expedient to obtain the opinion of this Court upon it."

In the past also references had been made in regard to contemplated legislation and not in regard to Acts which had been enacted.[56]

(2) The reference was vague, general and of an omnibus nature. The only question referred was whether the Bill was constitutional. This was a very broad question. The whole Bill had been referred without mentioning specifically which of the provisions of the Bill could be open to attack under the Constitution and on what grounds. Those specific points on which Court's advice was sought had not been mentioned.

The Court agreed that a reference in such broad and general terms would be difficult to answer because it gave no indication of the specific points on which the opinion of the Court was sought. "It is not proper or desirable that this Court should be called upon to embark upon a roving inquiry into the constitutionality of a Bill or an Act". It ought not to be expected of the Court that it would examine each constitutional provision to find out under which of these provisions could the validity of the Bill be challenged.

The Court said that in the beginning it was "so much exercised over the undefined breadth of the reference" that it was contemplating to return the reference to the President. But, then, after perusing the briefs presented to the Court by the lawyers of the various parties, and after listening to the oral arguments advanced by them, it was possible to narrow down the legal controversies surrounding the Bill, to crystallise the issues arising for the consideration of the Court, and to ascertain the points of dispute needing the opinion of the Court. The Court emphasized:[57]

> "We hope that in future, whenever a reference is made to this Court under Art. 143 of the Constitution, care will be taken to frame specific questions for the opinion of the Court.... the risk that a vague and general reference may be returned unanswered is real..."

(3) Since Parliament was seized of the Bill, it was its exclusive function to decide upon the constitutionality of the Bill.

The Court rejected this argument saying that under the Indian Constitution the power of reviewing the constitutionality of legislation was vested in the Supreme Court and the High Courts. The Court observed on this point:

> "The right of the Indian judiciary to pronounce a legislation void if it conflicts with the Constitution is not merely a tacit assumption but is an express avowal of our Constitution. The principle is firmly and wisely embedded in our Constitution that the policy of law and the expediency of passing it are matters for the legislature to decide while interpretation of laws and questions regarding their validity fall within the exclusive advisory or adjudicatory functions of Courts."[58]

(4) Since the Bill was pending in Parliament for consideration, it would affect Parliament's sovereignty, and it would be encroaching on the functions and

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56. *In the Estate Duty* case, AIR 1944 SC 73; *In the Kerala Education Bill* case, AIR 1958 SC 956; *supra; In the Sea Customs Bill*, AIR 1963 SC 1760; *supra*.

57. AIR 1979 SC at 493.

58. *Ibid*, at 494.

privileges of Parliament, if the Court were to withdraw the question of validity of the Bill for its consideration.

The Court rejected the contention saying that in dealing with the reference, the Bill was not being withdrawn from Parliament. The Court was under a constitutional obligation to consider the reference made to it by the President under Art. 143(1) and report thereon. As the question of constitutional validity of the Bill fell within the Court's domain, no function or privilege was "wittingly or unwittingly" being encroached upon.

(5) The Court rejected the argument that the reference virtually abrogated Art. 32. The proceeding under Art. 32(1) were of an entirely different nature from the proceeding under Art. 143(1). If the Court were to pronounce on the question referred to it by the President, "there is neither supplanting nor abrogation of Art. 32".[59]

(6) It would be futile for the Court to pronounce on the constitutional validity of the Bill, for whatever view it might take, Parliament was free to pass the Bill or not as it pleased.

The Court rejected the argument saying that the argument was based on an unrealistic basis, "its assumption being that the Parliament will not act in a fair and proper manner". True, whatever the Court would say could not deter the Parliament from proceeding with the Bill as it pleased, and no Court would issue a writ or order restraining the Parliament from proceeding with the consideration of the Bill pending before it, yet it could not be assumed that if the Court were to hold the Bill to be unconstitutional "Parliament will proceed to pass it without removing the defects from which it is shown to suffer". The Court further observed on this point:[60]

> "Since the constitutionality of the Bill is a matter which falls within the exclusive domain of the courts, we trust that the Parliament will not fail to take notice of the Court's decision".

(7) The Court rejected the argument that the reference raised a purely political question. The question of constitutionality of the Bill was not a political question. The Court said: "The question referred by the President for our opinion raises purely legal and constitutional issues which is our right and function to decide". The President had not asked the opinion of the Court as to the desirability of passing the Bill, or the soundness of the policy underlying it or whether special Courts ought to be set up, or not, or whether political offenders should be prosecuted or not.

(8) It was argued that considering the repercussions of the exercise of advisory jurisdiction, the Court should "in the interest of expediency and propriety," refuse to answer the reference. The Court disagreed with this contention. The question referred to the Court raised a purely constitutional issue and it was neither difficult nor inexpedient to answer the reference.

In the end, the Court held the reference made by the President as maintainable and, accordingly, proceeded to report its opinion thereon.[61] During the course of

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59. *Ibid,* at 495.
On Art. 32, see, *infra,* Ch. XXXIII, Sec. A.

60. *Ibid,* at 495.

61. For discussion on this case, see, *infra,* under Arts. 14 and 21, Chs. XXI and XXVI.

its opinion in the instant case, the Court also made the following comments on Art. 143:

(1) Art. 143(1) is couched in broad terms.

(2) Under Art. 143(1), the President is empowered to make a reference even on questions of fact provided the other conditions of the article are satisfied.

(3) It is not necessary that the question on which the opinion of the Supreme Court is sought must have arisen actually. The President may make a reference at an anterior stage, *i.e*., at the stage when the President is satisfied that the question is likely to arise.

(4) The satisfaction whether the question has arisen or is likely to arise and whether it is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, is a matter essentially for the President to decide.

(5) The duty and function of the Supreme Court under Art. 143(1) is to consider the question referred to it by the President and report its opinion to him, provided of course the question is capable of being pronounced upon and falls within the power of the Court to decide.

(6) If, for any appropriate reason, the Court considers it not proper or possible to answer the question, it would be entitled to return the reference by pointing the impediments in answering it.

(7) Even in matters falling under Art. 143(2) [which uses the word 'shall' and not 'may' as in Art. 143(1)], the Court may be justified in returning the reference unanswered if it finds for a valid reason that the question is incapable of being answered.[62]

On the question of the binding nature of an advisory opinion under Art. 143(1), the Court has expressed the view that while it is always open to the Supreme Court to re-examine the question already decided by it and to overrule, if necessary, in so far as all other courts are concerned they ought to be bound by it. Earlier the Supreme Court had expressed the view in some cases that the advisory opinions do not have the force of law. **See**, *U.P. Legislative Assembly*;[63] *St. Xaviers College*.[64] In *St. Xaviers College,* RAY, C.J., observed that even if an advisory opinion may not be binding, it is entitled to great weight. Some High Courts have taken the view that an advisory opinion is law declared by the Supreme Court within the meaning of Art. 141.[65]

(h) Cauvery Waters

In the matter of *Cauvery Water Disputes Tribunal*, the main question referred to the Court for its advisory opinion was whether the Tribunal established under the Inter-State Water Disputes Act, 1956, has power to grant an interim relief to

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62. This is in contrast with what the Court had observed earlier in *Keshav Singh's* case, see, *supra*.

63. AIR 1965 SC 745, 762, 763.

64. AIR 1974 SC 1389; *infra*, Ch. XXX.

65. See, *Ram Kishore Sen v. Union of India*, AIR 1965 Cal 282; *Chhabildas Mehta v. Legislature Assembly,*
Gujarat State, (1970) 2 Guj LR 729.
For Comments on Art. 141, see, *infra*, Sec. J.

the parties to the dispute. The issues involved in this case are discussed later in this book.[66]

In this case again, the question whether the opinion given by the Supreme Court on a Presidential for Reference under Art. 143 is binding on all courts was debated. However, the Court refused to express any definitive opinion on the point for two reasons;

(1) the specific question did not form part of Presidential Reference in the instant case;

(2) any opinion expressed by the Court in the instant case would again be advisory.

Thus, the Court "leaves the matter where it stands" with, however, the following observation:[67]

> "It has been held adjudicatively that the advisory opinion is entitled to due weight and respect and normally it will be followed. We feel that the said view which holds the field today may usefully continue to do so till a more opportune time."[68]

(i) Ram Janmabhumi

In Special Reference No. 1 of 1993, the question referred to the Supreme Court for its advisory opinion was whether a Hindu temple or religious structure existed at a particular place in Ayodhya. The question referred to the Court was formulated as follows:[69]

"Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi—Babri Masjid.... in the area on which the structure stood."

The Supreme Court refused to give its opinion on this reference for several reasons. According to the majority opinion, the matter under reference was already the subject-matter of litigation in the lower courts, wherein the dispute between the parties would be adjudicated, and, therefore, the reference made under Art. 143(1) became superfluous and unnecessary.

Two of the Judges (AHMADI & BHARUCHA, JJ.) in a separate concurring opinion maintained that the Supreme Court could decline to answer a question referred to it under Art. 143 if it considers it to be not proper or possible to do so, but the Court must indicate its reasons. These learned Judges gave the following reasons for refusing to answer the reference in the instant case:

(1) The reference favoured one religious community and disfavoured another. The purpose of the reference was, therefore, opposed to secularism and was unconstitutional; the reference served no constitutional purpose.

(2) The Government proposed to use the Court's opinion as a springboard for negotiations. It did not propose to settle the dispute in terms of the Court's opinion.

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66. For a fuller discussion on this case, see, *infra*, Ch. XIV, Sec. E.
67. AIR 1992 SC 552, at 558.
68. Also see, *infra*, Secs. F. and J. on this point.
69. (1993) 1 SCC 642.

(3) To answer the reference it would be necessary to take evidence of experts, such as, historians, archaeologists and have them cross-examined.

(4) The principal protagonists of the two stands would not appear in the reference. Any opinion expressed by the Supreme Court would be criticised by one or both sides. This would impair the Court's credibility and compromise the dignity and honour of the Court.

(j) Supreme Court/High Court Judges

The reference was made by the President in July, 1998.[70] In *Advocates-on-Record Association v. Union of India,*[71] the Supreme Court had laid down the procedural norms for the appointment of the Judges of the Supreme Court and the High Courts. The decision was rendered by a Bench of 9 Judges and five judgments were delivered. As doubts arose about the interpretation of the law laid down by the Supreme Court in the above-mentioned case, the President made a reference to the Supreme Court under Art. 143(1) seeking clarification on certain points.

Nine questions were referred to the Court for its advisory opinion. These questions pertained to the following three main points:

(1) Consultation between the Chief Justice of India and other Judges in the matter of appointment of the Supreme Court and the High Court Judges;

(2) Transfer of High Court Judges and judicial review thereof;

(3) The relevance of seniority in making appointments to the Supreme Court.[72]

(k) Gujarat Assembly Election Matter

The reference under Art. 143(1) arose as a result of premature dissolution of the Gujarat Legislative Assembly. The main question raised in the reference was regarding the time-frame within which election to the Assembly must be held.[73]

(l) The Gujarat Gas Act

The Gujarat State Legislature passed an Act by name "the Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001" ("the Gujarat Act"), which came into force w.e.f. 19-12-2000. The object of the enactment is to provide for regulation of transmission, supply and distribution of gas, in the interests of the general public and to promote gas industry in the State, and for that purpose, to establish a Gujarat Gas Regulatory Authority. The State Legislature passed the said enactment by tracing its legislative competence under Entry 25 of List II of the Seventh Schedule of the Constitution. Parliament has passed various enactments under Entry 53 of List I dealing with the matters of petroleum and petroleum products. *In re Special Reference No. 1 of 2001,*[74] the following questions were referred to this Court under clause (1) of Article 143:

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70. *In re : Presidential Reference,* AIR 1999 SC 1; see, *supra,* Sec. B(d).
71. *Supra,* Sec. B(d).
72. For detailed discussion on these points, see, *supra,* this Chapter, Sec. B and *infra,* Ch. VIII.
73. (2002) 8 SCC 237 : (2002) 8 JT 389.
For further discussion on this case, see, Ch. XIX, *infra.*
74. (2004) 4 SCC 489 : AIR 2004 SC 2647.

(*1*) Whether natural gas in whatever physical form including liquefied natural gas (LNG) is a Union subject covered by Entry 53 of List I and the Union has exclusive legislative competence to enact laws on natural gas.

(*2*) Whether States have legislative competence to make laws on the subject of natural gas and liquefied natural gas under Entry 25 of List II of the Seventh Schedule to the Constitution.

(*3*) Whether the State of Gujarat had legislative competence to enact the Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001.

The Court construed Entry 53 of List I, and held that Parliament has got power to enact legislation for regulation and development of oilfields, mineral oil resources; petroleum, petroleum products, other liquids and substances declared by Parliament by law to be dangerously inflammable. Natural gas product extracted from oil wells is predominantly comprised of methane and is not independent of other petroleum products. The Court therefore concluded that "natural gas" is included in Entry 53 of List I and regulation of oilfields and mineral oil resources necessarily encompasses the regulation as well as development of natural gas and the Union Government alone has got legislative competence to enact laws in that regard. The Court was of the opinion that Entry 25 of List II was limited to the gas manufactured and used in gasworks. In view of this and having regard to the specific nature of Entry 53 covering any petroleum and petroleum products, the Court answered the reference by holding that The Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001, in so far as it related to natural gas or liquefied natural gas was without any legislative competence and the Act to that extent was ultra vires the Constitution.

(m) Advisory Opinions in the U.S.A., Australia and Canada

The U.S. Constitution has no specific provision like Art. 143(1) authorising the President to make a reference to the U.S. Supreme Court seeking its opinion on any question. The U.S. Constitution is based on the doctrine of Separation of Powers.[75] Art. III, s. 2(1) of the U.S. Constitution provides that the judicial power vested in the Supreme Court shall extend to "cases" and "controversies".

The U.S. Supreme Court has consistently refused to render advisory opinions on abstract legal questions as it does not wish to exercise any non-judicial function. Giving of such an advice, it has been feared, might involve the Court in too direct participation in legislative and administrative processes. The reluctance of the Court is formally based on the doctrine of separation of powers which forms one of the bases of the U.S. Constitution.

In 1793, when Secretary of State Jefferson enquired of the Supreme Court whether it would give advice to the President on questions of law arising out of certain treaties, the Court refused saying that there was no such provision in the Constitution, and that it was not proper for the highest Court to decide questions extra-judicially,[76] Again, in *Muskrat v. U.S.,*[77] the Court refused to give an advi-

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75. See, Ch. III, Sec. F., *supra.*

76. DOUGLAS, *MARSHALL TO MUKHERJEA,* 25-26. Also, THAYER, *LEGAL ESSAYS,* 53 (1923).

77. 219 US 346.
Also, SCHWARTZ, *THE SUPREME COURT,* 142 (1957).

sory opinion arguing that under the Constitution its jurisdiction extends to a 'case or controversy' and so it cannot give an opinion without there being an actual controversy between adverse litigants. The Court has consistently refused to decide abstract, hypothetical or contingent questions.

Similar has been the approach of the High Court of Australia,[78] as the Australian Constitution has no provision parallel to Art. 143(1) of the Indian Constitution. However, to some extent, a similar purpose is served by permitting an Attorney-General to bring proceedings in the High Court to secure a determination of the validity of National or State legislation after its passage by the Legislature whether before or after it has come into force.[79]

In Canada, the Governor-General in Council is empowered to refer important questions of law touching on the validity or interpretation of the Dominion or Provincial legislation.[80] The practice of obtaining advisory opinions from the Judiciary has been very extensively used in Canada. It has almost become the normal strategy for determining constitutional issues. Protesting voices have, however, been raised against a too frequent use of this technique to settle constitutional controversies.[81]

The Judicial Committee of the Privy Council, which functioned as the highest Court of appeal from India before Independence, is obligated under sec. 4 of the Judicial Committee Act, 1833, to tender advice to the Crown on any matter other than appeals presented to it.

(n) Evaluation of the System of Advisory Opinions

The practice of invoking advisory judicial opinions is not universally approved. A serious objection raised against it is that opinions are sought on hypothetical questions, in the absence of concrete factual situations, without there being a real controversy in existence, and that it is inexpedient and inconvenient for the courts to express their opinions in the absence of the factual situation within which a rule is to operate.

Many legal questions can properly be appreciated in the context of concrete factual situations; since a reference to the court seeking its advice does not present actual facts, the court is unable to see the problem in the background of an actual controversy between the litigants. The court depends upon assumptions and its advisory opinions, are, therefore, nothing more than 'speculative opinions on hypothetical questions.'[82] It is not possible for the judiciary to lay down a principle adequately and safely without understanding its relation to concrete facts to which it may be applied.

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78. *In re Judiciary and Navigation Acts*, 29 CLR 25 (1921).

79. *Attorney-Gen. for Victoria v. Commonwealth*, 71 CLR 237 (1945); SAWER, The Supreme Court and the High Court of Australia, *6 Jl of Public Law*, 482, 491 (1957).

80. See, s. 60 of the *Canadian Supreme Court Act*, 1960.

81. MACDONALD, The Privy Council and Canadian Const., 29 *Can. B.R.* 1020 (1951); DAVISON, The Constitutionality and Utility of Advisory Opinions, 2 *Univ. of Toronto L.J.*, 347 (1950); RUBIN, The Nature, Use, and Effect of Reference Cases in Canadian Constitutional Law, 6 *McGill L.J.*, 168 (1959-60).

82. EARL HALSBURY in *Att. Gen. for Ontario v. Hamilton Street Rly.*, (1903) A.C. 524; FELIX FRANKFURTER, A Note on Advisory Opinions, 37 *Harv. L.R.* 1006; also his *LAW AND POLITICS*, 25 (1939); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY*, 306 (1941); PYLEE, *THE FEDERAL COURT OF INDIA*, 276-287 (1966).

The great weakness of a decision without a true case is that, being rendered in *vacuo*, it is divorced from the real life of actual facts. Advisory opinions may thus move in an unreal atmosphere. The interests of future litigants may also be prejudiced by the Court laying down principles in the abstract.[83] It may be inconvenient for them to agitate the matter later when an actual controversy arises.[84] It is also argued that when an actual controversy comes before a court along with full facts, the court has a manoeuvrability and a flexibility of approach in deciding the issues raised but the same flexibility of approach is not available to the court when cut and dry questions are put to it for advice, for then it has to move within the framework of the questions, and its freedom of approach to legal issues is cabined and restricted by the way the questions are framed, and to safeguard itself from being misunderstood in future, the court may have to hedge its answers with all kinds of 'buts', 'ifs' and 'provideds'.

On the other hand, there are quite a few advantages of advisory jurisdiction: it can provide guidance to the government on questions of its legal powers and may promptly remove any cloud of uncertainty in the public mind, regarding the validity of any legislation or governmental action. An advance judicial opinion regarding the validity of a legislative measure may avoid inconvenience which may otherwise arise by its being declared invalid later.[85] Also, to depend solely on a real controversy for deciding a constitutional issue means that the court's jurisdiction depends on the whims of private litigants, and vital questions of constitutional law may remain clouded and unanswered by the highest Court for long till a suitable case arises and reaches the Court.

The ordinary court procedure is time-consuming and expensive as the case must pass through several courts before reaching the highest Court and for all this period a cloud of uncertainty would hang around the law, and the ultimate decision may very much depend on how and when a question is raised.

All these arguments for and against advisory opinions however lead to one conclusion: it is advisable that the highest Court has advisory jurisdiction but it should be invoked only sparingly and not frequently and only in such cases where factual situations are ripe, or where legal issues are capable of being formulated precisely and can be considered by the Court without much of a factual data, and political questions should not be referred to the Court for advice.

Most of the above objections are diluted by the safeguards subject to which only the Supreme Court in India may be consulted, *viz*.:

(1) It has an option to give or not to give its opinion on issues referred to it and, therefore, it can withhold its opinion *inter alia* if it feels that the reference suffers from prematurity or from lack of facts, or if the facts on which the reference is based are disputed, or if the reference is of a political nature *etc*.

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83. *Att. Gen. for Br. Col. v. Att. Gen. for Canada*, (1914) A.C. 153, 162; *In re Regulation and Control of Aeronautics in Canada*, (1932) A.C. 54, 66.

84. FREUND, Umpiring the Federal System, 54 *Col. L.R.* 561, 574; also, FREUND, A Supreme Court in a Federation, 53 *Col. L.R.* 597, 613.

85. BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM*, 107-111 (1954); SCHWARTZ, *AMERICAN CONST. LAW*, 149 (1955); MCWHINNEY, *JUDICIAL REVIEW*, 181 (1969).

(2) Judicial procedure is used in hearing the reference and opinion is delivered in open court so that the reasons on which it is based are subject to public scrutiny.

(3) Questions on which opinion is sought have to be framed by the Executive, for the Court is to give its opinion on problems of law or fact presented to it by the Executive in the reference.

Further, much depends as to how, in practice, the technique is used, and here the Indian experience cannot be said to be discouraging so far. On the whole, the institution of advisory opinions has functioned well in India and has proved to be creative in value so far as the constitutional interpretation is concerned. It has been used wisely and sparingly so far as is evident from the fact that over a period of 50 years only twelve references have been made to the Supreme Court of which the Court refused to entertain only one reference, *viz., In the matter of Ram Janma Bhumi.*

The reference procedure has been used in India so far only when substantial constitutional issues have been involved. Abstract and hypothetical questions have not generally been referred. References have been made only when issues have become clarified and crystallised by public discussion and were mature enough for judicial opinion.

Only in one or two references so far has the Court complained that it was handicapped by a lack of sufficient factual data to enable it to give its opinion. As for example, in *In re Levy of Estate Duty*, certain questions regarding future legislation on levy of estate duty were referred to the Federal Court for opinion, but no draft Bill was submitted. So, in answering the questions, the Judges had to make certain assumptions and reservations and they had no clear appreciation of the context in which the legal issues posed were to operate. In fact, one of the Judges hearing the reference, even refused to give his opinion, because the reference was enveloped in a 'thick fog of hypothesis' and 'uncertainties'. However, the two other Judges did give their opinion on the reference.

In the *Kerala Bill* case also, the Court pointed out that the questions referred had not arisen out of actual application of any specified section of the Bill to the facts of any particular case and so the questions were necessarily 'abstract or hypothetical' in nature. In the *Kerala Bill* case, though facts were absent, yet it differed from the *Estate Duty* case in so far as a Bill enacted by the State Legislature was before the Court and so it did not have to function in a complete vacuum.

The difficulties pointed out in these cases suggest that the reference, to elicit a meaningful judicial opinion, should be made, as far as possible, when the case is ripe and factual context and all relevant data are available. However, this much can be said for the *Kerala* reference that the Central Government had not much choice in the matter. Had it sought amendments in the Bill by the Kerala Legislature on its own accord, its political motives would have been questioned because the Central and the State Governments belonged to two different political parties. So, an objective assessment of the defects of the Bill by the Supreme Court was the best alternative available.

The controversy was set in legalistic and constitutional terms and the reference did not raise any political issue although the motivation behind the reference might have been political. On the whole, however, the full matter may be said to be the precursor

of healthy conventions in the area of federalism insofar as even when the Centre could have vetoed the Bill, it did not do so without seeking an opinion of a forum whose objectivity and impartiality none could challenge.[86]

G. POWER TO DO COMPLETE JUSTICE : ART 142(1)

Under Art. 142(1), in the exercise of its jurisdiction, the Supreme Court is entitled to pass any decree, or make any order, as is necessary *for doing complete justice* in any cause or matter pending before it.[87] Therefore although the ambit of the power is wide it should "be limited to the short compass of the actual dispute before the court and not to what might reasonably be connected with or related to such matter".[88]

The expressions 'cause' or 'matter' include any proceeding pending in the Court and would cover almost every kind of proceeding in the Court including civil or criminal.

Article 142(1) confers very wide powers on the Supreme Court to do complete justice in any case. The Court has given a broad and purposive interpretation to this provision.

The jurisdiction and powers of the Supreme Court under Art. 142 are supplementary in nature and are provided for doing complete justice in any matter. In course of time, the Apex Court has given a much wider dimension and ambit to Art. 142, practically raising the provision to the status of a new source of substantive power for itself.

Article 142(1) contains no limitations regarding the causes or the circumstance in which the power can be exercised nor does it lay down any condition to be satisfied before such power is exercised. The exercise of the power is left completely to the discretion of the highest court. Referring to Art. 142(1), the Supreme Court in *Supreme Court Bar Association v. Union of India*, has characterised its own role in these words:[89]

> "Indeed the Supreme Court is not a court of restricted jurisdiction of only dispute-settling. The Supreme Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a problem-solver in the nebulous areas…"

In the same case, the Court has described the nature of its power under Art. 142 as follows:

> "The plenary powers of the Supreme Court under Art. 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise, may be put on a different and perhaps even wider footing, to prevent injustice in the process of

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86. *Infra*, Ch. X, Sec. K.
87. *Delhi Electric Supply Undertaking v. Basanti Devi*, AIR 2000 SC 43, 49 : (1999) 8 SCC 229.
88. *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 5 SCC 353 : AIR 2004 SC 3467.
89. AIR 1998 SC 1895 : (1998) 4 SCC 409.

> litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law....."[90]

The Supreme court has exhibited a wavering attitude as regards the scope of Art. 142.

The nature of the power must lead the Court to set limits for itself within which to exercise those powers.

In some cases, the Court has laid down the restriction on itself with regard to Art. 142(1), *viz.*, the Court does not exercise the power to override any express statutory provisions. The power is not to be exercised in a case where there is no basis in law to form an edifice for building up a superstructure.

Article 142 is curative in nature; the power under Art. 142 is meant to "supplement" and not to "supplant" substantive law applicable to the case under consideration. Substantive statutory provision dealing with the subject-matter of a given case cannot be altogether ignored by the Supreme Court while making order under Art. 142.

The Apex Court has ruled that though its power under Art. 142 is broad, it cannot be exercised against a Fundamental Right.[91] In *Prem Chand,*[92] the Court had suggested that its power under Art. 142(1) cannot be exercised against a definite statutory provision. It was observed in that case:[93]

> ".....The wide powers which are given to this Court for doing complete justice between the parties, can be used by this Court for instance, in adding parties to the proceeding pending before it, or in admitting additional evidence, or in remanding the case, or in allowing a new point to be taken for the first time. It is plain that in exercising these and similar other powers, this Court would not be bound by the relevant provisions of procedure if it is satisfied that a departure from the said procedure is necessary to do complete justice between the parties."

In *A.R. Antulay v. R.S. Nayak*,[94] the Supreme Court has observed in relation to Art. 142:

> "… however wide and plenary the language of the article, the directions given by the Court should not be inconsistent with, repugnant to, or in violation of the specific provisions of any statute".

But, then, there are a member of cases, where the Court has expressed the view that the scope of Art. 142, which is a constitutional provisions, cannot be cut down by a statutory provision. Accordingly, the Court has observed:

> "Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be ex-

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90. Also see, *Delhi Electric Supply Undertaking v. Basanti Devi,* AIR 2000 SC 43 at 49 : (1999) 8 SCC 229.
91. *Prem Chand v. Excise Commr., infra,* footnote 92.
92. *Prem Chand v. Excise Commissioner,* AIR 1963 SC 996 : 1963 Supp (1) SCR 885.
93. *Ibid.,* at 1003.
94. Also see, *A.R. Antulay v. R.S. Nayak,* AIR 1988 SC 1531 : (1988) 2 SCC 602.

> ercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject".[95]

In *Delhi Judicial Service Assn.*,[96] the Supreme Court has observed that its power under Art. 142(1) to do complete justice is entirely of a different level and of a different quality and that any prohibition or restriction contained in ordinary laws can not act as a limitation on the constitutional power of the Supreme Court. Once the Court is in seision of a matter before it, "it has power to issue any order or direction to do 'complete justice' in the matter. This constitutional power of the Apex Court cannot be limited or restricted by provisions contained in statutory law." Thus, no enactment made by a legislature can limit or restrict the power of the Supreme Court under Art. 142, though the Court must take into consideration the statutory provisions regulating the matter in dispute.[97]

In *Union Carbide*,[98] the Court has taken a very broad view of Art. 142. The Court has observed in relation to the scope of its powers under Art. 142:

> "The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Art. 142(1) is unsound and erroneous..... The [Court's] power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, *ipso facto*, act as prohibitions or limitations on the constitutional powers under Art. 142.... Perhaps, the proper way of expressing the idea is that in exercising powers under Art. 142 and in assessing the needs of 'complete justice' of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. This proposition does not relate to the powers of the Court under Art. 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power."

Under section 25 of the Delhi Special Police Establishment Act, 1946, Central Bureau of Investigation (CBI) cannot investigate a cognizable offence committed within a State without the consent of the concerned State Government. But the Supreme Court has ruled that it can under Art. 142(1) direct CBI to investigate such an offence within a State without the consent of the concerned State Government. The Court has asserted that the exercise of its power under Art. 142(1) is not conditioned by any statutory power, because statutory provisions cannot override constitutional provisions. Art. 142(1) being a constitutional power cannot be limited or conditioned by any statutory provision. The Court has explained the scope of Art. 142 in the following words:

> "The constitutional plenitude of the powers of the Apex Court is to ensure due and proper administration of justice and is intended to be co-extensive in each case and to meeting any exigency. Very wide powers have been conferred

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95. *Supreme Court Bar Association v. Union of India*, AIR 1998 SC 1895 : (1998) 4 SCC 409.

96. *Delhi Judicial Service Assn. v. State of Gujarat*, AIR 1991 SC 2176, at 2210 : (1991) 4 SCC 406.

97. The Court has expressed this view in a number of cases. See, for example, *State of Uttar Pradesh v. Poosu*, AIR 1976 SC 1750 : (1976) 3 SCC 1; *Ganga Bishan v. Jai Narain*, AIR 1986 SC 441 : (1986) 1 SCC 75; *Navnit R. Kamani v. R.R. Kamani*, AIR 1989 SC 9 : (1988) 4 SCC 655; *B.N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942 : (1966) 3 SCR 682; *Harbans Singh v. State of Uttar Pradesh*, AIR 1982 SC 849 : (1982) 2 SCC 101.

98. *Union Carbide Corpn. v. Union of India*, (1991) 4 SCC 584, 634-35 : AIR 1992 SC 248, 278.

> on this Court for due and proper administration of justice and whenever the Court sees that the demand of justice warrants exercise of such powers, it will reach out to ensure that justice is done by resorting to this extraordinary power conferred to meet precisely such a situation."

The power under Art. 142(1) cannot be diluted merely because the Act in question stipulates that the State Government's permission will be necessary if the CBI is to investigate any offence committed within the territorial jurisdiction of a State Government. That may be a statutory obligation governing the relations between the Central Government and the State Government but it cannot control Supreme Court's power under Art. 142(1). The statute does not prohibit investigation by CBI but only requires certain formalities to be completed which has no relevance when the Apex Court makes an order in exercise of its power under Art. 142(1).[1]

The Supreme Court has emphasized that the power given to it under Art. 142 is conceived to meet situations which cannot be effectively and appropriately tackled by the existing legal provisions. The Supreme Court has left the power under Art. 142 "undefined and uncatalogued" so that "it remains elastic enough to be moulded to suit the given situation".[2]

A 3-judge Bench of the Supreme Court rejected the contention that it could not with the aid of Art. 142 cancel mining leases as the power to do so was with the State Government under Mines & Minerals (Development & Regulation) Act, 1957.[3]

While holding that the appointments to the posts of clerks in the subordinate courts in Karnataka without consultation with the State Public Service Commission were not valid, the Supreme Court, nevertheless, exercising its power under Art. 142, ruled on humanitarian grounds not to remove them from service as they had put in more than 10 years of service. These persons deserved "justice ruled by mercy". Accordingly, the Court ruled that these persons be treated as "regularly appointed with all the benefits of the past service."[4]

In a recent case the appellant challenged an order of punishment imposed by departmental authorities. His statutory appeal and revisional application were dismissed. The suit filed by him was dismissed as well as the First and Second Appeals. The only issue before the Supreme Court was the failure of the High Court to frame a substantial question of law. The Supreme Court however went into the facts and found that the order of punishment was indeed unjustified. Instead of remanding the case to the High Court, in exercise of its jurisdiction under Article 142, it set aside the judgment of the High Court confirming the judgments of the two lower courts and decreed the suit in favour of the appellant.[5]

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1. *Mohd. Anis v. Union of India,* (1994) Supp (1) SCC 145 : 1994 SCC (Cr) 248. Also, *Maniyeri Madhavan v. Sub-Inspector of Police*, AIR 1994 SC 1033 : (1994) 1 SCC 536.

2. *Delhi Development Authority v. Skipper Construction Co.*, AIR 1996 SC 2005 : (1996) 4 SCC 622.

3. *M.C.Mehta v. U.O.I.*, (2009) 6 SCC 142 : (2009) 6 JT 434.

4. *H.C. Puttaswamy v. Hon'ble Chief Justice of Karnataka,* AIR 1991 SC 295 : 1991 Supp (2) SCC 421.

5. *Man Singh v. State of Haryana*, (2008) 12 SCC 331. See also *Narendra Gopal Vidyarthi v. Rajat Vidyarthi*, (2009) 3 SCC 287 : (2008) 13 JT 313.

The Supreme Court has again explained the plenitude of the power under Art. 142 and has emphasized in the case mentioned below[6] that the power of the Supreme Court under Art. 142 is "a constituent power transcendental to statutory prohibition". There are no limiting words in Art. 142 "to moulding of relief or taking of appropriate decision to mete out justice or to remove injustice". The expression "complete justice" engrafted in Art. 142(1) is of wide amplitude "couched with elasticity to meet myriad situations". In the ultimate analysis, "it is for the Supreme Court to exercise its power to do complete justice or prevent injustice arising from the exigencies of the cause or matter before it". The question of lack of jurisdiction or nullity of the order of the Supreme Court does not arise."

In exercise of its extra-ordinary jurisdiction the Court may set aside not only the order impugned, but another order if it is of the view that setting aside the order impugned would give rise to another illegality.[7]

In *Vineet Narain v. Union of India*,[8] the Supreme Court has ruled that ample powers are conferred on the Court under Arts. 32, 141, 142 and 144 to issue necessary directions to fill the vacuum till either the legislature steps in to cover the gap or discharges its role.

In *Vishakha*,[9] the Supreme Court has emphasized that it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.[10]

Similarly, the deserted wife of a tenant was held to be entitled to continue in occupation of the tenanted premises having regard to the "demands of social and gender justice" under Art. 142 until suitable amendment in the legislation takes place.[11]

Presumably exercising its power under Art.142, the court directed that although no disability pension was payable to an army personnel since the disability was not caused by military service, yet it directed that the amount paid to the legal representatives of the disabled was not to be recovered from them.[12]

In a case where the court found that a respondent was in fact rendering service for a long time in the post of UDC although he was strictly not entitled to be in the UDC grade, the court directed that he should not be reverted to LDC but his seniority should be counted from the date on which he joined in the UDC post.[13]

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6. *Ashok Kumar Gupta v. State of Uttar Pradesh*, (1997) 5 SCC 201 : 1997 SCC (L&S) 1299.

7. *Commissioner of Income Tax, Shimla v. Greenworld Corporation, Parwanoo*, (2009) 7 SCC 69 : (2009) 8 JT 429.

8. AIR 1998 SC 889 : (1958) 1 SCC 226.

9. *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241 : AIR 1997 SC 3011.
For further discussion on this case, see, Ch. XXVI

10. The Supreme Court has used its power to issue directions in a number of cases. For example, see, *Lakshmi Kant Pandey v. Union of India*, AIR 1984 SC 469 : (1984) 2 SCC 244; *State of West Bengal v. Sampat Lal*, AIR 1985 SC 195 : (1985) 1 SCC 317; *Union Carbide Corp. v. Union of India*, AIR 1992 SC 248 : (1991) 4 SCC 584; *Advocate-on-Record Ass. v. Union of India*, (1993) 4 SCC 441 : AIR 1994 SC 268; *Vishakha, op. cit.*

11. *B.P. Achala Anand v. S.Appi Reddy*, (2005) 3 SCC 313 : AIR 2005 SC 986.

12. *Secretary, Ministry of Defence v. A.V.Damodaran (Dead) Through LRS.*, (2009) 9 SCC 140.

13. *Union of India v. Muralidhara Menon*, (2009) 9 SCC 304.

It is thus clear from the above discussion that the Supreme Court's power under Art. 142 is vastly broad based. There are only three restrictions on the exercise of this power:

(i) it can be exercised only when the Court is otherwise exercising its jurisdiction;

(ii) the order which the Court passes is necessary for doing complete justice in the cause or matter pending before it; and

(iii) an order made under Art. 142(1) cannot contravene a constitutional provision though it may by-pass substantive provisions of the relevant statutory laws, if the court feels it necessary.

As regards the power under Art. 142 to do complete justice, the Supreme Court has put the power at its highest in *In re, Vinay Chandra Mishra*,[14] where the Court declared that "statutory provisions cannot override the constitutional provisions" and "Art. 142(1) being a constitutional power it cannot be limited or conditioned by any statutory provision." No enactment made by Central or state legislature can limit or restrict the power of the Supreme Court under Art. 142, though the Court must take into consideration the statutory provisions regulating the matter in dispute. What would be the need of complete justice in a cause or matter, would depend upon the facts and circumstances of each case. The limited view of Art. 142 expressed in *Premchand*[15] was expressly overruled as being "no longer a good law".[16]

The main point which the Court was called upon to decide in *Vinay Chandra* was whether it could suspend an advocate from practice, reading Arts. 129 and 142(1) together, when he was held guilty of contempt of court.[17] It was argued that since the power to suspend an advocate had been vested exclusively in the State Bar Council and the Bar Council of India, the Supreme Court was denuded of its power to impose such punishment. But the Court rejected the argument and ruled that under Arts. 129 and 142(1), it had the power to suspend an advocate from practice for its contempt. The Court ruled that Advocates Act had nothing to do with the contempt jurisdiction of the Court. No statute could restrict or limit the Court's power to take action for contempt against an advocate. The Court observed:[18]

> ".....The disciplinary jurisdiction of the State Bar Councils and the Bar Council of India to take action for professional misconduct is different from the jurisdiction of the courts to take action against the advocates for the contempt of court. The said jurisdiction co-exists independently of each other. The action taken under one jurisdiction does not bar an action under the other jurisdiction".

Therefore, invoking its power under Art. 129 read with Art. 142, the Court awarded to the contemner advocate not only a suspended sentence of imprisonment for six weeks but also suspended him from practice for three years.

Following *Vinay Chandra*, the Court has observed in the case noted below:[19]

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14. (1995) 2 SCC 621.
15. See, *supra*, footnote 92.
16. Also see, *E.S.P. Rajaram v. Union of India*, AIR 2001 SC 581 : (2001) 2 SCC 186.
17. See, *supra*, Sec. C(i)(a).
18. (1995) 2 SCC 621, at 624; *supra*.
19. *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, AIR 1996 SC 2005, 2011 : (1996) 4 SCC 622.

> "As a matter of fact, we think it advisable to leave this power undefined and uncatalogued so that it remains elastic enough to be moulded to suit the given situation."

Art. 142 is conceived to meet situations which cannot be effectively and appropriately tackled by the existing provisions of law. For example in *R.K. Anand v. Registrar, Delhi High Court,*[20] a 3-judge Bench appears to have expressed a contrary view holding that the High Court could, in appropriate cases, direct an Advocate who is found to be guilty of committing contempt to prohibit him from appearing in the High Court or lower courts subordinate to it. Thus, where an influential prisoner flouted all laws while in a particular jail, and it was imperative to transfer the prisoner out of the state, even though there was no provision in either the Jail Manual or The Transfer of Prisoners Act,1950, the "legislative vacuum" was filled and directions were given for his transfer to a jail outside the State.[21] Similarly, a decree for divorce on the ground of an irretrievable breakdown of marriage was granted although the Hindu Marriage Act, 1955, under which the matter arose, does not recognize it as one of the grounds on which a court can direct dissolution of marriage.[22] The limited power of review in the Designated Authority under Rule 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on Dumped Articles and for Determination of Injury) Rules, 1995 was extended under this Article.[23]

But the same question was re-agitated before the Supreme Court in *Supreme Court Bar Association v. Union of India,*[24] and this time the Court modified, and toned down, its views as expressed in *Vinay Chandra*. The Court has now ruled that it has no power to suspend an advocate from practice. He should be dealt with under the Advocates Act, 1961, which "contains a detailed and complete mechanism for suspending or revoking the licence of an advocate for his professional misconduct". Regarding Art. 142, the Court has observed:[25]

> "The power to do complete justice under Article 142 is in a way, corrective power, which gives preference to equity over law but it cannot be used to deprive a professional lawyer of the due process contained in the Advocates Act, 1961, by suspending his license to practice in a summary manner, while dealing with a case of contempt of court."

The Court has asserted that it is not a court of restricted jurisdiction of only dispute settling. The Supreme Court "has always been a law maker and its role travels beyond merely dispute settling. It is a problem solver in the nebulous areas". Nevertheless, imposing a self limitation on itself it has said:[26]

> "....The substantive statutory provisions dealing with the subject-matter of a given case, cannot be altogether ignored by this Court, while making an order

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20. (2009) 8 SCC 106 : (2009) 10 JT 1.
21. *Kalyan Ranjan Sarkar v. Rajesh Ranjan,* (2005) 3 SCC 284 : AIR 2005 SC 972.
22. *A. Jayachandra v. Aneel Kaur,* (2005) 2 SCC 22 : AIR 2005 SC 534; See also *Swati Verma v. Rajan Verma,* (2004) 1 SCC 123 : AIR 2004 SC 161*; Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit,* (2005) 13 SCC 410 *:* (2004) 10 SCALE 362*; Sanghamitra Ghosh v. Kajal Kumar Ghosh,* (2007) 2 SCC 220 : (2006) 10 JT 288.
23. *Designated Authority v. Indian Refractory Makers Assocn.,* 2003 (154) ELT 349 (SC) : (2003) 11 SCC 28
24. AIR 1998 SC 1895 : (1998) 4 SCC 409; *supra*.
25. *Ibid,* at 1907.
26. *Ibid,* at 1909. Also see, *Bonkya v. State of Maharashtra,* AIR 1996 SC 257 : (1995) 6 SCC 447.

> under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

Therefore, while "prohibitions or limitations in a statute" cannot come in the way of exercise of jurisdiction under Art. 142 to do complete justice between the parties, the Apex Court "will take note of the express provisions of any substantive statutory law and regulate the exercise of its power and discretion accordingly". The Court disapproved the proposition stated in *Vinay Chandra*[27] that "while exercising jurisdiction under Art. 142, this Court can altogether ignore the substantive provisions of a statute, dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute."

On Art. 142, the Court has observed that "the power exists as a separate and independent basis of jurisdiction, apart from the statutes". "This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law". The power conferred by Art. 142 being "curative in nature" cannot be construed as power authorising the Court to ignore "the substantive rights of a litigant" while dealing with a cause pending before it". The power conferred by Art. 142 has been held to be "complementary" to those powers specifically conferred on the Court by statutes. Thus in an appropriate case the Court can direct the Commissioner of Income tax to reopen an assessment under the Income Tax Act.[28]

The Court has further observed that it cannot use its power under Art. 142 to "supplant" substantive law applicable to the case or cause under consideration of the Court. Art. 142 cannot be used, even with the width of its amplitude, to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.

The Court has cautioned:

> "It must be remembered that wider the amplitude of its power under Art. 142, the greater is the need of care for this Court to see that the power is used with restraint."

Thus, the plenitude of power conferred on the Supreme Court under Art. 142 needs to be used with care as not to interfere with the performance of their statutory duties and functions by other authorities in accordance with law.

Hence the Court has said that in exercise of its jurisdiction under Art.142 and the High Courts under S. 482 of Criminal Procedure Code would not direct quashing of a case involving crime against society and more so when both trial

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27. *Supra*, footnote 14.

28. *Commissioner of Income Tax, Shimla v. Greenworld Corporation, Parwanoo*, (2009) 7 SCC 69 : (2009) 8 JT 429.

court as also the High Court have found that a *prima facie* case has been made out against the accused.[29]

The court will not exercise the power to direct re-computation of tax based on law declared when the controversy was two decades old on the ground of extreme difficulty by reason of long lapse of time.[30]

To enable the exercise of discretion to be an informed one, the assistance of experts may be availed.[31]

In *M.S. Ahlawat v. State of Haryana*,[32] the Court has held that under Art. 142, it cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute.

Again, in *M.C. Mehta v. Kamal Nath*[33], the Court has stated that Art. 142 cannot be pressed into service in a situation where action under that article would amount to contravention of the specific provisions of the Act. In the instant case, the Court awarded damages against the respondent under the "Polluter Pays Principle". The further question was whether the Court could under Art. 142 impose pollution fine on the polluter under such statutes as the Water (Pollution and Control of Pollution) Act, 1974, the Environment (Protection) Act 1986, and the Air (Prevention and Control of Pollution) Act, 1981. The Supreme Court ruled that to impose punishment under any of these Acts, the polluter must be tried in a court and if the offence is proved then alone he can be punished. Art. 142 can not be pressed into aid in such a situation for to impose fine upon the polluter would amount to contravention of the specific statutory provisions.

However, while the law declared by the Supreme Court is presumed to be in operation from the inception, while declaring the law, in exercise of its powers to do complete justice, it may be direct the declaration to operate prospectively and save the transactions whether statutory or otherwise that were effected on the basis of the earlier law.[34]

Recently, there has been a reiteration of the "restrictive" approach. In *State of Haryana v. Sumitra Devi*,[35] the opinion was that no order can be passed under Art. 142 contrary to statute or statutory rules. .In another case an order passed under Art. 142 was corrected on review as it was passed contrary to a statutory provision.[36] The Constitutional Bench decision in *Secy. State of Karnataka v.*

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29. *Rumi Dhar (SMT) v. State of West Bengal*, (2009) 6 SCC 364 : AIR 2009 SC 2195.
30. *Commissioner of Income Tax, Faridabad v. Ghanshyam (HUF)*, (2009) 8 SCC 412 : (2009) 9 JT 445.
31. *M.C. Mehta v. Union of India*, (2007) 1 SCC 110 : AIR 2007 SC 1087.
32. (2000) 1 SCC 409 : AIR 2000 SC 1997.
33. (2000) 6 SCC 213, 223. However see *Oriental Insurance Co. Ltd. v. Brij Mohan*, (2007) 7 SCC 56, at page 64 : AIR 2007 SC 1971, Also see, *infra*, Ch. XXVI.
34. *Golak Nath v. State of Punjab*, AIR 1963 SC 1643. For a full discussion see Part VII Chapter XL Sec. G: Prospective overruling.
35. (2004) 12 SCC 322 : AIR 2004 SC 1050. See also *Sarat Chandra Mishra v. State of Orissa*, (2006) 1 SCC 638 : AIR 2006 SC 861.
36. *Textile Labour Asscn v. Official Liquidator*, (2004) 9 SCC 741 : AIR 2004 SC 2336.

Umadevi (3)[37] emphasized that "complete justice" under Art. 142 means justice according to law and not sympathy. It said that "equitable considerations or individualization of justice" have resulted in conflicting opinions leading to confusion and uncertainty in the law and that the Court would not grant a relief which would amount to perpetuating an illegality encroaching into the legislative domain.[38]

However the earlier liberal approach as propounded in *Vinay Chandra* also continues to be applied.[39]

The sum and substance of the above observations of the Apex Court seems to be that the scope of Art. 142 is extremely broad. Being a constitutional provision, it can override any statutory provision. But, in practice, the Court does not use its powers under Art. 142 in direct confrontation with any express statutory provision applicable to the case in hand. This is a self-imposed restriction but the Court can by-pass the same if the equitable considerations in a given case so demand.

A large number of cases have been disposed of by the Court invoking its power under Art. 142. From the conspectus of decided cases, it appears that the Court has invoked its power under Art. 142 in different types of cases involving different fact situations for doing complete justice between the parties. The observations of the Court in numerous cases spanning over 60 years also indicate that, at times, the Court has adopted a somewhat narrow view, and, at other times, an extremely broad view, of its power under Art. 142. Particular reliefs have been granted while providing that the case would not be treated as a precedent or by prefacing the direction with a phrase emphasizing the peculiar facts and circumstances of the case.[40]

The discussion above establishes that Art. 142 confers a plenary power on the Supreme Court which is free of any statutory limitations. Ordinarily, the Court does not by-pass statutory provisions under Art. 142, but, if in any situation, the Court feels it necessary to do complete justice to by-pass statutory provisions, it can do so. It can be said that the Supreme Court's power under Art. 142, theoretically speaking, is not conditioned by any statutory provisions, but, in practice, it

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37. (2006) 4 SCC 1, 36 : AIR 2006 SC 1806.

38. (2006) 4 SCC 1, 18 : AIR 2004 SC 32. See also *Teri Oat Estates (P) Ltd. v. U.T. Chandigarh,* (2004) 2 SCC 130 : (2003) 10 SCALE 1016; *A. Umarani v. Registrar, Cooperative Societies,* (2004) 7 SCC 1, 18*; Govt. of W. Bengal v. Tarun K. Roy,* (2004) 1 SCC 347 : (2003) 9 JT 130*; National Aluminium Co. Ltd. v. Presssteel & Fabrications (P) Ltd.,* (2004) 1 SCC 540 : AIR 2005 SC 1514; *Pramod Kumar Saxena v. Union of India,* (2008) 9 SCC 685; *U.P.STRC v. Commissioner of Police,* (2009) 3 SCC 634 : (2009) 2 JT 553; *Leila David v. State of Maharashtra,* (2009) 4 SCC 578 : (2009) 11 JT 252.

39. *Monica Kumar (Dr.) v. State of U.P.,* (2008) 8 SCC 781; *Tamilnadu Mercantile Bank Shareholders Welfare Assn. (2) v. S.C. Sekar,* (2009) 2 SCC 784.

40. See for example *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission,* (2003) 8 SCC 593 : AIR 2003 SC 4519; *Pohla Singh v. State of Punjab,* (2004) 6 SCC 126AIR 2004 SC 3329*; Bharat Petroleum Corpn Ltd. v. P. Kesavan,* (2004) 9 SCC 772 : AIR 2004 SC 2206; *Swedish Match AB v. SEBI,* (2004) 11 SCC 641 : AIR 2004 SC 4219; *India Umbrella Manufacturing Co. v. Bhagabandei Agarwalla,* (2004) 3 SCC 178 : AIR 2004 SC 1312*; Harigovind Yadav v. Rewa Siddhi Gramin Bank,* (2006) 6 SCC 145 : AIR 2006 SC 3596*; Hari Shankar Singhania v. Gaur Hari Singhania,* (2006) 4 SCC 679 : (2006) 4 SLT 551*; Hari Shankar Singhania v Gaur Hari Singhania,* (2006) 4 SCC 658 : AIR 2006 SC 2488; *Hasham Abbas Sayyad v. Usman Abbas Sayyad,* (2007) 2 SCC 355 : AIR 2007 SC 1077; *State of Kerala v. Mahesh Kumar,* (2009) 3 SCC 654, at page 660 : (2009) 3 JT 424.

would not disregard such provisions unless it is absolutely necessary to do so with a view to do justice between the parties.

CRIMINAL JUSTICE

In the area of criminal justice, under Art. 136 read with Art. 142, the Supreme Court is entitled to stay the execution of the sentence and to grant bail pending the disposal of the application for special leave to appeal.[41] Disposing of an appeal from an order refusing bail to the appellants who were charged *inter alia* with cheating several investors, in exercise of its powers under Art. 142, the Supreme Court granted bail and also issued several directions relating to the realization and disposal of the assets of the appellants to meet the demands of the various depositors.[42]

Under Art. 142(1) coupled with Arts. 32 and 136, the Supreme Court has jurisdiction to quash criminal proceedings if on admitted facts no charge is made out against the accused, or if the proceedings are initiated on concocted facts or false evidence, or if the proceedings are initiated for oblique purposes.[43] The power of the Court under Art. 142 insofar as quashing of criminal proceedings are concerned is not exhausted by ss. 320 or 321 or 482 Cr. P.C., or all of them put together.[44] Thus, while acquitting an accused of charges of rape he was directed to pay compensation to the complainant by way of damages for committing breach of promise to marry her.[45]

The Court can enhance the sentence awarded to the accused while hearing an appeal against his conviction.

In *Chandrakant Patil v. State*,[46] the Court has observed that "power under Article 142 of the Constitution is entirely of different level and is of a different quality which cannot be limited or restricted by provisions contained in statutory law. No enactment made by the Central or State legislature can limit or restrict the power of this Court under Article 142, though while exercising it the Court may have regard to statutory provisions." The Court has however cautioned that it will use its power under Art. 142 "only sparingly" and "not frequently".

In the instant case, the appellant was convicted under TADA and sentenced to 5 years' rigorous imprisonment. While hearing an appeal filed by the accused, the Supreme Court found the sentence to be inadequate and enhanced the sentence to 10 years' imprisonment to meet the ends of justice. The question was raised whether the Supreme Court could enhance the sentence as the Criminal Procedure Code has no such provision. The Court took the view that the Court could do so under its "wide and residual powers to deal with the situation like this, which are well enclosed in Article 142 of the Constitution". It may be noted

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41. *K.M. Nanavati v. State of Bombay,* AIR 1961 SC 112, 120 : (1961) 1 SCR 497.
For inter-relation between Arts. 161 and 142, see, *infra,* under State Executive, Ch. VII.

42. *Arvind Mohan Johri v. State of U.P.,* (2005) 4 SCC 634 : (2005) 11 JT 478.

43. *Union Carbide Corpn. v. Union of India,* (1991) 4 SCC 584 : AIR 1992 SC 248; *Delhi Judicial Service Association v. State of Gujarat,* AIR 1991 SC at 2210; *Keshub Mahindra v. State of Madhya Pradesh,* (1996) 6 SCC 129 : 1996 SCC (Cri) 1124.

44. *R.S. Antulay v. Nayak,* AIR 1988 SC 1531 : (1988) 2 SCC 602; *Arvind Barsaul (Dr.) v. State of M.P.,* (2008) 5 SCC 794; *Monica Kumar (Dr.) v. State of U.P.,* (2008) 8 SCC 781, at page 801 : AIR 2008 SC 2781.

45. *Deelip Singh v. State of Bihar,* (2005) 1 SCC 88 : AIR 2005 SC 203.

46. *Chandrakant Patil v. State,* AIR 1998 SC 1165 : (1998) 3 SCC 38.

that, in the instant case, appeal was filed in the Supreme Court under section 19 of TADA and not under Art. 136.

A young woman was murdered because she resisted being raped by the accused. The trial court acquitted the accused and the High Court concurred with the trial court. On an appeal being filed in the Supreme Court under Art. 136, the Court reversed the lower courts and held him guilty.

It was argued that according to s. 401(3), Cr. P.C., if the Supreme Court found that the acquittal of the accused was wrong, then the case be sent back to the lower court for retrial. The Supreme Court did not agree with this contention, and invoking its power under Art. 142, held the accused guilty and sentenced him to life imprisonment.

The Court argued that the power available to it under Art. 136, is not circumscribed by any limitation. In any case, power under Art. 142 is available to pass such order as may be deemed appropriate to do complete justice. Accordingly, the Court by passed the limitation imposed on it by s. 401(3), Cr. P.C., and itself sentenced the accused.[47]

H. POWER TO REVIEW

Under Art. 137, the Supreme Court has power to review any judgment pronounced or order made by it. But this special power is, however, exercisable in accordance with, and subject to any parliamentary legislation and rules made by the Court itself under its rule making power.

Under Art. 145(e), the Supreme Court is authorised to make rules as to the conditions subject to which the Court may review any judgment or order.[48] In exercise of this power, Order XL has been framed.

According to the rules of the Court, in a civil proceeding, review of a Court decision will lie on the following grounds:

(1) discovery of new and important matter of evidence;

(2) mistake or error apparent on the face of the record;[49]

(3) any other sufficient reason, *e.g.*, that there are in the judgment certain unmerited observations against the petitioner.[50]

The expression, 'for any other sufficient reason' has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power.[51]

The Apex Court has clarified that a review is by no means an appeal in disguise.

The Court has justified review of its own judgment with the following remarks:[52]

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47. *Dharma v. Nirmal Singh Bitta*, AIR 1996 SC 1136 : (1996) 7 SCC 471.
48. On the rule-making power of the Court, see, Sec. I(f), *infra.*
49. See, *CST v. Pine Chemicals Ltd.*, (1995) 1 SCC 58; *Devidayal Rolling Mills v. Prakash Chimanlal Parikh*, AIR 1993 SC 1982 : (1993) 2 SCC 470.
50. *Dayanand v. Nagaraj*, AIR 1976 SC 2183 : (1976) 2 SCC 932.
51. *S. Nagaraj v. State of Karnataka, infra*, footnote 52.
52. *S. Nagaraj v. State of Karnataka*, (1993) Supp. 4 SCC 595.
Also see, *Lily Thomas v. Union of India*, AIR 2000 SC 1650 : (2000) 6 SCC 224.

> "Review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility… Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality."

In *Hindustan Sugar Mills v. State of Rajasthan*,[53] the Court accepted the review petition because the assumption on which it made certain observations in the earlier decision was shown to be unfounded. These observations were, therefore, deleted from the judgment.

The Court has ruled that it is not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for the sake of justice,[54] or the previous decision suffers from an error apparent on the face of the record.[55]

Review is a serious matter; it is not rehearing of the appeal all over again. A judgment once delivered is final—this is the normal rule. A departure from that principle can be justified only when circumstances of a substantial and compelling character make it necessary to do so. A judgment is not reconsidered except "where a glaring omission or patent mistake or like grave error has crept in the earlier decision".[56] "The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength."[57]

As the Supreme Court has observed:[58]

> "It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so."[59]

For example, the Court will review its judgment if its attention was not drawn to a material statutory provision during the first hearing,[60] or if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.[61] "A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility."[62]

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53. AIR 1981 SC 1681 : (1980) 1 SCC 599.
54. *S. Nagaraj v. State of Karnataka*, (1993) Supp (4) SCC 595.
55. *Sheonandan Paswan v. State of Bihar*, AIR 1987 SC 877 : (1987) 1 SCC 288; *Deo Narain Singh v. Daddan Singh*, (1986) Supp SCC 530.
Also see, *A.R. Antulay and Common Cause*, *infra.*
56. *Chandra Kanta v. Sheik Habib*, AIR 1975 SC 1500 : (1975) 1 SCC 674; *P.N. Eswara Iyer v. Registrar, Supreme Court of India*, AIR 1980 SC 808; *Avtar Singh Sekhon v. Union of India*, AIR 1980 SC 2041 : 1980 Supp SCC 562.
57. *Lily Thomas v. Union of India*, AIR 2000 SC 1650 at 1663 : (2000) 6 SCC 224.
58. *Northern India Caterers v. Lt. Governor of Delhi*, AIR 1980 SC 674 : (1980) 2 SCC 167.
Also see, *Sow Chandra Kante v. S.K. Habib*, (1975) 1 SCC 674 : AIR 1975 SC 1500.
59. *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 : (1965) (1) SCR 973.
60. *Girdhari Lal Gupta v. D.H. Mehta*, AIR 1971 SC 2162 : (1971) 3 SCC 189; *UCO Bank v. Rajinder Lal Capoor*, (2008) 5 SCC 257 : AIR 2008 SC 1831.
61. *O.N. Mohindroo v. Dist. Judge, Delhi*, AIR 1971 SC 107 : (1971) 3 SCC 5.
62. *Chandrakanta v. Shaikh Habib*, AIR 1975 SC 1500 : (1975) 1 SCC 674; *Northern India Caterers, supra*, footnote 58; *Lily Thomas v. Union of India*, AIR 2000 SC 1650 at 1663 : (2000) 6 SCC 224.

Thus review of a judgment or order has been allowed if the order sought to be reviewed is based on a decision *per incuriam*,[63] or on an incorrect assumption of facts or law[64] or a non consideration of a contention made,[65] or if the judgment is inconsistent with the operative portion[66] or an interim order which was granted subject to the outcome of the appeal[67] or to clarify an ambiguity.[68]

The Court has described its review power as follows in *Lily Thomas*:[69]

> "… the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review."

In this case, the Court refused to review its earlier judgment in *Sarla Mudgal v. Union of India*[70]as there was no error apparent on the face of the record; no new material had come to light after the judgment. The earlier judgment was held not violative of any of the fundamental rights guaranteed to the citizens. Review power cannot be exercised merely because there is possibility of taking a different view.[71]

The expression "error apparent on the face of the record" is an error which is based on clear ignorance or disregard of the provisions of the law. The error should be something more than a mere error; it must be one manifest on the face of the record. An error is not apparent on the face of the record if it is not self-evident and if it requires an examination or argument to establish it.[72]

But, recently, the Supreme Court has given an expansive scope to the Court's power of review. The Court has observed:[73]

> "… to maintain a review petition it has to be shown that there has been miscarriage of justice. Of course, the expression "miscarriage of justice" is all embracing."

In *A.R. Antulay v. R.S. Nayak*,[74] the Supreme Court has stated that it has, *de hors* Art. 137, inherent power *ex debito justitiae* to recall an order made by it

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63. *Vinod Kumar v. Prem Lata*, (2003) 11 SCC 397 : AIR 2003 SC 3854.
64. *Chairman SBI v. All Orissa State Bank Officers Assocn.*, (2003) 11 SCC 607 : AIR 2003 SC 4201; See also *Tushar H. Shah v. Manilal Pitambardas*, (2003) 9 SCC 184 : (2000) 8 SLT 722.
65. *Indian Charge Chrome v. Union of India*, (2005) 4 SCC 67 : AIR 2005 SC 2087; *Noise Pollution (VI), In re*, (2005) 8 SCC 794 : (2005) 8 SCALE 101; *National Insurance Co. Ltd. v Bommithi Subbhayamma*M (2005) 12 SCC 243 : (2006) 131 Com Cases 280.
66. *J.P. Srivastava & Sons (Rampur) (P) Ltd. v. Gwalior Sugar Company Ltd.*, (2004) 7 SCC 193.
67. *K.T.Venkatagiri v. State of Karnataka*, (2003) 9 SCC 1 : AIR 2003 SC 1819.
68. *Arvind Mohan Johri v. State of U.P.*, (2005) 5 SCC 131 : (2005) 5 SLT 516 (2).
69. *Lily Thomas v. Union of India*, AIR 2000 SC 1650 : (2000) 6 SCC 224.
70. See, *infra*, Ch. XXXIV, for this case.
71. *Lily Thomas*, *supra*, at 1666.
72. *P.N. Eswara Iyer v. Registrar, Supreme Court of India*, AIR 1980 SC 808 : (1980) 4 SCC 680; *Chandra Kanta v. Sheikh Habib*, AIR 1975 SC 1500 : (1975) 1 SCC 674; *Sheonandan Paswan v. Bihar*, AIR 1983 SC 1125 : (1983) 4 SCC 104; *State of Haryana v. Prem Chand*, AIR 1990 SC 538; *T.C. Basappa v. T. Nagappa*, AIR 1954 SC 440 : 1955 (1) SCR 250; *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233 : 1955 (1) SCR 1104.
For further discussion on the concept of "error apparent on the face of the record", see, Ch. VIII, *infra*.
73. *Suthenthiraraja v. State*, AIR 1999 SC 3700, at 3703 : (1999) 9 SCC 323.
74. AIR 1988 SC 1531 : (1988) 2 SCC 602.

earlier if it was made by the Court by mistake. The Supreme Court being the Apex Court, and there being no higher forum where one could question any of its decisions, it is not only appropriate but also the duty of the Court to rectify the mistake in any of its decisions.

The Court has emphasized that the basic fundamental of the administration of justice is that no man should suffer because of the mistake of the Court. *Ex debito justitiae,* the Court must do justice to him. If a man has been wronged, so long as it lies within the human machinery of administration of justice, the wrong must be remedied. Some of the situations where the Court may exercise such a power are: (1) violation of a fundamental right; (2) violation of the principles of natural justice; (3) mistake of the Court; (4) judgement was obtained by fraud; (5) the Court made the earlier order without jurisdiction.

In the instant case, the Court (Bench of 7 Judges) recalled by majority (5:2) an order made earlier by a Bench of five Judges in *R.S. Nayak v. A.R. Antulay*.[75]

In that case, the Court had transferred a case pending against Antulay in a special court under the Prevention of Corruption Act for trial to the Bombay High Court. The order was made in 1984. This direction was now challenged after four years before the Supreme Court on the ground of "non-perception of certain provisions and certain authorities which would amount to derogation of the constitutional rights of the citizen." The Court now took the view that it was proper for it to act *ex debito justitiae* in favour of the appellant whose fundamental rights have been infringed. The Court had given directions in the earlier case *suo motu* without observing the principle of *audi alteram partem.* This had deprived the appellant of a right of appeal to the High Court and thus he was prejudiced. The said direction had also violated the fundamental rights of the appellant guaranteed to him by Arts. 14 and 21.[76]

The Supreme Court also ruled that the directions given by it in 1984 were violative of the limits of the Court's jurisdiction since the Court could not confer jurisdiction on a High Court which by relevant law was exclusively vested in the Special Judge and the decision was given *per incuriam*.[77] The Court now recalled the direction given by it in 1984 and directed that the corruption case against Antulay be tried by the Special Judge appointed under the Prevention of Corruption Act.

Some of the observations made by the Court on its inherent right to correct its own mistakes may be taken note of here. SABYASACHI MUKHARJI, J, (majority view) observed in this connection:[78]

> "But the Superior Court can always correct its own error brought to its notice either by way of the petition or *ex debito justitiae*".

SABYASACHI MUKHARJI, J., observed at another place:[79]

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75. AIR 1984 SC 684 : (1984) 2 SCC 183.

76. For Art. 14, see, Ch. XXI, *infra;* for Art. 21, see, Ch. XXVI, *infra.*

77. AIR 1988 SC at 1549.
Also see, *In the matter of Cauvery Water Disputes Tribunal,* AIR 1992 SC 522, 555.
The term '*per incuriam*' has been explained by the Court in *Antulay* as follows (AIR 1988 SC at 1548):
"*Per Incuriam*" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned".

78. AIR 1988 SC at 1547.

79. *Ibid,* at 1548.

> "In rectifying the error, no procedural inhibitions should debar this Court because no person should suffer by reason of any mistake of the Court".

And further:[80]

> "[T]he Court has power to review either under section [Art.] 137 or *suo motu* the directions given by this Court".

The learned Judge said at another place:[81]

> "But directions given *per incuriam* and in violation of certain constitutional limitations and in derogation of the principles of natural justice can always be remedied by the Court *ex debito justitiae*."

And, again, he said explaining the scope of the inherent power of the Supreme Court to review *de hors* Art. 137:

> "We are of the opinion that this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the Court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner."[82]

In *Ahlawat*,[83] the Supreme Court set aside the order passed by it earlier. The Court observed:

> "To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience"

The Court has asserted that if it is convinced that it has earlier passed a wrong order in a case, it has power to recall the same and set it aside.

In *Common Cause*,[84] on a review petition, the Court reversed its own earlier judgment[85] on the ground that it suffered from patent error of law resulting in serious miscarriage of justice. In the instant case, the petition of review was allowed.

In 1997, the Supreme Court had held a Central Minister guilty of committing the tort of "malfeasance in office" and imposed exemplary damages of Rs. 50 lacs payable by the Minister to the Central Government. But in its decision in 1999, the Court reversed its earlier decision. It ruled that though the conduct of the Minister was wholly unjustified, "it falls short of 'misfeasance in public office' which is a specific tort and the ingredients of that tort are not wholly met in the case." That being so, there was no occasion to award exemplary damages.

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80. *Ibid*, at 1555.
81. *Ibid*, at 1549.
82. *Ibid*, at 1549.
83. *M.S. Ahlawat v. State of Haryana*, AIR 2000 SC 168 : (2000) 1 SCC 278. However a different view was expressed in *Surendra Kumar Vakil v. Chief Executive Officer*, (2004) 10 SCC 126 : AIR 2004 SC 3088, which held that a point that has been heard and decided will not be reviewed even if the decision is erroneous.
84. *Common Cause-A Regd. Society v. Union of India*, AIR 1999 SC 2979 : (1999) 6 SCC 667.
85. *Common Cause-A Regd. Society v. Union of India*, AIR 1997 SC 1203 : (1997) 3 SCC 433. For a detailed discussion on both these cases, see, JAIN, *A TREATISE ON ADMINISTRATIVE LAW, II*, JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW, IV*.

Therefore, the direction made by the Court in 1997 to pay Rs. 50 lacs as exemplary damages was now recalled by the court.[86] Nevertheless it has been held that a subsequent judgment of the Supreme Court is no ground for review[87] nor the fact that the earlier order was contrary to a matter of practice[88], nor will the Court re-appreciate the evidence.[89] A point not argued at the hearing of the appeal will not be permitted to be raised in review[90] and a second review petition against a reviewed judgment will not be entertained.[91]

According to the Court Rules, review petition is filed within 30 days from the date of the judgment or order sought to be reviewed [Order XL, r. 2]. Ordinarily, an application for review is disposed of by circulation without any detailed arguments unless otherwise ordered by the Court [Order XL, Rule 3].

To avoid the petition for review being disposed of by circulation, the petition is often couched as an application for clarification. This has been deprecated and has been visited with exemplary costs.[92]

According to the Rules made by the Supreme Court [Order XL of the Supreme Court Rules, 1966], a review in a criminal proceeding is available on the ground of an "error apparent on the face of the record" [Rule 1 of Order XL]. This rule has been broadly interpreted by the Court. As the Court has observed in *Eswara*[93] : "The substantive power is derived from Art. 137 and is as wide for criminal as for civil proceedings… We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source."

In *G.L Gupta v. D.N. Mehta*,[94] the Supreme Court reviewed its earlier decision in a criminal appeal because a statutory provision [s. 23-C(2) of the Foreign Exchange Act, 1947], which had a vital bearing on the case, was not brought to its notice. The Court modified the sentence of imprisonment to fine.

CURATIVE PETITIONS

Even after a review petition filed under Art. 137 is rejected by the Court, that may not be the end of the road. The court may still review the case under its inherent power but on very restricted grounds. The court has recently ruled in *Rupa Ashok Hurra v. Ashok Hurra*[95] that while certainty of law is important in India, it cannot be at the cost of justice. The court has observed in this connection :

> "...this Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may reconsider its judgments in exercise of its inherent power:"

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86. Also see, Ch. III, *supra.*
87. *State of M.P. v. Steel Authority of India,* (2002) 10 SCC 144.
88. *Devender Pal Singh v. State,* (2003) 2 SCC 501 : AIR 2003 SC 886.
89. *Kerala SEB v. Hitech Electrothermics & Hydropower Ltd.,* (2005) 6 SCC 651 : (2005) 7 JT 485.
90. *Common Cause v. Union of India,* (2004) 5 SCC 222 : (2004) 9 SCALE 32*; Citibank N.A. v. Standard Chartered Bank,* (2004) 8 SCC 348 : AIR 2005 SC 94*; Govt of Tamil Nadu v. M. Anachu Asari,* (2005) 2 SCC 332 : AIR 2005 SC 1062.
91. *Common Cause v. Union of India,* (2003) 10 SCC 264 : (2002) 7 SCALE 22(1).
92. See *Zahira Habibullah Sheikh v. State of Gujarat,* (2004) 5 SCC 353 : AIR 2004 SC 3467*; APSTRC v. Abdul Kareem,* (2007) 2 SCC 466 : (2007) 2 JT 532.
93. *P.N. Eswara Iyer v. Registrar, Supreme Court of India,* AIR 1980 SC 808; *Suthenthiraraja v. State,* AIR 1999 SC 3700 : (1999) 9 SCC 323. However see, *Zahira Habibullah Sheikh v. State of Gujarat,* (2004) 5 SCC 353 : AIR 2004 SC 3467.
94. AIR 1971 SC 2162.
95. JT 2002(3) SC 609 : (2002) 4 SCC 388.

Such a curative petition under the Court's inherent power can be filed, seeking review of a decision which has become final after dismissal of a review petition under Art. 137, on very strong grounds, such as,

(1) variation of the principle of natural justice—the right to be heard, as for example, when the affected person was not served notice or not heard during the proceedings;
(2) a Judge who participated in the decision—making process did not disclose his links with a party to the case, i.e. the question of bias;
(3) abuse of the process of the court.

The above list of the grounds to move a curative petition is not exhaustive. The court has observed in this connection:

"It is neither advisable nor possible to enumerated all the grounds on which such a petition may be entertained."

While opening the channel of review by way of curative petitions, the court has imposed several severe conditions thereon, for example:

(1) The grounds stated in the curative petition must have been taken earlier in the review petition;
(2) A senior advocate must certify that the above requirements have been fulfilled;
(3) If at any stage of consideration of the curative petition, the bench holds that the petition is without any merit and is vexatious, exemplary costs may be imposed on the petitioner;
(4) The petition has first to be circulated to a bench of three senior-most judges and the judges who passed the judgement complained of. If a majority of these Judges conclude that the matter needs to be heard, it should be listed before the same bench (as far as possible).

This procedural precaution is necessary because "the matter relates to re-examination of a final decision of this court."[1] The requirements are stringently enforced and the jurisdiction to entertain such petitions though frequently invoked, is rarely exercised.[2]

I. MISCELLANEOUS PROVISIONS

(a) TRANSFER OF CASES

To facilitate quick disposal of cases, Art. 139A(1) provides that if cases involving substantially the same questions of law are pending before the Supreme Court and a High Court, or before two or more High Courts, the Supreme Court can withdraw the cases from the High Courts and decide them itself. Once the common issue of law is decided, the cases may be returned to the High Courts under the proviso to Art.139A (1) to decide individual cases in the light of the law so laid down.[3]

All issues which could be raised before the High Court including an objection to the maintainability of the proceeding would not be affected by an order of transfer.[4]

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1. *Ibid,* at 632. See also *Sanjay Singh v. UPSC,* (2007) 3 SCC 720, 732 : AIR 2007 SC 950.
2. *Gurdeep Singh v. State of Punjab,* (2005) 10 SCC 468-470*;* See also *Shaukat Hussain Guru v. State,* (2008) 6 SCC 776, at page 779 : AIR 2008 SC 2419.
3. *Gnaneshwar B. Pettukota v. Govt. of India,* (2005) 12 SCC 447.
4. *Tata Cummins Ltd. v. State of Jharkhand,* (2005) 11 SCC 496.

The application for the purpose can be made by the Attorney-General or a party to any such case. The questions involved in the cases should be "substantial" and of "general importance".[5] However where an issue between the parties being decided by the Supreme Court is also the subject matter of proceedings between the same parties in the High Courts, transfer of all proceedings to the Supreme Court was directed.[6]

The Supreme Court has ruled that Art. 139A(1) is not exhaustive of the Supreme Court's power to withdraw a case to itself from a lower court. The Court can also act under Arts. 136 and 142(1). The Court has stated: "To the extent power of withdrawal and transfer of cases to the Apex Court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Arts. 136 and 142(1), the power under Art. 139A must be held not to exhaust the power of withdrawal and transfer."[7]

Under Art. 139-A(2), the Supreme Court may also transfer a case from one High Court to another if it deems it expedient to do so for meeting ends of justice.[8] This provision enables the litigants to approach the Apex Court for transfer of proceedings if the conditions envisaged therein are satisfied.[9] The Supreme Court can pass an order of transfer *suo motu.*[10]

As regards Art. 139A(2), the Supreme Court has observed that the power to transfer a case from one State to another is to be used by the Court with caution and circumspection. But if the ends of justice so demand in an appropriate case, the Court would not hesitate to act.

A suit for damages was filed in Punjab against the Union of India for loss of the gurdwara properties by its agents as a result of Blue Star Operation. On a petition by the Union of India, the Supreme Court transferred the case to the Delhi High Court in view of the unusual and sensitive nature of the suit and the extraordinary atmosphere prevailing in Punjab.[11]

A book contained adverse remarks against certain popular leaders of Tamil Nadu thereby hurting the sentiments of the people of that State. A number of political leaders filed suits in the Madras High Court against the author and the publisher. The High Court granted an *ex parte* interim order prohibiting the release of the publication and sale of the book in the State. In such circumstances, at the author's instance, envisaging that atmosphere in the T.N. High Court

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5. For an example of transfer of cases from the High Court to the Supreme Court, see, *Union of India v. M. Ismail Faruqui,* (1994) 1 SCC 265. Also see, *Punjab Vidhan Sabha v. Prakash Singh Badal,* (1987) Supp SCC 610. See also *State of A.P. v. National Thermal Power Corpn. Ltd.,* (2002)5 SCC 203 : AIR 2002 SC 1895*; Union of India v. Radhika Backliwal,* (2003) 2 SCC 316 : (2002) 6 Scale 163*; All India Motor Vehicles Security Association v. Association of Regn. Plates Mfg.,* (2003) 10 SCC 93*; Anil Kumar Srivastava v. State of U.P.,* (2004) 8 SCC 671 : AIR 2004 SC 4299.

6. *International Finance Corpn. v. Bihar State Industrial Development Corpn.,* (2005) 10 SCC 179.

7. *Union Carbide Corpn. v. Union of India,* AIR 1992 SC 248, 273 : (1991) 4 SCC 584. See for example *Commodore Vimal Kumar v. Ruchi Rastogi,* (2008) 12 SCC 62 : (2008) 4 JT 596; *Harbans Lal & Sons v. Ramson Cycles (P.) Ltd.,* (2009) 4 SCC 16.

8. For transfer of writ petitions pending before several High Courts to one High Court, see, *Bank of Madura v. Jugal Kishore Vyas,* (1995) Supp (4) SCC 110.

9. *Union Carbide Corpn. v. Union of India,* (1991) 4 SCC 584 : AIR 1992 SC 248; *Continental Construction Ltd. v. Raj Kumar,* (2004) 13 SCC 444.

10. *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569 : 1994 Cr LJ 3139.

11. *Union of India v. Shiromani Gurdwara Prabandhak Committee,* AIR 1986 SC 1896.

would not be congenial for a fair trial, the Supreme Court directed the suits to be transferred to the Andhra Pradesh High Court.[12]

A case may be transferred by the Supreme Court from one High Court to another if the petitioner has a "reasonable genuine and justifiable" apprehension that he would not get justice, Assurance of a fair trial in the first imperative of the dispensation of justice.[13]

In the wake of widespread communal riots in Gujarat, criminal prosecutions were launched. Several ended in acquittal of the accused. The acquittals were affirmed by the High Court. The appeals from the decisions of the High Court were allowed. Reinvestigation and retrial were directed and the cases were ordered to be transferred to a court of competent jurisdiction under the jurisdiction of the Bombay High Court as there was "ample evidence on record glaringly demonstrating subversion of justice delivery system with no congenial and conducive atmosphere still prevailing" in Gujarat.[14]

(b) FEDERAL COURT'S JURISDICTION EXERCISABLE BY THE SUPREME COURT

According to Article 135, the Supreme Court has jurisdiction and powers with respect to any matter to which the provisions of Article 134 do not apply, if the jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of the Constitution under any law then existing.

The Federal Court was established in India under the provisions of the Government of India Act, 1935. The court was introduced as an essential element of the federal system which was introduced for the first time in India by the Act of 1935. This court remained in operation until it was replaced by the Supreme Court of India on January 26, 1950.[15] Appeals from the Federal Court lay to the Privy Council.

The purpose of this constitutional provision is to safeguard interests of those litigants who had a right of appeal to the Federal Court, before the advent of the new Constitution, but who might have lost this right by reason of the Supreme Court taking the place of the Federal Court. The provision is, therefore, merely of a transitory nature.

(c) POWER TO SUMMON WITNESSES

Subject to a law made by Parliament in this behalf, the Court is empowered to make, as regards the whole of India, any order for the purpose of securing the attendance of any person, the discovery or production of all documents, or the investigation or punishment of any contempt of itself [Art. 142(2)].

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12. *K. Govindan Kutty v. All India Anna Dravida Mannetra Khazagam*, (1996) 7 SCC 68.

13. *Maneka Sanjay Gandhi v. Rani Jethamalani*, AIR 1979 SC 468 : (1979) 4 SCC 167; *R. Balakrishna Pillai v. State of Kerala*, AIR 2000 SC 2778, 2781 : (2000) 7 SCC 129. See also *Leelawati v. Ramesh Chand*, (2004) 9 SCC 63 : AIR 2004 SC 1488.

14. *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158, 202 : AIR 2004 SC 3114.

15. See, GADBOIS, Evolution of the Federal Court of India: An Historical Foot-Note, 5 *JILI*, 19: GADBOIS. The Federal Court of India: 1937-1950, 6 *JILI*, 253; PYLEE, *The Federal Court of India* (1966); JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 345-348 (1990).

(d) ENFORCEMENT OF DECREES

Under Art. 142(1), any decree passed, or order made, by the Supreme Court is enforceable, throughout India in such manner as may be prescribed by a law of Parliament, or, pending the enactment of such a law, by the Presidential order.[16]

(e) ALL AUTHORITIES BOUND BY COURT ORDERS

All authorities, civil and judicial, in India are under an obligation to act in aid of the Court [Art. 144].

The Court can hold any authority in contempt of Court if he disregards or disobeys any Court order.[17] The Supreme Court has emphasized that there should be meticulous compliance of the directions issued by the Court[18] and has on occasion constituted a monitoring committee to oversee and ensure compliance with its directions.[19] The judgment of the court must be respected and any time frame specified in such judgment must be adhered to by all concerned even if they were not parties to the original proceedings.[20]

Thus, in *Prakash Singh v. Union of India*[21], after noting the various reports of Commissions recommending the need to amend or replace the Indian Police Act, 1861 wholly insulating the police from any pressure so as to enable them to operate effectively, the Court constituted various bodies to effect the objective, to the Central Government, State Governments and Union Territories for compliance till framing of the appropriate legislation. The directions were to be complied with by the concerned Governments, on or before 31-12-2006 so that the bodies become operational from 2007. The Cabinet Secretary, Government of India and the Chief Secretaries of State Governments/Union Territories were directed to file affidavits of compliance by 3-1-2007[22].

Art. 144 covers not only the courts [Art. 141] but also other civil authorities as well. Art. 144 obligates the authorities to follow not only the law declared by the Court [Art. 141] but also its orders, decrees or directions. Therefore, the scope of Art. 144 is broader than Art. 141.[23]

An Army Public School was held to be bound to give effect in terms of Article 144 to the guidelines of the Supreme Court in Vishaka's case to provide a complaint mechanism to enquire into allegations of sexual harassment.[24]

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16. See, The Supreme Court (Decrees and Orders) Enforcement Order, 1954 (C.O. 47). See further *State of Haryana v. State of Punjab*, (2004) 12 SCC 673, 709-711 : (2004) 5 JT 72.

17. See, *M.L. Sachdev v. Union of India*, AIR 1991 SC 311.

In this case, the Government of India was held guilty of contempt of court for its failure to comply with a mandatory direction issued by the Supreme Court.

In *Dinesh Kumar v. Motilal Nehru Medical College, Allahabad*, AIR 1990 SC 2031, the Supreme Court held that the Governments of Bihar and Uttar Pradesh had committed its contempt for not complying with its directions. The Court imposed exemplary costs against the State Governments. See also *Palitana Sugar Mills (P) Ltd. v. State of Gujarat*, (2004) 12 SCC 645, 665 : (2004) 9 JT 526*; Nair Service Society v. State of Kerala*, (2007) 4 SCC 1, 29.

18. See *In re Lily, Thomas*, AIR 1964 SC 855 : 1964 (6) SCR 229.

19. See for example *M.C. Mehta v. Union of India*, (2006) 3 SCC 429 : (2006) 3 SCALE 615.

20. *Veer Kanwar Singh University Ad-hoc Teachers Association. v. The Bihar State University (C.C.) Service Commission*, 2007 (4) Supreme 376.

21. (2006) 8 SCC 1, at page 6.

22. *Ibid* at page 17.

23. For Art. 141, see, *infra*, under "*Stare Decisis*", Sec. J.

24. *D.S. Grewal v. Vimmi Joshi*, (2009) 2 SCC 210 : (2009) 1 JT 400.

A piquant situation arose out of the Constitutional Bench decision in *Commissioner of Central Excise v. Dhiren Chemical Industries*.[25] Circulars issued by the Central Board of Excise &Customs under section 37-B of the Central Excise Act 1944, are, in terms of that section, binding on all excise officers and "all other persons employed in the execution of the Act"[26]. Circulars were issued by the CBEC construing an Exemption Notification. The Supreme Court construed it otherwise but said that regardless of the interpretation by the Court, if there were circulars interpreting the Notification otherwise, that interpretation would bind the Revenue. Divergent views were expressed on whether the Circulars could survive after the decision of the Court having regard to Articles 141 and 144[27]. The difference of opinion has been referred to a Constitution Bench[28] which disposed of reference saying:

> "Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court."[29]

The Court appears to have misappreciated the question to be decided.The question was not whether the Courts are bound by the Circulars but whether the statutory authorities under the particular Act would have to abide by the Circular despite a decision to the contrary by a court. This question was left unresolved.

"In *Spencer*,[30] the Supreme Court has emphasized upon the obligation of a High Court to come to the aid of the Supreme Court "when it required the High Court to have its order worked out". All authorities, civil or judicial, are mandated by Art. 144 to come to the aid of the Supreme Court. A High Court is a judicial authority covered by Art. 144. "The language of request oftenly employed by this Court in such situations is to be read by the High Court as an obligation, in carrying out the constitutional mandate, maintaining the writ of this Court running large throughout the country".

(f) COURT'S RULE-MAKING POWER

The Supreme Court has been given a rule-making power for regulating generally its practice and procedure including such matters as persons practising before it, procedure for hearing appeals, conditions for reviewing its own judgment, fees, grant of bail, stay of proceedings *etc*.[31]

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25. (2002) 2 SCC 127 : AIR 2002 SC 453*; CCE v. Dhiren Chemical Industries*, (2002) 10 SCC 64 : (2002) 143 ELT 19.

26. Similar provisions exist in the Income Tax Act, 1961 (s. 119) and the Customs Act. 1962 (s.151-A).

27. *Commissioner of Customs v. Indian Oil Corporation*, (2004) 3 SCC 488 : AIR 2004 SC 2799; *Collector of Central Excise v. Maruti Foam*, (2004) 6 SCC 722 : (2006) 144 STC 161; *contra Kalyani Packaging Industry v. Union of India*, (2004) 6 SCC 719 : (2004) 168 ELT 145.

28. *CCE v. Ratan Melting & Wire Industries*, (2005) 3 SCC 57 : (2005) 6 JT 77.

29. *CCE v. Ratan Melting & Wire Industries*, (2008) 13 SCC 1, at page 4 : (2008) 11 JT 412.

30. *Spencer and Co. Ltd. v. Vishwadarshan Distributors Pvt. Ltd.*, (1995) 1 SCC 259 : (1995) 1 JT 113. See also *Tirupati Balaji Developers (P.) Ltd. v. State of Bihar*, (2004) 5 SCC 1, 14 : AIR 2005 SC 2351; *Hombe Gowda Educational Trust v. State of Karnataka*, (2006) 1 SCC 430 : (2005) 10 JT 598; *Deepak Mallik v. Rakesh Batra*, (2005) 13 SCC 113 : (2003) 157 ELT 500.

31. *Ex-Capt. Harish Uppal v. Union of India*, (2003) 2 SCC 45 : AIR 2003 SC 739.

Rules made by the Court need the approval of the President and they are subject to any law made by Parliament [Art. 145].[32] The reason to make the Court's rule-making power subject to the President's approval is that the rules might impose considerable fiscal burden upon the revenues of the country. The matter of fees, for which the Court would make rules, relates to public revenues. These matters could not be left entirely to the Supreme Court; and President's approval is necessary for the burden is to be financed by Parliament and the Executive by imposing taxes.[33] It would appear that this requirement does not apply to the procedure to be adopted by Courts seeking reference of a difference of opinion with an earlier decision to a larger Bench[34].

The Supreme Court's rule-making power is also subject to Fundamental Rights.[35]

(g) OFFICERS AND SERVANTS OF THE SUPREME COURT

Appointment of officers and servants of the Supreme Court are to be made by the Chief Justice, or such other Judge or officer of the Court as the Chief Justice may direct, but the President may by rules direct that appointments are to be made after consultation with the Union Public Service Commission [Art. 146(1)].

Subject to any law made by Parliament, the conditions of service of officers and servants of the Court may be prescribed by rules made by the Chief Justice, or any other Judge or officer of the Court as the Chief Justice may authorise for the purpose. Any such rules, so far as they relate to salaries, allowances, leave or pension, require the approval of the President [Art. 146(2)].

The scheme of Art. 146(2) is that it is primarily the responsibility of Parliament to lay down conditions of service for officers and servants of the Supreme Court. However, so long as Parliament does not do so, the Chief Justice (or any other Judge or officer of the Court authorised by the Chief Justice) may make the rules for the purpose. The rules require the assent of the President to be effective insofar as they relate to salaries, allowances, leave or pensions. The reason for requiring presidential approval is that the rules concerning salaries, *etc*., place financial liability on the Government of India.

In the case mentioned below,[36] the Supreme Court has elaborately discussed the nature of the power conferred on the Chief Justice by Art. 146(2). The Court has ruled that it cannot issue a writ of *mandamus* directing the President to give or withdraw his approval to the rules made by the Chief Justice.[37] The President of India cannot be compelled to grant approval to the rules proposed by the Chief Justice relating to salaries *etc*. Nevertheless, when the Chief Justice submits the rules to the President for approval "it should be looked upon with respect and unless there is very good reason not to grant approval, the approval should always be granted." It was observed further:[38]

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32. *Dinesh Kumar v. Motilal Nehru Medical College,* AIR 1990 SC 2030 : (1990) 4 SCC 627.
33. VIII *CAD,* 643-651.
34. *Central Board of Dawoodi Bohra Community v. State of Maharashtra,* (2005) 2 SCC 673 : AIR 2005 SC 752.
35. *Prem Chand v. Excise Comm.,* AIR 1963 SC 996 : 1963 Supp (1) SCR 885.
36. *Supreme Court Employees Welfare Association v. Union of India,* AIR 1990 SC 334 : (1989) 4 SCC 187.
37. For discussion on *Mandamus,* see, *infra,* Ch. VIII, sec. D.
38. AIR 1990 SC, at 354.

> "If the President of India is of the view that the approval cannot be granted, he cannot straightway refuse to grant such approval, but before doing so, there must be exchange of thoughts between the President and the Chief Justice of India."

The President acts in this matter on the advice of the concerned Minister. The Chief Justice has to apply his mind to the framing of the rules and the Government has to apply its mind to the question of approval of the rules relating to salaries, *etc*. This condition should be fulfilled and it should appear from the records that it has been fulfilled.

The application of mind will include exchange of thoughts and views between the Government and the Chief Justice and it is highly desirable that there should be a consensus between the two. The rules framed by the Chief Justice of India should normally be accepted by the Government and the question of exchange of thoughts and views will arise only when the Government is not in a position to accept the rules relating to salaries, allowances, *etc*.[39]

(h) BENCHES OF DECISIONS

At least five Judges are to sit on the Bench to decide a case involving a substantial question of law as to the interpretation of the Constitution and for hearing a reference by the President under Art. 143 [Art. 145(3)].[40]

A substantial question of interpretation of a constitutional provision does not arise if the law on the subject has been finally and effectively decided by the Supreme Court; no reference to a Bench of five Judges need be made in such a case.[41]

In other matters, the rules made by the Supreme Court may fix the minimum number of Judges who are to sit for any purpose [Art. 145(2)]. Under the Supreme Court Rules [O. VII, Rule 1], subject to other provisions of these Rules, every cause, appeal or matter is to be heard by a Bench consisting of not less than two Judges. If the two Judge Bench considers that the matter ought to be heard by a larger Bench, it refers the matter to the Chief Justice who would constitute a larger Bench [O. VII, Rule 2].

The Supreme Court is required to deliver its judgment in the open court [Art. 145(4)]. No judgment or opinion is delivered by the Court except with the concurrence of a majority of the Judges present at the hearing of the case, though a Judge not agreeing with the majority view is entitled to deliver a dissenting judgment or opinion [Art. 145(5)].

Under Art. 145(5), the concurrence of a majority of Judges present at the hearing of a case is necessary for any judgment or order. When a Bench consists of two Judges, and they differ, the matter is to be referred to the Chief Justice for constituting a larger Bench.[42]

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39. *Ibid*., at 355.
Also see discussion on the parallel provision Art. 229 concerning the High Courts, *infra*, Ch. VIII.

40. *Supra*, Sec. F.

41. *State of Jammu & Kashmir v. Ganga Singh*, AIR 1960 SC 356 : 1960 (2) 346; *Bhagwan Swarup v. State of Maharashtra*, AIR 1965 SC 682 : 1964 (2) SCR 378.

42. *Gaurav Jain v. Union of India*, AIR 1998 SC 2848 : (1998) 4 SCC 270.

The practice of multiple opinions has the disadvantage that it creates confusion in the public mind regarding the law and it becomes difficult to appreciate the law laid down by the Supreme Court, for it is then difficult to extract a reasonably authoritative *ratio decidendi*. Multiple opinions tend to become diffused and repetitive. On the other hand, dissenting opinions stimulate reasoning and help in developing and building up the law.[43]

This aspect of the matter assumes all the greater importance when the Supreme Court does not strictly follow the doctrine of *stare decisis* and regards itself free to overrule its own decision.[44] When it does so, usually the minority opinion in the previous case would become the majority opinion in the subsequent case. Sometimes, Judges may agree in the result in a case but some of them may have some reservations on some principles or propositions, and may explain their point of view in separate concurring opinions.

In the beginning of the career of the Supreme Court, there was a tendency on the part of the Judges to place their individual views on record in matters of interpretation of the Constitution with the result that as many as seven opinions have been delivered in some earlier cases.[45] This tended to make the opinions repetitive and law uncertain. In course of time, however, this tendency has been very much mitigated and group opinions have come to take the place of individual opinions. Most of the time, the Court now delivers single unanimous opinion. In some cases, there may be a majority and a minority opinions. It is only in rare constitutional controversies of great importance that multiple opinions may be delivered.[46]

(i) ADDITIONAL JURISDICTION

Under Art. 138(1), Parliament may confer on the Supreme Court further jurisdiction and powers with respect to any of the matters in the Union List.[47]

Under this constitutional provision, a miscellany of laws enacted by Parliament confer jurisdiction on the Supreme Court. For example, under the Income-tax Act [s. 257], the Supreme Court can hear an appeal from a High Court decision on a reference made to it by the Income-tax Appellate Tribunal.[48] Under section 38, Advocates Act, 1961, an appeal lies to the Supreme Court from a decision of the disciplinary committee of the Bar Council of India.[49]

Jurisdiction has been conferred on the Supreme Court under the Monopolies and Restrictive Trade Practices Act, 1969, the Customs Act, 1962, the Central Excise and Salt Act, 1944 and a number of other Acts.

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43. FREUND, A Supreme Court in a Federation, 53 *Col LR* 614 (1953).
Also, MCWHINNEY, *JUDICIAL REVIEW, op. cit., and his article,* Judicial Concurrence and Dissents, 31 *Can. B.R.* 595 (1953).

44. *Infra,* under *Constitutional Interpretation,* Ch. XL.
For the doctrine of *Stare Decisis,* see, *infra,* Sec. J.

45. See, for example, *Gopalan v. State of Madras,* AIR 1959 SC 27; *In re Delhi Laws Act case, supra,* Ch. II, Sec. N.

46. Multiple opinions delivered in *S.P. Gupta v. Union of India,* AIR 1981 SC 149.
For discussion of this case see, *infra,* Ch. VIII.
Also see, *infra,* Ch. XL.

47. For this List, see, *infra,* Ch. X, Sec. D.

48. See, JAIN, *INDIAN ADM. LAW, CASES & MATERIALS, II,* Ch. XII.

49. See, JAIN, *op. cit.*

Jurisdiction is also conferred on the Supreme Court by several constitutional provisions, such as, Art. 317(1),[50] Arts. 323A and 323B.[51]

Under Art. 138(2), the Supreme Court shall have such jurisdiction and powers with respect to any matter as the Government of India and any State Government may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

Under Art. 139, Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warrants* and *certiorari*, or any of them, for any purposes other than those mentioned in Art. 32(2). Under Art. 32(2), the Supreme Court has power to issue these writs for purpose of enforcement of Fundamental Rights.[52] Under Art. 139, power to issue writs may be conferred on the Supreme Court for purposes other than enforcement of Fundamental Rights.

Under Art. 140, Parliament may by law make provisions for conferring upon the Supreme Court such supplemental powers not inconsistent with any provision of the Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred on the Court by or under the Constitution.

The Supreme Court has ruled in *In re, Special Courts Bill*, 1973,[53] that as regards conferring additional jurisdiction on the Supreme Court provisions from Arts. 124 to 147 of the Constitution are exhaustive and no more jurisdiction can be conferred on the Supreme Court outside those provisions. Parliament can confer additional jurisdiction on the Supreme Court while exercising its legislative power under Arts. 246(1) and (2).[54] Thus, Parliament can confer jurisdiction on the Supreme Court beyond what Arts. 133(3), 134(2), 138(1), 138(2), 139 and 140 provide. These provisions are to be read in harmony and conjunction with, and not in derogation of other constitutional provisions. Thus, the Court has ruled:

> "The Parliament, therefore, has the competence to pass laws in respect of matters enumerated in Lists I and III not withstanding the fact that by such laws, the jurisdiction of the Supreme Court is enlarged in a manner not contemplated by or beyond what is contemplated by the various articles in Chapter IV, Part V".[55]

For example, preventive detention falls under entry 3 in List III. Parliament is competent while legislating on that topic under Art. 246(2) to provide under Art. 246(1) read with entry 77, List I, that an appeal shall lie to the Supreme Court from an order of detention passed under a preventive detention law.[56]

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50. *Infra*, Ch. XXXVI.
51. *Infra*, Ch. VIII, Sec. I.
52. For discussion on Art. 32(2), see, *infra*, Ch. XXXIII, Sec. A.
53. See, *supra*, Sec. F.
54. For discussion on Art. 246, see, *infra*, Ch. X, Sec. B.
55. AIR 1979 SC at 500.
56. For discussion on 'Preventive Detention', see, *infra*, Ch. XXVII, Sec. B.

Similarly, Parliament can enact under entry 77, List I,[57] that an appeal shall lie as of right to the Supreme Court from any judgment or order of a Special Court both on fact as well as on law. The law relating to Special Courts can be enacted by Parliament under entry 11A of List III.[58]

Under Art. 138(2), the Supreme Court shall have such further jurisdiction as may be agreed between a State and the Central Government by special agreement, if Parliament by law provides for the exercise of such jurisdiction by the court.

Under Art. 134(2) Parliament may by law confer on the Supreme Court further powers to hear appeals from any High Court judgement in a criminal proceeding subject to such conditions as may be specified in such law.

J. DOCTRINE OF *STARE DECISIS*

The doctrine of *stare decisis* or precedents is the distinguishing characteristic of the English common law. It envisages that judicial decisions have a binding force for the future. It is not, however, the whole judgment that is deemed to be so binding. A judgment is authoritative only as to that part of it, called *ratio decidendi*, which is considered to have been necessary for the decision of the actual issues between the litigants. As KEETON suggests, "The *ratio decidendi* of a decision is the principle of law formulated by the Judge for the purpose of deciding the problem before him." In some cases, it may be quite difficult to extract a *ratio*, and the difficulty is enhanced when multiple opinions are delivered in a case.

On the other hand, *obiter dicta* are "observations made by the Judge, but which are not essential for the decision reached. There may be observations upon the broader aspect of the law relating to the problem arising for decision; they may be answers to hypothetical questions raised by the Judge or the counsel in the course of the hearing or they may be observations upon social or other questions, prompted by the facts of the case under consideration".[59]

In the course of the argument and decision of a case, many incidental considerations arise which may all be part of the legal process but which have different degrees of relevance to the central issue. Judicial opinions upon such matters may be merely casual, or wholly gratuitous, or of collateral relevance and are known as *obiter dicta*.[60]

The doctrine of *stare decisis* in Britain envisages that the lower courts are bound by the decisions of the higher courts and, thus, every court in Britain is bound by the decisions of the House of Lords. The Indian Judicial system is also characterised by a scheme of hierarchy of courts, the Supreme Court being the

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57. This entry runs as: "Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court)....."

The Court has ruled: "A law which confers additional powers on the Supreme Court by enlarging its jurisdiction is evidently a law with respect to "jurisdiction and powers" of that Court."

For further discussion on entry 77, List I, see, *infra*, Ch. X, Sec. D.

58. Entry 11A, List III, runs as: "Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court".

For further discussion on this entry, see, Ch. X, Sec. F., *infra.*

59. *Elementary Principles of Jurisprudence*, 106.

60. ALLEN, *LAW IN THE MAKING*, 248.

Apex Court and, therefore, the doctrine of binding precedent is the cardinal feature of the Indian Legal System.

The Indian Constitution specifically and unequivocally lays down this proposition in Art. 141 which says that "the law declared by the Supreme Court shall be binding on all courts within the territory of India."[61] Thus, all courts are bound to follow the decisions of the Supreme Court. The law declared by the Supreme Court is the law of the land.[62] Judgments of the Supreme Court constitute a source of law.[63]

Article 141 mandates every court subordinate to the Supreme Court to accept the law laid down by the Apex Court.[64] The Supreme Court has explained the rationale underlying Art. 141 as follows: "In the hierarchical system of courts" such as exists in India, "it is necessary for each lower tier", including the High Court, "to accept loyally the decisions of the higher tiers". The better wisdom of the court below must yield to the higher wisdom of the Court above. The Supreme Court has observed:[65]

> "It is inevitable in hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary.... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted."

The Supreme Court in *State of Andhra Pradesh v. A.P. Jaiswal*,[66] emphasizing upon the need for the courts to follow the principle of *stare decisis*, has observed:

> "Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedents, principle of stare decisis *etc.* These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice."

The Apex Court has impressed on the High Courts that they should follow the law laid down by the Supreme Court. Judicial discipline requires that clear pronouncements by the Supreme Court, about what the law on a matter is, must be treated as binding by all courts in India. Art. 141 is an imprimatur to all courts that the law declared by the Supreme Court is binding on them.[67] This is of course subject to the fundamental principle that an order obtained by fraud has to be treated as a nullity whether by the court of first instance or by the final court[68].

Article 141 gives a constitutional status to the theory of precedents in respect of law declared by the Supreme Court. Obviously, therefore, the *ratio* of a Su-

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61. For further discussion on Art. 141, see, *infra*, under Constitutional Interpretation, Ch. XL.
62. *Delhi Transport Corp. v. D.T.C. Mazdoor Congress,* AIR 1991 SC 101 : 1991 Supp (1) SCC 600.
63. *All India Reporter Karamchari Sangh v. All India Reporter Ltd.,* AIR 1988 SC 1325 : 1988 Supp SCC 472.
64. *Gauraya v. S.N. Thakur,* AIR 1986 SC 1440 : (1986) 2 SCC 709.
65. *C.C.E. v. Dunlop India Ltd.,* AIR 1985 SC 330 : (1985) 1 SCC 260.
66. AIR 2001 SC 499 : (2001) 1 SCC 748.
67. *C.N. Rudramurthy v. K. Barkathulla Khan,* (1998) 8 SCC 275; *Suganthi Suresh Kumar v. Jagdeeshan,* (2002) 2 SCC 420 : AIR 2002 SC 681.
68. A.*V. Papayya v. Govt. of A.P.,* (2007) 4 SCC 221 : AIR 2007 SC 1546.

preme Court decision is binding on all courts below it.[69] Even the *obiter dicta* of the Supreme Court is regarded as binding by the courts below,[70] though the same cannot be said for those statements which are casual or which are neither clear nor definite.[71] Observations of the Supreme Court on points not argued before it but conceded by the counsel[72] or judgments rendered merely having regard to the facts[73] or directions issued under Art. 142,[74] or interim orders[75] are not binding on the courts below. Further, suggestions or guidelines addressed to the legislature are not binding law.[76]

Once the *ratio* of a Supreme Court decision is discovered, the case is not an authority for a proposition that may seem to follow logically from it and the courts may refuse to extend the principle of a Supreme Court decision.[77] Observations by the Judges in the process of reasoning do not however amount to declaration of law as contemplated by Art. 141.[78] What is of the essence in a decision is its *ratio* and not every observation found therein nor what logically follows from the various observations in the Judgment.[79]

On this point, the Court has observed recently:[80]

> "A decision of this Court is an authority for the proposition which it decides and not for what it has not decided or had no occasion to express an opinion on".

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69. *Rajeshwar Pd. v. State of West Bengal*, AIR 1965 SC 1887 : 1966 (1) SCR 178.

70. *Veerappa v. I.T. Commr*., AIR 1959 Mad. 56; *I.T. Commr. v. Vazir Sultan*, AIR 1959 SC 814; *Sadhu Singh v. State*, AIR 1962 All. 193; *D.G. Viswanath v. Govt. of Mysore*, AIR 1964 Mys. 132; *Jaswantlal v. Nichhabhai*, AIR 1964 Guj. 283. *Nalu v. State*, AIR 1965 Ori. 7; *Municipal Committee v. Hazara Singh*, AIR 1975 SC 1087; *Union of India v. Rampur Distillery & Chemical Co. Ltd*., AIR 1981 Del. 348; *Sarwan Singh Lamba v. Unon of India*, AIR 1995 SC 1729 : (1995) 4 SCC 546.

71. *K.P. Doctor v. State of Bombay*, AIR 1955 Bom. 220; *Mohandas Issardass v. Sattanathan*, 56 Bom LR 1156; *Venkata v. Madras*, AIR 1958 AP 173; *Chunilal Basu v. Chief Justice*, Cal HC AIR 1974 Cal 326; *Municipal Corp. of Delhi v. Gurnam Kaur*, AIR 1989 SC 38 : (1989) 1 SCC 101. See also *Oriental Insurance Co. Ltd v. Meena Variyal*, (2007) 5 SCC 428 : AIR 2007 SC 1609.

72. *M.S.M. Sharma v. Shri Krishna Sinha*, AIR 1959 SC 395 : 1959 Supp (1) SCR 806; *Suptdt. & Legal Remembrancer, State of West Bengal v. Corp. of Calcutta*, AIR 1967 SC 997 : 1967(2) SCR 170; *Kulwant Kaur v. Gurdial Singh Mann*, (2001) 4 SCC 262 : AIR 2001 SC 1273; *Municipal Corp. of Delhi v. Gurnam Kaur*, (1989) 1 SCC 101 : AIR 1989 SC 38. See also *Bihar School Examination Board v. Suresh Prasad Sinha*, (2009) 8 SCC 483: (2009) 11 JT 541, relevance of facts and context to be considered.

73. *U.P Brassware Corpn Ltd v. Uday Narain Pandey*, (2006) 1 SCC 479, 491 : AIR 2006 SC 586.

74. *State of U.P. v. Neeraj Awasthi*, (2006) 1 SCC 667, 689 : (2006) 1 JT 19. See also *State of Kerala v. Mahesh Kumar*, (2009) 3 SCC 654 : (2009) 3 JT 424.

75. *State of Assam v. Barak Upatyaka Karmachari Sanstha*, (2009) 5 SCC 694 : AIR 2009 SC 2249.

76. *Mohmed Amin Alias Amin Choteli Rahim Miyan Shaikh v. Central Bureau of Investigation (Through its Director)*, (2008) 15 SCC 49. See also *Vishnu Dutt Sharma v. Manju Sharma*, (2009) 6 SCC 379 : AIR 2009 SC 2254. Mere direction of a Court without considering the legal position is not a precedent.

77. *I.T. Commr. v. Shirin Bai*, AIR 1956 Bom. 586.

78. *Ram Swarup v. State of U.P*., AIR 1958 All. 119; *Raval Co. v. K.G. Ramachandra*, AIR 1974 SC 818 : (1974) 1 SCC 424.

79. *Orient Paper and Industries Ltd. v. State of Orissa*, AIR 1991 SC 672, 680 : 1991 Supp (1) SCC 81.

80. *General Manager, Northern Rly. v. Sarvesh Chopra*, (2002) 4 SCC 45, at 52.

The Court has also clarified that "a decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues", cannot be deemed to be a law declared to have a binding effect under Art. 141.[81] When the Supreme Court summarily dismisses a special leave petition[82] on a technical ground, it does not constitute a binding precedent for purposes of Art. 141. When reasons are given, the Supreme Court decision attracts Art. 141; when no reasons are given, Art. 141 is not attracted.

A clarificatory order of the Supreme Court is not a precedent.[83]

Explaining the significance of Art. 141, the Supreme Court has observed in the case noted below:[84] The Court may itself record in its order that it will not operate as a precedent.[85]

> "When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity."

No judgment is to be read as a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law.[86] When a general principle of law is laid down by the Supreme Court, it is binding on every body.[87] But a Supreme Court decision which is virtually a non-speaking order and which does not set out the facts or the reason for the conclusion or direction given cannot be treated as a binding precedent.[88]

The Court has advised that one of the principles to be followed while applying decisions of Supreme Court is to read it in consonance with the statute governing the field. The Court referred to its earlier decision in *M.C.Mehta* case[89] and explained that the purport of the decision was that if a transport vehicle overtook any other four-wheel motorized vehicle, it would be construed as a contravention of the conditions of the permit which could entail suspension/cancellation of the permit and impounding the vehicle and that such directions must be read in the light of the provisions of MV Act and not dehors the same.[90]

To promote consistency and certainty in the law laid down by the Supreme Court, the ideal situation would be that the entire Court should sit in all cases to decide questions of law. It is for that reason that the U.S. Supreme Court con-

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81. *S. Shanmugavel Nadar v. State of Tamil Nadu,* (2002) 7 SCALE 29 : (2002) 8 SCC 361 : AIR 2002 SC 3484; *Kalyan Chandra Sarkar v. Rajesh Ranjan,* (2005) 2 SCC 42 **:** AIR 2005 SC 921.

82. Sec. D, *supra.*

83. *P.P.C. Rawani (Dr.) v. U.O.I.*, (2008) 15 SCC 332.

84. In the matter of : *Director of Settlements, H.P. v. M.R. Apparao,* JT 2002 (3) SC 304, at 315 : (2002) 4 SCC 638 : AIR 2002 SC 1598. *Official Liquidator v. Dayanand,* (2008) 10 SCC 1, at page 52 : (2008) 11 JT 467.

85. *Jyoti Prakash Rai Alias Jyoti Prakash v. State of Bihar,* (2008) 15 SCC 223.

86. *Union of India v. Dhanwanti Devi*, (1996) 6 SCC 44; *Union of India v. Major Bahadur Singh,* (2006) 1 SCC 368 : (2005) 10 JT 127.

87. *MSL Patil, Asstt. Conservator of Forests, Solarpur v. State of Maharashtra*, (1996) 11 SCC 361.

88. *Govt. of India v. Workmen of State Trading Corpn.*, (1997) 11 SCC 641 : AIR 1999 SC 1532.

89. (1997) 8 SCC 770 : AIR 1998 SC 186,

90. *U.P. SRTC v. Commr. of Police (Traffic),* (2009) 3 SCC 634 : (2009) 2 JT 553.

sisting of nine Judges sits as a whole to decide cases. But it is not feasible to do so in India. Because of the volume of work coming before the Supreme Court, it is necessary for the Court to sit in benches of two or three Judges.[1]

A Constitution Bench consists of five or more Judges.[2] It is therefore possible for different Division Benches to render inconsistent decisions on points of law from time to time.

To promote consistency and certainty in the development of law, a rule is followed that the statement of law by a Division Bench is considered binding on a Division Bench of equal or smaller number of judges.[3]

Accordingly, a two judge Bench ought to follow the earlier decision of a larger Bench. The law declared by a Division Bench of the Supreme Court is binding on another Division Bench of the same or smaller number of Judges.[4]The decision of the Constitution Bench is binding on all smaller Benches. The Supreme Court has ruled that "no co-ordinate Bench of this Court can even comment upon, let alone sit in judgment over, the discretion exercised or judgement rendered in a cause or matter before another coordinate Bench."[5]

A three-judge Bench decision cannot prevail over an earlier constitutional bench decision of a five-Judge Bench on the ground of being a later decision.[6]

If two decisions of the Supreme Court on the question of law cannot be reconciled, and one of them is of larger Bench while the other is of a smaller Bench, the decision of the larger Bench whether it is earlier or later in point of time should be followed.[7] A Constitution Bench after resolving conflicting views in different decisions, instead of overruling specific judgments, in a rather innovative step clarified that all decisions which ran counter to the principle settled by it would "stand denuded of their status as precedents".[8] If a Bench of two Judges concludes that an earlier judgment of three Judges is so very incorrect that in no circumstances can it be followed, it should not directly refer the matter directly to a five Judge Bench for reconsideration. The two Judge Bench should refer the matter to a three Judge Bench setting out the reasons why it cannot agree with the earlier judgment. If the three Judge Bench also comes to the conclusion that the

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1. See, Art. 145, Cls. (2) and (3); Sec. I(h). Also, *Union of India v. Raghubir Singh,* (1989) 2 SCC 754.

2. *Ibid.*

3. *John Martin v. State of West Bengal,* AIR 1975 SC 775 : (1975) 3 SCC 836; *Indira Nehru Gandhi v. Raj Narain,* AIR 1975 SC 2299 : 1975 Supp SCC 1; *Union of India v. Raghubir Singh,* AIR 1989 SC 1933, 1945 : (1989) 2 SCC 754; *N. Meera Rani v. State of Tamil Nadu,* AIR 1989 SC 2027; *S.H. Rangappa v. State of Karnataka,* (2002) 1 SCC 538; *Chandra Prakash v. State of U.P.,* (2002) 4 SCC 234; *Delhi Development Authority v. Ashok Kumar Behal,* AIR 2002 SC 2940.

4. *Union of India v. Raghubir Singh,* (1989) 2 SCC 754 : AIR 1989 SC 1933 : (1989) 2 SCC 754; *Chandra Prakash v. State of U.P.,* (2002) 4 SCC 234.

5. *Sub-Committee of Judicial Accountability v. Union of India,* (1992) 4 SCC 97.

6. *John Martin v. State of West Bengal,* AIR 1975 SC 775 : (1975) 3 SCC 836.

7. *Poolpandi v. Supdt., Central Excise,* AIR 1992 SC 1795 : (1992) 3 SCC 259; *Pandit Munshi Ram v. Delhi Development Authority,* AIR 2001 Del. 82; *Laxman Thamappa Kotagiri v. G.M. Central Railway,* (2007) 4 SCC 596 : (2005) 1 SCALE 600.

8. *Secy. State of Karnataka v. Umadevi,* (2006) 4 SCC 1, 42 : AIR 2006 SC 1806*; Fairgrowth Investments Ltd. v. Custodian,* (2004) 11 SCC 472, 482 : (2004) 9 JT 124.

earlier three Judge Bench decision is incorrect, then it can refer the matter to a five Judge Bench.[9]

The rule is one of practice based on convenience and judicial propriety, or as some judges have termed it, judicial discipline. Nevertheless, it has been generally followed and enforced except in exceptional circumstances. A judicially unprecedented procedure was adopted by the Court in *Islamic Academy of Education v. State of Karnataka* [10] by constituting a Bench of 5 judges to "interpret" the decision of 11 judges in *T.M.A.Pai Foundation v. State of Karnataka*[11]. Subsequently a Bench of seven judges was constituted to consider the correctness ofthe "interpretation"[12]. Again a larger Bench decision in *India Cement Ltd. v. State of Tamil Nadu*[13] was not followed by a bench of five judges[14] on the ground that the judgment contained "A doubtful expression…apparently by mistake or inadvertence'', that " the apparent error should be ignored' and that " A statement caused by an apparent typographical or inadvertent error in a judgment…should not be read as declaration of such law by the Court'.[15]

When a Division Bench thinks differently from a Bench of the same number of Judges, it should not decide on the correctness or otherwise of the view taken by the earlier Bench, but should refer the case to a larger Bench for decision.[16]

Views expressed by one Bench are binding on coordinate Benches.[17] When there are two conflicting decisions of the Supreme Court rendered by co-equal benches, the question arises which of these two decisions should the High Court follow. Earlier, a view was expressed that the decision of the later date should be followed.[18] But this view is not followed now as it is regarded as too mechanical. The view being propounded now is that the High Court ought to follow the decision which appears to it to state the law more elaborately and accurately.[19]

When the Court is divided, it is the majority judgment which constitutes the "law declared" by the Supreme Court and not the minority view.[20] However, in *Virendra Kumar Srivastava v. U.P.Rajya Sabha Kalyan Nigam* [21], the tests propounded in the majority and minority judgments were applied to determine

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9. *Pradip Chandra Parija v. Pramod Chandra Patnaik,* (2002) 1 SCC 1 : AIR 2002 SC 296.
10. (2003) 6 SCC 697 : AIR 2003 SC 3724.
11. (2002) 8 SCC 481 : AIR 2003 SC 355.
12. *P.A.Inamdar v. State of Maharashtra,* (2005) 6 SCC 537 : AIR 2005 SC 3226. See further discussion under Art. 30.
13. (1990) 1 SCC 12 : AIR 1990 SC 85.
14. *State of West Bengal v. Kesoram Industries,* (2004) 10 SCC 201 : AIR 2005 SC 1646.
15. *Ibid.* at Pp. 292, 297.
16. *Union of India v. Godfrey Phillips India Ltd.*, AIR 1986 SC 806 : (1985) 4 SCC 369; *Union of India v. Raghubir Singh,* AIR 1989 SC, at 1945.
17. *Aarti Gupta v. State of Punjab*, AIR 1988 SC 481 : (1988) 1 SCC 258.
18. *Mattu Lal v. Radhe Lal*, AIR 1974 SC 1596 : (1974) 2 SCC 365; *Basdeo v. Board of Revenue,* AIR 1974 All. 337; *Ganapati v. Waman,* AIR 1981 SC 1956; *Ram Parkash v. Surinder Sharma Smt.*, AIR 1981 P.H. 297; *CST v. Pine Chemicals Ltd.*, (1995) 1 SCC 58; *Arjun Sethi v. L.A. Collector, Cuttack*, AIR 1998 Ori 34; *Gopal Krishna Andley v. 5th Addl. District Judge, Kanpur*, AIR 1981 All 300; *P. Ramanujan v. D. Venkat Rao,* AIR 1982 AP 227; *Pandit Munishi Ram v. DDA, supra,* footnote 7.
19. *Amar Singh Yadav v. Shanti Devi*, AIR 1987 Pat 191.
20. *John Martin v. State of West Bengal*, AIR 1975 SC 775 : (1975) 3 SCC 836; *Harish Verma v. Ajay Srivastava,* (2003) 8 SCC 69 : AIR 2003 SC 3371; *Common Cause v. Union of India,* (2004) 5 SCC 222 : (2004) 9 SCALE 32.
21. (2005) 1 SCC 149 : AIR 2005 SC 411.

whether the respondent corporation was a "state" or not within the meaning on Art. 12.

As regards the binding nature of an advisory opinion, theoretically, it may be true to say that it is not binding as it does not amount to a proper judicial adjudication since there are no parties before the Court. But this is only a technical view to take. In practice, the lower courts regard it as having the same efficacy, authority and value as a judgment of the Supreme Court delivered by it in a case coming before it in the normal manner. As the law regarding several difficult constitutional points is declared by the Supreme Court in its advisory opinions, the lower Courts have to take note of that and apply the same.[22] The Federal Court has itself said that advisory opinions were not to be treated any the less binding on account of being advisory.[23] The matter has already been discussed earlier.[24]

In *Union of India v. Kantilal,*[25] the Supreme Court disapproved of the approach of the Central Administrative Tribunal where the tribunal did take notice of the Supreme Court's decision but, without mentioning any distinguishing features or facts of the case before it, failed to follow the same.

The Supreme Court has emphasized that it would amount to judicial impropriety on the part of subordinate courts and the High Court to ignore the well settled position in law as a result of its decision and to pass a judicial order which is clearly contrary to the settled position. The Court has observed: [26]

> "Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

The Supreme Court has ruled that it can initiate contempt of court proceedings against such High Court Judges as flout the order of the Supreme Court.[27]

When the Supreme Court gives reasons for dismissing a special leave petition under Art. 136,[28] the decision becomes one which attracts Art. 141 and, thus, becomes binding. When, however, the Court dismisses a special leave petition *simpliciter* but gives no reasons for summarily dismissing the petition or does not specifically affirm the reasoning in the order appealed against, the Court does not lay down any law under Art. 141. The effect of a non-speaking order dismissing a special leave petition must, by implication, be taken to be that the Supreme

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22. *Ramkishore v. Union of India*, AIR 1965 Cal. 282.
23. *Province of Madras v. Boddu Paidanna,* AIR 1942 FC 33.
24. *Supra*, Sec. F.
25. This point has been discussed later : see, *Union of India v. Kantilal Hematram Pandya,* (1995) 3 SCC 17 : AIR 1995 SC 1349.
26. *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (P.) Ltd.,* AIR 1997 SC 2477, 2484 : (1997) 6 SCC 450. Also see, *Shivaji Narayan Bachhav v. State of Maharashtra,* AIR 1983 SC 1014 : (1983) 4 SCC 129.
27. *Spencer & Co. Ltd. v. Vishwadarshan Distributors (P.) Ltd.,* (1995) 1 SCC 259.
28. For discussion on Art. 136, see, *supra,* Sec. D.

Court thinks that the case is not a fit one where special leave to appeal should be granted.[29]

The Supreme Court has emphasized upon its law-creative function. The Court has emphasized that the "childish fiction" that the courts only find the law but do not make it must be done away with.[30] Under Art. 141, the law declared by the Supreme Court is of binding character and as commandful as the law made by the Legislature. The Court has further asserted that it is not merely an interpreter of the existing law but much more than that. As a wing of the state, the Court is by itself a source of law. The law is what the Court says it is.[31]

Consequently, the Supreme Court does not regard itself as absolutely bound by its own decisions, especially in the area of interpretation of the Constitution.[32] The words of Art. 141 "binding on all courts", though wide enough to include the Supreme Court, do not actually include the Supreme Court itself. The Court is thus not bound by its own decisions and is free to reconsider them in appropriate cases. This approach is necessary so that along with consistency and uniformity, development of law is not stultified with passage of time. Therefore, while the Supreme Court does usually follow its own decisions, it may, at times, find it necessary to differ from its own previous rulings in the interest of development of law and justice.[33] The Court has observed that if the subject-matter is of fundamental importance to national life, or the reasoning is so plainly erroneous in the earlier decision in the light of the later thought, then "it is wiser to be ultimately right rather than to be consistently wrong."[34] A later judgment will not be followed if it has ignored an earlier decision and was rendered *per incuriam*[35].

On the promulgation of the Constitution, the Federal Court, which functioned under the Government of India Act, 1935, ceased to exist and the Supreme Court was set up instead.[36] Appeals from the Federal Courts and the High Courts lay to the Privy Council which was the ultimate court of appeal from India. The Supreme Court has ruled that while the pre-Constitution decisions rendered by the

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29. *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy,* (1970) 1 SCC 613 : AIR 1971 SC 2355; *Union of India v. All India Services Pensioners' Association,* AIR 1988 SC 501 : (1988) 2 SCC 580; *Indian Oil Corpn. v. State of Bihar,* AIR 1986 SC 1780 : (1986) 4 SCC 146; *Supreme Court Employees' Welfare Association v. Union of India,* AIR 1990 SC 334 : (1999) 4 SCC 187; *Ajit Kumar Rath v. State of Orissa,* AIR 2000 SC 85, at 93 : (1999) 9 SCC 596.
See, *supra,* Sec. D(a).

30. See, further on this point, Ch. XL, *infra.*

31. *Delhi Transport Corp. v. DTC, Mazdoor Union,* (1991) Supp. (1) SCC 600 : AIR 1991 SC 101; *Nandkishore v. State of Punjab,* (1995) 6 SCC 614; *BIC v. C.T.O.,* (1994) Supp. (1) SCC 310. See also *M. Nagaraj v. Union of India,* (2006) 8 SCC 212, 267 : AIR 2007 SC 71.
Also see, Ch. XL, *infra.*

32. *Bengal Immunity Co. v. State of Bihar,* AIR 1955 SC 661 : 1955 (2) SCR 603; *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325 : (1982) 3 SCC 24.

33. *Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer,* (1990) 3 SCC 682.
For a fuller discussion of this theme, see, *infra,* Ch. XL. See also *T.K. Rangarajan v. Govt. of Tamil Nadu,* (2003) 6 SCC 581, 589 : AIR 2003 SC 3032.

34. *Ganga Sugar Company v. State of Uttar Pradesh,* AIR 1980 286, 294 : (1980) 1 SCC 223.

35. *Babu Prasad Kaikadi v. Babu,* (2004) 1 SCC 681 : AIR 2004 SC 754*; Mukesh Tripathi v. Senior Divisional Manager, LIC,* (2004) 8 SCC 387, 396 : AIR 2004 SC 4179.

36. *Supra.*

Privy Council and the Federal Court are entitled to great weight, those decisions are not binding on the Supreme Court which can take a different view.[37]

The Supreme Court has also insisted that tribunals also follow the doctrine of *stare decisis* . A tribunal is bound to follow the law laid down by the concerned High Court and the Supreme Court. A bench of a tribunal ought to follow the law laid down by an earlier bench. This is part of the judicial discipline. If a subsequent bench feels that the view taken by an earlier bench is incorrect, it ought to refer the matter to a larger bench. This step is necessary so as to avoid any difference of opinion between two co-ordinate benches of the same tribunal.[38]

The Supreme Court has also emphasized that a subordinate court is bound to follow the law as enunciated by the superior courts. This is in essence the doctrine of precedent or *stare decisis*.[39]

K. INDEPENDENCE OF THE SUPREME COURT

The concept of independence of the Judiciary took time to grow in England. Before 1701, the Judges held their office during the Crown's pleasure and, like any other Crown servant, he could be dismissed by the King at will. The Judges were thus subservient to the Executive. This subservience naturally led the Judges to favour the royal prerogative. The most typical example of such an attitude is to be found in the *Hampden's* case (the *Ship Money* case) in which seven out of twelve Judges gave an award in favour of the Crown's prerogative to collect money without parliamentary approval. One of the Judges even propounded the view that "Rex is Lex." In 1616, Coke was dismissed from the office of the Chief Justice of the King's Bench. The judicial independence was secured by the Act of Settlement, 1701, which declared the Judicial tenure to be during good behaviour, and that upon the address of both the Houses of Parliament it would be lawful to remove a Judge. This position regarding security of judicial tenure is now secured by statutes.[40]

An independent judiciary is the *sine qua non* of a vibrant democratic system. Only an impartial and independent Judiciary can stand as a bulwark for the protection of the rights of the individual and mete out even handed justice without fear or favour. The Judiciary is the protector of the Constitution and, as such, it may have to strike down executive, administrative and legislative acts of the Centre and the States. For Rule of Law to prevail, judicial independence is of prime necessity. Being the highest Court in the land, it is very necessary that the Supreme Court is allowed to work in an atmosphere of independence of action and judgment and is insulated from all kinds of pressures, political or otherwise.

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37. *Delhi Judicial Service Association v. State of Gujarat*, AIR 1991 SC 2176, 2202 : (1991) 4 SCC 406. The Supreme Court did not follow the Federal Court decisions in *State of Bihar v. Abdul Majid,* AIR 1954 SC 245, 248-49 : 1954 SCR 786; *Shrinivas Krishnarao Kango v. Narayan Devji Kango*, AIR 1954 SC 379, 387-88 : 1955 (1) SCR 1.

38. *S.I. Rooplal v. Lt. Governor through Chief Secretary, Delhi,* 2000 AIR SCW 19; *State of Andhra Pradesh v. A.P. Jaiswal,* AIR 2001 SC 499 : (2001) 1 SCC 748. See also *Ajay Kumar Bhuyan v. State of Orissa,* (2003) 1 SCC 707 : (2002) 9 SCALE 56.

39. *Ibid.*

40. O. HOOD PHILIPS & PAUL JACKSON, *CONST. OF ADM. LAW* 28-29, 386-387 (1987). Also see, *supra.*

The members of the Constituent Assembly were very much concerned with the question of independence of the Judiciary and, accordingly, made several provisions to ensure this end.[41] The Supreme Court has itself laid emphasis on the independence of the judiciary from time to time. As the Court has observed recently in *Thalwal*:[42] "The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy".

The concept of "separation of powers between the legislature, the executive and the judiciary" and "independence of judiciary", a fundamental concept, has now been "elevated to the level of the basic structure of the Constitution and are the very heart of constitutional scheme."[43] The Court has rendered several decisions with a view to strengthen not only its own independence but that of the entire judicial system including the subordinate judiciary.[44]

As regards the relationship between Parliament and the Supreme Court, the basic pattern of the Court, its composition, powers, jurisdiction *etc*., the Constitution makes detailed provisions which cannot be touched by ordinary legislative process. But, within the constitutional framework, Parliament has some powers *vis-a-vis* the Court. The minimum number of its Judges is fixed by the Constitution but Parliament has authority to increase, not to decrease, this number.[45] The Constitution confers a security of tenure on the Judges subject to Parliament moving an address for removal of a Judge.[46] The power thus vested in Parliament cannot be misused owing to several safeguards, *viz.*, charges of misbehaviour and incapacity against the Judge concerned have to be enquired and proved, and special majority is required in the two Houses for the motion to be carried;[47] the executive plays no role in this procedure.

The salaries of the Judges are fixed by Parliament by law but it cannot be reduced during the tenure of a Judge.[48] Parliament may prescribe the privileges, allowances, leave and pension of a Judge, subject to the safeguard that these cannot be varied during the course of tenure of a Judge to his disadvantage.[49]

In the area of the Court's jurisdiction, Parliament may provide that an appeal may lie to the Supreme Court in civil matters from the judgment, decree or final order of a single Judge of a High Court.[50] Parliament can enhance the appellate criminal jurisdiction of the Supreme Court by enabling it to entertain and hear appeal from any judgment, final order or sentence in a criminal proceeding in a High Court over and above those cases in which the Court can already hear appeals under Art. 134.[51] Parliament can provide that the Supreme Court shall not have jurisdiction and powers of the Federal Court beyond what it already has un-

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41. AUSTIN, *op. cit.,* 164.
42. *A.C. Thalwal v. High Court of Himachal Pradesh,* (2000) 7 SCC 1, 9 : AIR 2000 SC 2732.
43. *State of Bihar v. Bal Mukund Sah,* AIR 2000 SC 1296, 1317 : (2000) 4 SCC 640.
For comments on this case, see, *infra,* Ch. VIII, Sec. F.
44. See, for example, *S.C. Advocates on Record Ass. v. Union of India*, *supra*; *In re* : *Presidential Reference*, *supra.* Also see, Ch. VIII, *infra.*
45. *Supra*, Sec. B(a).
46. *Supra*, Sec. B(m).
47. *Supra*, Sec. B(m).
48. *Supra*, Sec. B(i).
49. *Ibid.*
50. Art. 133(3); *supra*, Sec. C(iv)(c).
51. Art. 134(2); *supra*, Sec. C(iv)(d).

der Arts. 133 and 134.[52] Parliament can regulate the Supreme Court's power to review its own decisions and orders.[53] Parliament can confer further jurisdiction (quantitatively or qualitatively) on the Supreme Court regarding any matter in the Union or Concurrent List.[54] Parliament can provide that the Supreme Court shall have jurisdiction and powers with respect to any matter as the Government of India and the Government of a State may by special agreement seek to confer on it.[55] Parliament can confer on the Supreme Court power to issue directions, orders or writs, for any purpose other than those mentioned in Art. 32.[56] Parliament can confer supplementary powers on the Supreme Court so as to enable it to exercise its jurisdiction more effectively.[57]

It is clear from these provisions that what Parliament can do is to expand the jurisdiction and powers of the Supreme Court in several respects over and above what the Constitution confers. The effect of all these provisions, therefore, is that whereas the Constitution guarantees to the Supreme Court jurisdiction of various kinds, the matter has not been stereotyped into a rigid pattern for ever but is capable of expansion in the light of experience and the prevailing circumstances.

The rule-making power of the Supreme Court is subject to any law made by Parliament.[58] Parliament may regulate and prescribe the conditions of service of officers and servants of the Supreme Court;[59] may prescribe the manner in which a decree or order passed by the Supreme Court may be enforced;[60] may also pass a law to regulate the Court's power to make an order for securing the attendance of a person, discovery and production of documents or investigation or punishment of contempt of itself.[61] These are, however, procedural matters and do not affect the Supreme Court in any substantive manner.

To enable Parliament to make laws pertaining to the above-mentioned matters, Entry 77, List I, Sch. VII, confers on Parliament power to make law with respect to the constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of the Court) and the fees taken therein and also as to the persons entitled to practice before it.[62]

The Constitution insulates the Court from political criticism, and, thus, ensures its independence from political pressures and influence, by laying down that neither in Parliament nor in a State Legislature the conduct of a Supreme Court Judge in the discharge of his duties, can be discussed.[63] In the *Keshav Singh* case, the Supreme Court has taken opportunity to underline the significance of this provision. It protects a Judge of the Court from any contempt proceedings which may be taken against him in any House of Parliament or State Legislature for anything that the Judge may do in the discharge of his duties. The provision amounts to an absolute constitutional prohibition against any discussion in a

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52. *Supra*, Art 135, Sec. I(b).
53. Art. 137, *supra*, Sec. H.
54. Art. 138(1), see, *supra*, Sec. I(i) and *infra*, Ch. X.
55. Art. 138(2), Sec. I(i), *supra*.
56. Art. 139; *Infra*, Ch. XXXIII; *supra*, Sec. I(i).
57. Art. 140; Sec. I(i), *supra*.
58. Art. 145; *supra*, Sec. I(f).
59. Art. 146(2); *supra*, Sec. I(g).
60. Art. 142(1), *supra*, Sec. I(d).
61. Art. 142(2); *supra*, Sec. I(c).
62. *Infra*, Ch. X.
63. *Supra*, Ch. II.

House, with respect to a Supreme Court Judge. Reading Arts. 121 and 211 together, it is clear that the conduct of a Supreme Court Judge cannot be discussed in a House except when a motion to remove him is before Parliament.[64]

Further, the Supreme Court's expenses are charged upon the Consolidated Fund of India, which means that this item is non-votable in Parliament although a discussion on it is not ruled out.[65] It is thus not possible for Parliament, howsoever annoyed it may be with the Court, to starve it of funds. And the possibility of Parliament getting annoyed with the Court is not just a figment of the imagination. That such occasions may arise is evidenced by the reaction to the Supreme Court's decision in the *Golaknath* case[66] or the *Kesavanand Bharati* case[67] and earlier in the property cases, which led to the First and the Third Amendments of the Constitution.[68] The extreme controversy between a State Legislature and the High Court concerned which occurred in the *Keshav Singh* case has already been referred to.[69] Therefore, making supply of money to the Supreme Court independent of parliamentary vote is a great step in ensuring the Supreme Court's independence from political pressures.

As regards the Central Executive-Supreme Court relationship, the effective power to appoint Supreme Court Judges has over the years passed from the Executive to the Judiciary itself which has greatly strengthened judicial independence.[70] The Executive has no power to remove a Judge without an address from the House of Parliament,[71] and cannot control the Court's jurisdiction in any manner. However, the rules made by the Supreme Court concerning its staff members are to be approved by the Executive because of the financial implications involved therein. Here, again, the Court has made consultation between the Executive and the Chief Justice compulsory.[72]

Recruitment of the Court's staff is outside the purview of the Executive except that it can by rules provide for consultation with the Union Public Service Commission.[73] Salaries and allowances of the officers and servants of the Supreme Court are to be approved by the Executive, the reason being that ultimately they are to be met out of the Public Exchequer which affects the tax-payer and, therefore, some governmental control over the Court's expenses is necessary.

From the above, it would appear that the constitutional position of the Supreme Court is very strong relatively to the other two organs of government. A reasonable security of tenure has been provided to the Judges which is an important condition to enable them to act in an atmosphere of independence. The Court has been reasonably immunized from the stresses and strains of contemporary politics in the country.

There is however a danger of the judicial independence being eroded somewhat by the prevailing practice of the government re-employing retired Supreme

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64. *Supra*, Ch. II.
65. *Supra*, Ch. II.
66. Ch. XLI, *infra.*
67. *Ibid.*
68. *Infra*, Chs. XXXI, XXXII and XLII.
69. *Supra*, Ch. II; also see, Ch. VI, *infra.*
70. *Supra*, Sec. B.
71. *Ibid.*
72. *Supra.*
73. *Supra.*

Court Judges in various capacities. The only ban imposed by the Constitution on a Supreme Court Judge is that he should not plead or act in any Court or before any authority after retirement.[74]

In the Constituent Assembly, an attempt to put a restriction on re-employment of a retired Supreme Court Judge by the government did not succeed.[75] Ambedkar stated that the judiciary decided issues between citizens and rarely between citizen and the government and, consequently, the chances of the government influencing the conduct of a member of the Judiciary were very remote; in many cases employment of judicial talent in a specialized forum might be very necessary, as for example, the Income-tax investigation Commission; and that relations between Executive and Judiciary were so separate and distinct that the Executive had hardly any chance of influencing the judgment of the Judiciary.[76]

It is obvious that Ambedkar unduly minimised the importance of litigation in which government is a party. Today a very large chunk of the Supreme Court's work consists of deciding cases in which the government figures as a party. Also, the retired Judges are not always appointed, as Ambedkar envisaged, to *quasi*-judicial posts only. Many a time, they are appointed to pure and simple executive posts, for example, as Governors of States.[77]

The Law Commission has also criticised the prevailing practice of re-employing the retired Judges. "It is clearly undesirable that Supreme Court Judges should look forward to other government employment after their retirement. The government is a party in a large number of cases in the highest Court and the average citizen may well get the impression, that a Judge who might look forward to being employed by the government after his retirement, does not bring to bear on his work that detachment of outlook which is expected of a Judge in cases in which government is a party. We are clearly of the view that the practice has a tendency to affect the independence of the Judges and should be discontinued."[78]

The solution of the problem appears to lie in increasing the age of retirement of a Supreme Court Judge from 65 to 70 years, to make liberal pension provisions for the retired Judges, to put a legal ban on a Supreme Court Judge accepting an employment under any government after retirement, and to use his judicial talent in an honorary, and not in a salaried, capacity.

In *Nixon M. Joseph v. Union of India*,[79] a very pertinent and significant question was raised before the Kerala High Court through a public interest petition, *viz.* : should the retired Supreme Court and High Court Judges take any job, or contest election for the legislature. There is no specific bar in the Constitution against this. Nevertheless, K. NARAYANA KURUP J. has expressed a firm opinion

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74. See, *supra*, Sec. B(h).
75. VIII *CAD*, 229-260.
76. *Ibid*, 259-260.
77. The dangers in accepting a political office, like that of a State Governor, are very tellingly revealed by a recent episode. Fatima Beevi, a retired Supreme Court Judge, was appointed the Governor of Tamil Nadu. She appointed Jayalalitha as the Chief Minister. Jayalalitha was at the time disqualified to be a member of the State Legislature. Annoyed by the action of the Governor, the Central Executive recalled her from her office. For details, see, Ch. VII, Sec. A(d), *infra*.
78. Law Comm., *XIV Rep.*, I, 46.
79. AIR 1998 Ker. 385.

against this practice. To maintain the dignity and independence of the judiciary as well as public confidence in the judiciary, it is necessary that a Judge should now allow his judicial position to be compromised at any cost. Justice must not only be done but seen to be done. KURUP, J., has made the following pithy remarks:

> "The general public reposing absolute faith in the judiciary, see in it, justifiably an institution, that can rein in, if not eliminate, the rapacity, nepotism and corruption, especially at high places which have come to be associated with governance. The judiciary should continue to merit the exalted position it occupies in the minds and hearts of the people as the "saviour of democracy". It cannot be gainsaid that the one necessary condition for this is its independence. Independence in the sense free from the executive, meaning the bureaucracy and politicians interference and influence of every type. And fundamental to freedom from such influence and pressures on the judiciary is to eschew active politics and acceptance of positions by judges after retirement."

While the learned Judge was definitely of the opinion that judges be precluded from taking up jobs, or moving into active politics after retirement, he refrained from giving a definitive ruling in the case. As the matter is of national significance, the Judge dismissed the petition in *limine* and left the matter to the Central Government for consideration and necessary action.

In the past, at times, appointment of the Chief Justice raised controversy when a junior Judge was appointed as the Chief Justice by-passing the senior-most Judge.[80] This was regarded as an attempt to interfere with judicial independence. While a rule of automatic promotion of the senior-most Judge to the office of the Chief Justice might not always be satisfactory, by-passing him because his judicial views are not palatable to the government is to strike at the roots of judicial independence. It is hoped that such controversies will not arise in future because of the introduction of new procedure to appoint the Chief Justice.[81]

The Supreme Court of India enjoys far larger powers than any other Apex Court, *e.g.,* House of Lords in Britain or the Supreme Court in the USA. The Court enjoys very extensive jurisdiction. It plays a very significant role in the administration of law and justice in the country. It is the final arbiter and interpreter of the Constitution.[82] Judicial review is the basic structure of the Constitution[83] and this places a special responsibility on the Supreme Court in the area of constitutional interpretation. It is the final court of appeal in matters of private law as well as public law,[84] and has a supervisory role *vis-a-vis* the tribunals[85] and enjoys advisory jurisdiction.[86]

The Supreme Court is at the apex of the national judicial system. It constitutes a constitutional balance wheel acting as countervailing power to the Executive and the Legislature. The Court has played an extremely creative role in keeping the responsible and the parliamentary system of government in proper working

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80. *Supra*.
81. *Supra.*
82. See, *infra*, Ch. XL.
83. Ch. XLI, *infra.*
84. *Supra.*
85. *Supra.*
86. *Supra.*

order,[87] in maintaining the federal balance,[88] in protecting the fundamental rights of the people.[89] The Court has endeavoured to promote a welfare state in India.[90]

But the Court is faced with a serious problem, *viz.*, load of work.[91] Because of the spate of legislative and executive activity, increase in population and explosion of economic activity, there has been an explosion in litigation in India. Creation of tribunals, like the Central Administrative Tribunal, has further added to the load of work on the Supreme Court as appeals from these tribunals lie directly to the Supreme Court.[92]

There seems to be no possibility that the work-load on the Court will decrease in future. On the other hand, it is possible that the load of work on the court may increase. It, therefore, appears to be necessary to think of ways and means to expedite disposal of cases by the Supreme Court.

One obvious step to meet the situation is to further increase the number of judges and to select persons of calibre, aptitude and industry for the purpose. At times, filling of judicial vacancies takes a long time. The Government should devise ways and means to cut-short this period. The Court may also think of establishing specialised Benches according to the major heads of litigation coming before it. If the same judges deal with the same subject-matter over and over again, there can be quick disposal of cases and also a uniformity in decisions making law more certain and thus reducing the number of appeals to the Supreme Court in the long run.

Another method may be to establish all India tribunals, or a Central Appellate Tribunal, to hear appeals from all the various tribunals in the country, leaving only an exceptional appeal to the Supreme Court on questions of law from such a Tribunal.

The Supreme Court itself has suggested setting up of a National Court of Appeal to entertain appeals by special leave from the decisions of the High Courts and tribunals in the country in civil, criminal, revenue and labour cases so that the Supreme Court may concern itself only with entertaining cases involving questions of constitutional law and public law.[93]

The important thing is that in a democratic country, to solve the problem of arrears of cases pending in the courts, the solution is not to deny justice to the people but to expand the judicial system in various ways so as to keep pace with the growth of litigation in the country.[94]

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87. See *U.N.R. Rao, supra,* Ch. II; *Samsher Singh, supra,* Ch. III; *S.R. Bommai v. Union of India*, AIR 1994 SC 1918; see, *infra*, Ch. XIII, Sec. B.

88. Chs. X, XI and XIV, *infra.*

89. See, *infra*, Chapters XX to XXXIII.

90. See, *infra*, Ch. XXXIV, *infra.*

91. R. DHAWAN, *THE SUPREME COURT UNDER STRAIN*: *THE CHALLENGE OF ARREARS* (I.L.I. 1978).

92. See, *infra*, Ch. VIII, Sec. H.

93. *Bihar Legal Support Society v. Chief Justice of India*, AIR 1987 SC 38 : (1986) 4 SCC 767.

94. See, *Law Commission, Fourteenth Report*, 46-63 (1958); *Forty-fourth Report* (1971) and *Forty-fifth Report* (1971); *Fifty-eighth Report on the Structure and Jurisdiction of the Higher Judiciary.* Also see, JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 348-362 (Reprint 1997). As on 31st December, 2008, 49,819 cases were pending in the Supreme Court. Court Newa: Vol. III, Issue No. 3 (October-December, 2008). The Supreme Court (Number of Judges) Amendment Bill, 2008 has been introduced in Parliament to further amend the Supreme Court (Number of Judges) Act, 1956 by increasing the number of Judges in the Supreme Court from twenty-five to thirty, excluding the Chief Justice of India.