IN THE SUPREME COURT OF INDIA

Decided On: 30.12.1981

S.P. Gupta
Vs.
President of India and Ors.

Hon'ble **Judges:**
A.C. Gupta, D.A. Desai, E.S. Venkataramiah, P.N. Bhagawati, R.S. Pathak, Syed M. Fazal Ali andv.D. Tulzapurkar, JJ.

JUDGMENT

P.N. Bhagwati, J.

1. These writ petitions filed in different High Courts and transferred to this Court under Article 139 of the Constitution raise issues of great constitutional importance affecting the independence of the judiciary and they have been argued at great length before us. The arguments have occupied as many as thirty five days and they have ranged over a large number of issues comprising every imaginable aspect of the judicial institution, Voluminous written submissions have been filed before us which reflect the enormous industry and vast erudition of the learned Counsel appearing for the parties and a large number of authorities, Indian as well as foreign, have been brought to our attention. We must acknowledge with gratitude our indebtedness to the learned Counsel for the great assistance they have rendered to us in the delicate and difficult task of adjudicating upon highly sensitive issues arising in these writ petitions. We find, and this is not unusual in cases of this kind, that a considerable amount of passion has been injected into the arguments on both sides and sometimes passion may appear to lend strength to an argument, but, sitting as Judges, we have to be careful to see that passion does not blind us to logic and predilections pervert proper interpretation of the constitutional provisions. We have to examine the arguments objectively and dispassionately without being swayed by populist approach or sentimental appeal. It is very easy for the human mind to find justification for a conclusion which accords with the dictates of emotion. Reason is a ready enough advocate for the decision one, consciously or unconsciously, desires to reach. I will recall the brilliant fling of Shri Arobindo in his poem "Savitri".

An inconclusive play is Reason's toil;
Each strong idea can use her as its tool;
Accepting every brief she pleads her case,
Open to every thought she cannot know.

We have therefore to rid our mind of any pre-conceived notions or ideas and interpret the Constitution as it is and not as we think it ought to be. We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation. We must also remember that the Constitution is an organic instrument intended to endure and its provisions must be interpreted having regard to the constitutional objectives and goals and not in the light of how a particular Government may be acting at a given point of time. Judicial response to the problem of constitutional interpretation must not suffer from the fault of emotionalism or sentimentalism which is likely to cloud the vision when Judges are confronted with issues of momentous importance. We must constantly bear in mind the famous words of Holmes J., in Northern Security Co. v. United States (1903) 193 US 197, where that great illustrious Judge said:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment, These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

With these prefatory words we may now proceed to state the facts of these writ petitions.

2. The first writ petition is that filed by Iqbal Chagla and others in the High Court of Bombay. The petitioners in this writ petition are advocates practising in the High Court of Bombay and they have challenged a circular letter dated 18th March, 1981, addressed by Shri Shiv Shankar, the Law Minister of the Government of India, to the Governor of Punjab and the Chief Ministers of the other States. Since the circular letter has formed the subject matter of heated controversy

between the parties and its constitutional validity has been assailed on behalf of the petitioners, it would be desirable to reproduce it in extenso in the words of the author himself:

D. O. No. 66/10/81-Jus.
Ministry of Law, Justice and
Company Affairs, India
New Delhi-110 001.
March 18, 1981.

My dear,

It has repeatedly been suggested to Government over the years by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one third of the Judges of the High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. In this context, I would request you to:

(a) obtain from all the Additional Judges working in the High Court of your State their consent to be appointed as permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as permanent Judges; and

(b) Obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part at the Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court. With regards.

Yours sincerely,
Sd/- (P. Shivshankar)

To

1. Governor of Punjab

2. Chief Ministers (by name) (Except North-Eastern States.)

It appears that a copy of the Circular letter was sent by Law Minister to the Chief Justice of each High Court and the Chief Minister of each State also forwarded a copy of the circular letter to the Chief Justice of the High Court of his State. We do not know what the Chief Justices of the various High Courts did on receipt of a copy of the circular letter from the Law Minister and from the Chief Ministers of their respective States, but presumably each Chief Justice sent a copy of the circular letter to the additional Judges in his Court with a request to do the needful in view of what was stated in the circular letter. The Chief Justice of Bombay High Court in any event addressed such a communication to each of the additional Judges in his Court. We do not know what was the response of the additional Judges in Bombay to the circular letter but the record shows that out of a total number of additional Judges in the Country, quite a few additional Judges gave their consent to be appointed outside their High Court. The petitioners and other advocates practising on the original as well as appellate side of the High Court of Bombay however took the view that the circular

letter was a direct attack on the independence of the judiciary which is a basic feature of the Constitution and hence the Advocates Association of Western India which represents advocates practising on the appellate side, the Bombay Bar Association which represents advocates practising on the original side and the Managing Committee of the Bombay Incorporated Law Society which represents Solicitors practising in the High Court of Bombay, passed resolutions condemning the circular letter as subversive of judicial independence and asking the Government of India to withdraw the circular letter. Since the circular letter was not withdrawn by the Law Minister, the petitioners filed the present writ petition in the High Court of Bombay challenging the constitutional validity of the circular letter and seeking a declaration that if consent has been given by any additional Judge or by any person whose name has been or is to be submitted for appointment as a Judge, consequent on or arising from the circular letter, it should be held to be null and void. There were several grounds on which the constitutional validity of the circular letter was challenged but it is not necessary to set them out at the present stage because we shall have occasion to refer to them in detail when we deal with the rival arguments of the parties. The petitioners impleaded the Law Minister as respondent No. 1, the Union of India as respondent No. 2 and ten additional Judges of the Bombay High Court as respondents Nos. 3 to 12. The writ petition was filed on 20th April 1981 and immediately after filing it, the petitioners applied to the learned single Judge sitting on the original side of the Bombay High Court for admission of the writ petition and interim relief. The admission of the writ petition as also the grant of interim relief were opposed on behalf of respondent Nos. 1 and 2 but the learned single Judge admitted the writ petition and issued a rule and granted interim relief in terms of prayer (e) of the writ petition. The effect of granting the interim relief was that respondents Nos. 1 and 2 were restrained from further implementing the circular letter and acting in any manner upon the consent, if any, obtained from any person following on or arising from the circular letter. Respondents Nos. 1 and 2 thereupon preferred an appeal to a Division Bench of the Bombay High Court under Clause (15) of the Letters Patent but the appeal was dismissed by the Division Bench on 24th April, 1981. The Division Bench fixed the hearing of the writ petition before the learned single Judge hearing writ petitions on 25th June 1981 and also gave directions for tiling of affidavits by the parties. Respondent Nos. 1 and 2 being aggrieved by the order made by the Division Bench dismissing their appeal made an application to this Court on 8th May 1981 for taking up their special leave petition directed against the order of the Division Bench on the same day, but this Court refused to take up the special leave petition for hearing on that day and directed that it may come up for hearing in due course, Respondents Nos. 1 and 2 in the meanwhile filed Transfer Petition No. 24 of 1981 for transfer of the writ petition from the Bombay High Court to this Court under Article 139A of the Constitution and ultimately by an order dated 9th June 1981, the vacation Judge directed that the writ petition be withdrawn from the Bombay High Court to this Court and he also gave directions for filing of affidavits and written briefs. That is how the present writ petition filed by Iqbal Chagla and others has come up for hearing before this Bench of seven Judges constituted by the Hon'ble the Chief Justice of India.

3. The second writ petition is that filed by V.M. Tarkunde in the High Court of Delhi. The petitioner in this writ petition is a senior advocate practising in the Supreme Court and he has not only challenged the constitutional validity of the circular letter issued by the Law Minister but also assailed the practice followed by the Central Govt. in appointing additional Judges in various High Courts. The grounds on which the constitutional validity of the circular letter is challenged are the same as those taken in the first petition filed by Iqbal Chagla and others, but, so far as the complaint in respect of appointment of additional Judges is concerned, this writ petition covers new ground not treaded by the first writ petition. What made it necessary to include this complaint in the writ petition was the fact that three additional Judges of Delhi High Court, namely, O.N. Vohra, S.N. Kumar and S.B. Wad who had originally been appointed as Additional Judges for a period of two years with effect from 7th March 1979, and whose term was expiring on the midnight of 6th March 1981 were further appointed as additional Judges for a period of three months only from 7th March 1981 and these short-term appointments were, according to the petitioner, unjustified by the terms of Article 224 and were in any event subversive of the independence of the judiciary. The petitioner therefore claimed in the writ petition, in addition to the declaration that the circular letter was unconstitutional and void, a writ of mandamus directing the Central Government to convert the posts of additional Judges into permanent Judges in the various High Courts commensurate with the regular business and the arrears in those High Courts and in particular to convert 12 posts of additional Judges in the Delhi High Court into permanent posts having regard to the regular business and the large arrears in that High Court. The petitioner also questioned the validity of short-term appointments of O.N. Vohra, S.N. Kumar and S.B. Wad and claimed that since there was an existing vacancy in a permanent post, O.N. Vohra should be appointed as a permanent Judge to fill that vacancy and so far as S.N. Kumar and S.B. Wad were concerned, they should be appointed for the full term of two years. It appears that the Union of India was the only respondent impleaded in the writ petition as originally filed, but subsequently the Law Minister as also the Joint Secretary, Ministry of Law, Justice and Company Affairs were added as respondents Nos. 2 and 3 to the writ petitions. The High Court of Delhi by its order dated 23rd April, 1981, admitted the writ petition and issued rule upon it. However, since the questions arising in the writ petition were questions of great constitutional importance and the first writ petition had already been filed in the Bombay High Court and another writ petition to which we shall presently refer had also been presented in the High Court of Allahabad raising substantially the same questions, an application was made to this Court on 24th April 1981 for transfer of the writ petition to this Court and by an order dated Ist May, 1981 this Court transferred the writ petition to itself from the Delhi High Court. Meanwhile, the further term of O.N. Vohra, S.N. Kumar and S.B. Wad was about to expire on 6th June, 1981 and no decision appeared to have been taken

till then for continuing these three additional Judges for a further term and the petitioner apprehended that if these three additional Judges were not continued as additional Judges on the expiration of their term on 6th June, 1981, the writ petition might become infructuous. The petitioner therefore, presented an application to this Court on 4th May 1981, for an order directing that the writ petition be heard and disposed of before 6th June, 1981 and that in any event, the respondents should maintain status quo by extending the period of appointment of additional Judges in the various High Courts till the disposal of the writ petition. Immediately on filing this application the petitioner requested the Court to fix an early date of hearing of the writ petition so that it could be disposed of before 6th June, 1981, but since the Court was closing for the summer vacation from 9th May, 1981, it was not possible to fix the hearing of the writ petition until the reopening of the court after the summer vacation. The petitioner thereupon prayed for an interim order that on the expiration of their term on 6th June, 1981, the additional Judges should be continued and their term extended until the final disposal of the writ petition. But, obviously this was not a prayer which could be granted by the Court because it is for the President and not for the Court to appoint Additional Judges and once the term of an Additional Judge has come to an end by efflux of time, it is not competent for the court to reappoint him for a further term. Since, however, an allegation was made in the application that the appointments of additional Judges for a further term were being made at the last minute and three additional Judges of the Bombay High Court at Nagpur were not informed about the extension of their term until the evening of the last day on which their original term was due to expire, this Court made an order dated 8th May 1981 directing that, since the hearing of the writ petition would not be taking place until the reopening of the Court after the summer vacation, the Union of India should "decide not less than ten days before 6th June, 1981 whether any of the three additional Judges should be reappointed for a further term as additional Judges or they should be appointed as permanent Judges or otherwise". So far as the circular letter was concerned, though no prayer for interim relief was made in the written application, this Court, on an oral application made on behalf of the petitioner, directed that any additional Judge who does not wish to respond to the circular letter may do so until the disposal of the writ petition and he shall not be refused extension nor shall he be refused permanent appointment, as the case may be, on the ground that he has not sent any reply to the circular letter or has not indicated his preference as asked for in the circular letter. Now, according to this order, the Central Government was bound to take its decision in regard to the continuance or otherwise of O.N. Vohra, S.N. Kumar and S.B. Wad on or before 27th May, 1981 but since no such decision was communicated to the three additional Judges, the petitioner, presuming that such decision must not have been reached by the Central Government, preferred an application to this Court on Ist June, 1981 for directing the Central Government to communicate its decision regarding the continuance or otherwise of the three additional Judges. Before this application came up for hearing, the petitioner came to know that a decision had been taken by the Central Government in regard to O.N. Vohra S.N. Kumar and S.B. Wad and while S.B. Wad was continued as an additional Judge for a period of one year from 7th June, 1981, O.N. Vohra and S.N. Kumar were not continued for a further term. The petitioner thereupon preferred another application to this Court on 4th June, 1981 and in this application the petitioner pointed out that there were still large arrears of work in the Delhi High Court and therefore there was no lawful and bona fide reason for the non-continuance of O.N. Vohra and S.N. Kumar and not granting fresh appointments to them was mala fide and unconstitutional and prayed that in the circumstances, an interim order should be made by the Court directing that O.N. Vohra and S.N. Kumar shall continue to function as Judges of the Delhi High Court. Both these applications came up for hearing before the learned Vacation Judge and by an order dated 6th June, 1981, the learned Vacation Judge declined to grant interim relief that O.N. Vohra and S.N. Kumar shall continue as additional Judges but directed that notice be issued to show cause why status quo in respect of these two Judges should not be maintained and continued till the pendency of the writ petition. It appears that no order was thereafter made on the notice, since the writ petition itself was directed to be heard at an early date and in the meanwhile, O.N. Vohra and S.N. Kumar were impleaded as respondent Nos. 4 and 5, to the writ petition. O.N. Vohra did not appear at the hearing of the writ petition but S.N. Kumar appeared through counsel, filed a counter-affidavit and claimed that the decision of the Central Government not to appoint him for a further term was vitiated since it was reached without full and effective consultation with the Chief Justice of India and in any event it was based on irrelevant considerations and that on a proper construction of Article 224 read with Article 217, he must be deemed to have been appointed a permanent Judge and in any event, he was entitled to be appointed as an additional Judge for a further term. The Union of India also filed an affidavit in answer to the writ petition and a further affidavit in reply to the counter-affidavit of S.N. Kumar. The writ petition was thereafter placed for hearing before this Bench of seven Judges along with the writ petition filed by Iqbal Chagla and others.

4. The third writ petition is that filed by J.L. Kalra and others in the High Court of Delhi. The petitioners in this writ petition are advocates practising in the Delhi High Court and they have prayed for the issue of a writ in the nature of mandamus directing the Central Government to make an assessment of the number of permanent and additional Judges required by the Delhi High Court having regard to its current business and the accumulated arrears, to create such number of posts of permanent and additional Judges as may be necessary and to make appointments to these posts. The other reliefs asked for in this writ petition are substantially the same as the reliefs prayed for in the writ petition filed by V.M. Tarkunde. This writ petition was also like the other writ petitions withdrawn and transferred to itself by this Court. Since the issues arising in this writ petition are identical with the issues arising in the other two writ petitions, it was heard by this Bench of seven Judges along with those writ petitions.

5. The fourth writ petition is that filed by S.P. Gupta in the High Court of Allahabad. The petitioner in that writ petition is an advocate practising in the Allahabad High Court and he has filed this writ petition for substantially the same reliefs as the writ petitions of Iqbal Chagla and V.M. Tarkunde, with only this difference that the reliefs claimed by him relate to the appointments of additional Judges in the High Court of Allahabad, The petitioner has inter alia prayed for a declaration that the three additional Judges of the Allahabad High Court, namely, Mr. Justice Murlidhar, Mr. Justice A.N. Verma and Mr. Justice N.N. Mittal must be deemed to have been appointed permanent Judges under the warrants already issued to them and that the circular letter of the Law Minister must be held to be void. This writ petition was also heard along with the other writ petitions by this Bench of seven Judges.

6. Since these four writ petitions to which we have just referred raise the same issues in regard to the circular letter issued by the Law Minister and the scope and ambit of the power of the Central Government in regard to appointment or non-appointment of additional Judges, it would be convenient to deal with them in a group and we shall hereafter for the sake of convenience refer to them as the first group of writ petitions.

7. The fifth writ petition is that filed by Miss Lily Thomas, an advocate practising in the Supreme Court. This writ petition has challenged the transfer of Mr. Justice M.M. Ismail, Chief Justice of the High Court of Madras as the Chief Justice of Kerala High Court. What occasioned the filing of this writ petition was an order dated 19th Jan., 1981 made by the President transferring Mr. Justice M.M. Ismail, Chief Justice of the Madras High Court as Chief Justice of the Kerala High Court with effect from the date he assumed charge of his office. This order recited that it was made by the President in exercise of the powers conferred under Clause (1) of Article 222 and after consultation with the Chief Justice of India. Simultaneously with the making of this order, another order of the same date was issued by the President whereby the President in exercise of the powers conferred by Clause (1) of Article 222 after consultation with the Chief Justice transferred Mr. Justice K.B.N. Singh, Chief Justice of the High Court of Patna as Chief Justice of the High Court of Madras with effect from the date he assumed charge of his office. It was the first order of transfer" of Mr. Justice M.M. Ismail as Chief Justice of the Kerala High Court that was challenged by the petitioner in this writ petition. There were several grounds on which the transfer was challenged and they were inter alia that the power of transfer conferred under Clause (1) of Article 222 was confined only to transfer of a High Court Judge and did not cover transfer of the Chief Justice of a High Court, even if the Chief Justice of a High Court could be transferred in exercise of the power conferred under Clause (1) of Article 222, such transfer could be effected only with consent of the Judge sought to be transferred and in any event, even if consent was not necessary, such transfer could be effected only in public interest and after full and effective consultation with the Chief Justice of India and in the case of transfer of Chief Justice M.M. Ismail, none of these conditions was satisfied, since the transfer was not effected with his consent and it was neither in public interest nor after full and effective consultation with the Chief Justice of India. This writ petition was filed by the petitioner under Article 32 of the Constitution and therefore when it came up for admission before a Bench of this Court, the Bench asked the petitioner as to how it was maintainable under Article 32. The Bench was inclined to throughout the petition summarily on the ground that it did not (sic) under Article 32, but the Attorney General of India appearing on behalf of the Union of India submitted that since the writ petition raised important questions of law, it may be entertained by the Court, because in any event, even if this writ petition were rejected on the ground that it was not maintainable under Article 32, a new writ petition for the same reliefs could always be filed under Article 226 and then it could be brought to this Court either by way of transfer under Article 124A or by way of an appeal under Article 136. The Bench therefore decided to admit this writ petition and issued rule nisi. After this writ petition was admitted, there were several inter-locutory proceedings taken out by the petitioner, but it is not necessary to refer to them since most of them were rejected. The Union of India filed a counter-affidavit in reply to this writ petition contesting the various grounds urged on behalf of the petitioner. Chief Justice M.M. Ismail who was impleaded as respondent No. 2 in this writ petition, also filed an affidavit but the stand he took was that he had decided not to challenge the legality or validity of the order of the President transferring him as Chief Justice of the Kerala High Court and he did not want anyone to litigate for or against him. Since Chief Justice M.M. Ismail, who was the person to whom legal injury was caused by the order of transfer, did not claim any relief and made it clear that he did not want anyone to litigate for him, this writ petition could not be maintained by the petitioner and it was liable to be dismissed, but since the petitioner who was appearing in person, wanted to make a few submissions in regard to the scope and ambit of the power of transfer, we heard her for sometime. We may point out that whilst this writ petition was pending, Chief Justice M.M. Ismail resigned his office as Chief Justice of the Madras High Court and therefore, all the more, nothing survives in this writ petition.

8. The sixth writ petition is that filed by A. Rajappa an advocate practising in the High Court of Madras. This writ petition was originally filed in the High Court of Madras under Article 226 of the Constitution and in this writ petition the petitioner challenged the constitutional validity of the orders of transfer passed by the President on 19th Jan., 1981 transferring Mr. Justice M.M. Ismail, Chief Justice of Madras High Court as the Chief Justice of Kerala High Court and Mr. Justice K.B.N. Singh, Chief Justice of Patna High Court as the Chief Justice of Madras High Court. The principal grounds on which these two orders of transfer were assailed as unconstitutional and void were substantially the same as those urged in the fifth writ petition filed by Miss Lily Thomas, with only two additional grounds, namely, that the

transfers having been effected without prior consultation with the Governors of the States to which the two Chief Justices were transferred, were violative of Clause (1) of Article 217 and so far as the transfer of Chief Justice K.B.N. Singh as Chief Justice of Madras High Court was concerned, it was not in public interest, since Chief Justice K.B.N. Singh did not know the Tamil language. This writ petition was withdrawn and transferred to itself by this Court since it raised substantially the same issues as the fifth writ petition filed by Miss Lily Thomas which was pending in this Court. The Union of India opposed this writ petition by filing a counter-affidavit where it contended that the transfers of both the Chief Justices were effected in public interest and after consultation with the Chief Justice of India who is the only authority required to be consulted whilst exercising the power of transfer under Article 222, Clause (1) and the procedure prescribed by Article 217 Clause (1) had no application in the case of transfer of a Judge or Chief Justice from one High Court to another. This writ petition was also referred to a Bench of seven Judges along with the fifth writ petition and that is how both these writ petitions have come up for hearing before us.

9. The seventh writ petition is that filed by P. Subramanian, an advocate practsing in the Madras High Court. This writ petition was originally filed in the Madras High Court under Article 226 and along with the other writ petitions it was transferred to this Court for hearing and final disposal. The averments and prayers made in this writ petition are substantially the same as those in the sixth writ petition filed by A. Rajappa and so also, are the statements made in the counter-affidavit filed on behalf of the Union of India. This writ petition does not therefore need any separate or independent consideration.

10. The eighth writ petition is that filed by D.N. Pandey and Thakur Ramapati Sinha, two advocates practising in the High Court of Patna. This writ petition was originally filed in the High Court of Patna under Article 226 and it challenged the constitutional validity of the Orders transferring Chief Justice M.M. Ismail to the Kerala High Court and Chief Justice K.B.N. Singh to the Madras High Court. The averments and prayers made in the writ petition are substantially the same as those made in the fifth, sixth and seventh writ petitions filed respectively by Miss Lily Thomas, A. Rajappa and P. Subramanian and it is therefore not necessary to repeat them. Suffice it to state that this writ petition was also transferred to this Court along with the other writ petitions under Article 124A. Whilst this writ petition was pending, Chief Justice K.B.N. Singh, who was originally impleaded as respondent No. 3 in the writ petition, applied for being transposed, as petitioner No. 3 and since the original petitioners had no objection to Chief Justice K.B.N. Singh joining them as co-petitioner, this Court made an Order on 17th Sept., 1981 transposing Chief Justice K.B.N. Singh as petitioner No. 3. Chief Justice K.B.N. Singh thereafter filed an affidavit setting out in extenso what transpired between him and the Chief Justice of India in regard to the proposal for his transfer and detailing the various grounds on which he contended that the order transferring him as Chief Justice of the Madras High Court was unconstitutional and void. Chief Justice K.B.N. Singh contended inter alia that the order transferring him as Chief Justice of the Madras High Court was passed by the President by way of punishment and it was based on irrelevant and insufficient grounds and was not in public interest and in any event, it was not preceded by full and effective consultation with the Chief Justice of India. The averments made by Chief Justice K.B.N. Singh in his affidavit were disputed by the Union of India in an affidavit sworn by K.C. Kankan, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs and the Chief Justice of India also filed a counter-affidavit in reply to the affidavit of Chief Justice K.B.N. Singh. The counter-affidavit of the Chief Justice of India prompted two affidavits in rejoinder, one by Chief Justice K.B.N. Singh and the other by petitioners Nos. 1 and 2. We shall have occasion to refer to these various affidavits when we deal with the rival arguments advanced on behalf of the parties.

11. These last four writ petitions challenging the constitutional validity of Orders of transfer of Chief Justice M.M. Ismail and Chief Justice K.B.N. Singh raised identical issues and we would therefore dispose them of together in one group. They may for the sake of convenience be referred as the second group of writ petitions.

12. We may also at this stage refer to S. L. P. No. 1509 of 1981, filed by Ripudaman Prasad Sinha in this Court. This petition for special leave is directed against an order passed by the High Court of Patna rejecting the writ petition of the petitioner challenging the constitutional validity of the order of transfer of Chief Justice K.B.N. Singh, on the ground that the petitioner had not been able to produce the documents on which he wanted to place reliance. This is hardly a ground on which the writ petition should have been rejected by the High Court in limine and we would have therefore, ordinarily granted special leave to appeal against the decision of the High Court, but in view of the fact that the issues sought to be raised by the petitioner have already been agitated in the other writ petitions, it is not necessary to grant special leave and hence we do not propose to make any order on the special leave petition

Locus Standi:

13. When these writ petitions reached hearing before us, a preliminary objection was raised by Mr. Mridul, appearing on behalf of the Law Minister, challenging the locus standi of the petitioners in Iqbal Chagla's writ petition. He urged that the petitioners in that writ petition had not suffered any legal injury as a result of the issuance of the Circular by the

Law Minister or the making of short term appointments by the Central Government and they had therefore no locus standi to maintain the writ petition assailing the constitutional validity of the Circular or the short term appointments. The legal injury, if at all, was caused to the additional Judges whose consent was sought to be obtained under the Circular or who were appointed for short terms and they alone were therefore entitled to impugn the constitutionality of the Circular and the short term appointments and not the petitioners. The basic postulate of the argument was that it is only a person who has suffered legal injury who can maintain a writ petition for redress and no third party can be permitted to have access to the Court for the purpose of seeking redress for the person injured. The same preliminary objection was urged by Mr. Mridul against the writ petition of S.P. Gupta and the contention was that the petitioner in that writ petition not having suffered any legal injury had no locus standi to maintain the writ petition. So far as the writ petition of V.M. Tarkunde is concerned, Mr. Mridul said that he would have had the same preliminary objection against the locus standi of the petitioner to maintain that writ petition because the petitioner had suffered no legal injury, but since S.N. Kumar had appeared, albeit as a respondent, and claimed relief against the decision of the Central Government not to appoint him for a further term and sought redress of the legal injury said to have been caused to him as a result of such decision, the lack of locus standi on the part of the petitioner was made good and the writ petition was maintainable. Mr. Mridul asserted that if S.N. Kumar had not appeared and sought relief against the decision of the Central Government discontinuing him as an additional Judge, the writ petition would have been liable to be rejected at the threshold on the ground that the petitioner had no locus standi to maintain the writ petition. This preliminary objection urged by Mr. Mridul raised a very interesting question of law relating to locus standi, or as the Americans call it 'Standing', in the area of public law. This question is of immense importance in a country like India where access to justice being restricted by social and economic constraints, it is necessary to democratise judicial remedies, remove technical barriers against easy accessibility to Justice and promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socio-economic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes.

14. The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legal protected interest by the impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born. The leading case in which this rule was enunciated and which marks the starting point of almost every discussion on locus standi is Ex parte Sidebotham (1980) 14 Ch D 458. There the Court was concerned with the question whether the appellant could be said to be a 'person aggrieved' so as to be entitled to maintain the appeal. The Court in a unanimous view held that the appellant was not entitled to maintain the appeal because he was not a 'person aggrieved' by the decision of the lower Court. James, L. J. gave a definition of 'person aggrieved' which, though given in the context of the right to appeal against a decision of a lower Court, has been applied widely in determining the standing of a person to seek judicial redress, with the result that it has stultified the growth of the law in regard to judicial remedies. The learned Lord Justice said that a 'person aggrieved' must be a man "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something." Thus definition was approved by Lord Esher M. R. in In Re Reed Bowen & Co. (1887) 19 QBD 174 and the learned Master of the Rolls made it clear that when James L. J. said that a person aggrieved must be a man against whom a decision has been pronounced which has wrongfully refused him of something, he obviously meant that the person aggrieved must be a man who has been refused something which he had a right to demand. There have been numerous subsequent decisions of the English Courts where this definition has been applied for the purpose of determining whether the person seeking judicial redress had locus standi to maintain the action. It will be seen that, according to this rule, it is only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest who can bring an action for judicial redress. Now obviously where an applicant has a legal right or a legally protected interest, the violation of which would result in legal injury to him, there must be a corresponding duty owed by the other party to the applicant. This rule in regard to locus standi thus postulates a right-duty pattern which is commonly to be found in private law litigation. But, narrow and rigid though this rule may be, there are a few exceptions to it which have been evolved by the Courts over the years.

15. In the first place a rate payer of a local authority is accorded standing to challenge an illegal action of the local authority. Thus, a rate payer can question the action of the municipality in granting a cinema licence to a person, vide : K.R. Shenoy v. Udipi Municipality MANU/SC/0082/1974 . Similarly, the right of a rate payer to challenge misuse of funds by a municipality has also been recognised by the Courts vide : Varadarajan v. Salem Municipality. MANU/TN/0195/1973 . The reason for this liberalisation of the rule in the case of a tax payer of a municipality is that his interest in the application of the money of the municipality is direct and immediate and he has a close relationship with the municipality. The Courts in India have, in taking this view, followed the decisions of the English Courts.

Secondly, if a person is entitled to participate in the proceedings relating to the decision making process culminating in the impugned decision he would have locus standi to maintain an action challenging the impugned decision. Vide : Queen v. Bowman (1898) 1 QB 663 where it was held that any member of the public had a right to be heard in opposition to an application for a licence and having such right, the applicant was entitled to ask for mandamus directing the licencing Justices to hear and determine the application for licence according to law. Thirdly, the statute itself may expressly recognise the locus standi of an applicant, even though no legal right or legally protected interest of the applicant has been violated resulting in legal injury to him. For example, in J.M. Desai v. Roshan Kumar MANU/SC/0011/1975 , this Court noticed that the Bombay Cinematograph Act. 1918 and the Bombay Cinema Rules, 1954 made under that Act, recognised a special interest of persons residing, or concerned with any institution such as a school, temple, mosque etc, located within a distance of 200 yards of the site on which the cinema house is proposed to be constructed and held that as the petitioner, a rival cinema owner, did not fall within the category of such persons having a special interest in the locality, he had no locus standi to maintain the petition for a writ of certiorari to quash the No Objection Certificate granted by the District Magistrate, to respondents Nos. 1 and 2. It is obvious from the observations made at page 72 (of SCR) : (at p. 586 of AIR of the Report that if the petitioner had been a person falling within this category of persons having a special interest in the locality, he would have been held entitled to maintain the petition. There is also another decision of this Court illustrating the situation where a statute expressly gives locus standi to persons to complain against a public wrong and that is the decision in Ratlam Municipality v. Vardhi Chand MANU/SC/0171/1980 . The statutory provision which came up for consideration in this case was Section 133 of Criminal P. C. which empowers a Magistrate on receiving the report of a police officer or other information to make an order for remedying a public nuisance. What happened in this case was that the Ratlam Municipality filed to carry out its statutory duty of constructing a drain pipe to carry the filth etc. on a particular road. The local residents decided to invoke Section 133 of Criminal P. C. against the Municipality. The Magistrate made an order requiring the Municipality to construct drain pipes and this order was confirmed in appeal by this Court. The Municipality pleaded lack of funds but this was not accepted as a valid defence. However, to have a viable scheme keeping in view the financial position of the Municipality, this Court examined the three schemes submitted to it and directed the Municipality to implement one of them. The standing of the local residents to move the Magistrate was recognised since Section 133 of Criminal P. C. expressly conferred such right on them.

16. There is also another exception which has been carved out of this strict rule of standing which requires that the applicant for judicial redress must have suffered a legal wrong or injury in order to entitle him to maintain an action for such redress. It is clear that, having regard to this rule, no one can ordinarily seek judicial redress for legal injury suffered by another person; it is only, such other person who must bring action for judicial redress. It is on this principle that the Supreme Court of the United States held in United States v. James Griggs Raines. (1960) 362 US 17 : 4 L Ed 2d 524 that a litigant may only assert his own constitutional rights or immunities and save in exceptional cases, no person can claim standing to vindicate the constitutional rights of a third party. But it must now be regarded as well settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the Court on account of some disability or it is not practicable for him to move the Court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke assistance of the Court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him. Take for example, the case of a minor to whom a legal wrong has been done or a legal injury caused. He obviously cannot on his own approach the Court because of his disability arising from minority. The law therefore provides that any other person acting as his next friend may bring an action in his name for judicial redress vide : Order XXXII of Civil P. C. So also where a person is detained and is therefore not in a position to move the Court for securing his release, any other person may file an application for a writ of habeas corpus challenging the legality of his detention. Of course, this Court has ruled in a number of cases that a prisoner is entitled to address a communication directly to the Court complaining against his detention and seeking release and if he addresses any such communication to the Court, the Superintendent of the prison is bound to forward it to the Court and, in fact, there have been numerous instances where this Court has acted on such communication received from a prisoner and treating it as an application for a writ of habeas corpus, called upon the detaining authority to justify the legality of such detention and on the failure of the detaining authority to do so, released the prisoner. But since a person detained would ordinarily be unable to communicate with the outside world, the law presumes that he will not be able to approach the Court and hence permits any other person to move the Court for judicial redress by filing an application for a writ of habeas corpus. Similarly, where a transaction is entered into by the Board of Directors of a company which is illegal or ultra vires the company, but the majority of the shareholders are in favour of it and hence it is not possible for the company to sue for setting aside the transaction, any shareholder may file an action impugning the transaction. Here it is the company which suffers a legal wrong or a legal injury by reason of the illegal or ultra vires transaction impugned in the action, but an individual shareholder is permitted to sue for redressing such legal wrong or injury to the company, because otherwise the company, being under the control of the majority shareholders would be without judicial redress. Vide: Atwood v. Merry Weather (1867) 5 Eq 464. The Judicial Committee of the Privy Council also affirmed this exception to the strict rule of standing in Durayappah v. Fernando (1967) 2 AC 337. There what happened was that the Jaffna Municipal Council was dissolved by the Minister of Local Government without giving it an opportunity to be heard. The order of

dissolution was therefore voidable at the instance of the Council, but the Council did not complain. The appellant was a mayor at the time of the dissolution and he petitioned for a writ in the nature of certiorari to quash the order of dissolution. Lord Upjohn speaking on behalf of the Judicial Committee denied standing to the appellant in the following words:

The appellant was no doubt mayor at the time of its dissolution but that does not give him any right to complain independently of the Council. He must show that he is representing the Council or suing on its behalf or that by reason of certain circumstances, such, for example, as that the council could not use its seal because it is in the possession of the Municipal Commissioner, or for other reasons it has been impracticable for the members of the council to meet to pass the necessary resolutions, the council cannot be the plaintiff.

The Judicial Committee thus clearly laid down that for a legal wrong or legal injury caused to the council, it is only the council which can sue but if a member of the council can show that for some sufficient reasons it is not possible for the council to take action for challenging the order of dissolution, he can file an application for a writ to assert the right of the council and to redress the legal wrong or injury done to the council. We find that in the United States of America also this exception has been recognised and the strict rule of standing has been liberalised in the interest of justice. In Barrows v. Jackson (1952) 346 US 249 3 97 Law Ed 1586, the defendant was sued for breach of a restrictive covenant binding the defendant not to sell his property to non-cancacians and claiming damages. The defendant raised the plea that the judgment of the Court allowing damages for breach of the covenant would constitute denial of the equal protection clause to non-cancacians, because a prospective seller of restricted land would either refuse to sell to non-cancacians or else would require non-cancacians to pay a higher price to meet the damages which the seller may have to pay. The argument put forward in answer to this plea was that the defendant was not entitled to plead in defence the constitutional rights of non-Caucasians. But the Supreme Court of the United States negative his argument observing : "We are faced with a unique situation in which it is an action of the State Court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any Court". Even in our own country we have recognised this departure from the strict rule of locus standi in cases where there has been a violation of the constitutional or legal rights of persons who by reason of their socially or economically disadvantaged position are unable to approach the Court for judicial redress. We have in such cases permitted a member of the public to move the Court for enforcement of the constitutional or legal rights of such persons and judicial redress for the legal wrong or legal injury caused to them. Take for example, the decision of this Court in Sunil Batra v. Delhi Administration MANU/SC/0265/1979 where this Court accepted the habeas corpus petition of a prisoner complaining of brutal assault by a head warden on another prisoner. It may be incidentally mentioned and this is a point of some importance in the area of judicial remedies -- that in this case the Court broadened the scope of habeas corpus by making it available to a prisoner, not only for seeking his liberty, but also for the enforcement of a constitutional right to which he was lawfully entitled even in confinement. Similarly, in Dr. Upendra Baxi v. State of U. P. (1981) 3 Scale 1137 when it was found that the inmates of the Protective Home at Agra were living in inhuman and de-garding conditions in blatant violation of Article 21 of the Constitution and by reason of their socially and economically disadvantaged position, they were not in a position to move the Court for judicial redress, two law professors of the Delhi University addressed a letter, to this Court seeking enforcement of the constitutional right of the inmates under Article 21 by improvement of the living conditions in the Protective Home, so that the inmates can live with human dignity in the Protective Home. This Court treated the letter as a writ petition and permitted the two law professors to maintain an action for an appropriate writ for the purpose of enforcing the constitutional right of the inmates of the Protective Home and providing judicial redress to them. This Court has also entertained a letter addressed by a journalist claiming relief against demolition of hutments of pavement dwellers by the Municipal Corporation of Bombay and this letter has been treated as a Writ Petition by a Bench presided over by the Chief Justice of India and interim relief has been granted to the pavement dwellers.

17. It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. Where the weaker sections of the community are concerned, such as under-trial prisoners languishing in jails without a trial inmates of the Protective Home in Agra or Harijan workers engaged in road construction in the Ajmer District, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public spirited individual espousing their cause and seeking relief for them, This Court will readily respond even to a letter addressed by such individual acting pro bono

publico. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The Court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public minded individual as a writ petition and act upon it Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief. It is in this spirit that the Court has been entertaining letters for Judicial redress and treating them as writ petitions and we hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented approach. But we must hasten to make it clear that the individual who moves the Court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be activised at the instance of such person and must reject his application at the threshhold, whether it be in the form of a letter ad-dressed to the Court or even in the form of a regular writ petition filed in Court. We may also point out that as a matter of prudence and not as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases, where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain eases of individual wrong or injury at the instance of a third party, where there is an effective legal aid organisation which can take care of such cases.

18. The types of cases which we have dealt with so far for the purpose of considering the question of locus standi are those where there is a specific legal injury either to the applicant or to some other person or persons for whose benefit the action is brought, arising from violation of some constitutional or legal right or legally protected interest. What is complained of in these cases is a specific legal injury suffered by a person or a determinate class or group of persons. But there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or there is no one who can complain and the public in-Jury must go unredressed. To answer these questions it is first of all necessary to understand what is the true purpose of the Judicial function. This is what Prof. Thio states in his book on "Locus Standi and Judicial Review";

Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of the public (Jurisdiction de droit objectif) or is it mainly directed towards the protection of private individuals by preventing illegal encroachments on their individual rights (jurisdiction de droit subjectif)? The first contention rests on the theory that Courts are the final arbiters of what is legal and illegal ....Requirement? of locus standi are therefore unnecessary in this case since they merely impede the purpose of the function as conceived here. On the other hand, where the prime aim of the judicial process is to protect individual rights, its concern with the regularity of law and administration is limited to the extent that individual rights are infringed.

We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law. If the State or any public authority acts beyond the scope of its power and thereby causes a specific legal injury to a person or to a determinate class or group of persons, it would be a case of private injury actionable in the manner discussed in the preceding paragraphs. So also if the duty is owed by the State or any public authority to a person or to a determinate class or group of persons, it would give rise to a corresponding right in such person or determinate class or group of persons and they would be entitled to maintain an action for judicial redress. But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The Courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the Courts in many decisions that whenever

there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and care thereby improving the administration of justice. Lord Dip-lock rightly said in Rex v. Inland Revenue Commrs. (1981) 2 WLR 722 at p. 740:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped.... It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of Justice for the lawfulness of what they do, and of that the Court is the only judge.

This broadening of the rule of locus standi has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalising the rule of locus standi that it is possible to effectively police the corridors of powers and prevent violations of law. It was pointed out by Schwartz and H.W.R. Wade in their book on "Legal Control of Government" at page 354:

Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged?" It is also necessary to point out that if no one can have standing to maintain an action for judicial redress in respect of a public wrong or public injury, not only will the cause of legality suffer but the people not having any judicial remedy to redress such public wrong or public injury may turn to the street and in that process, the rule of law will be seriously impaired. It is absolutely essential that the rule of law must wean the people away from the lawless street and win them for the court of law.

19. There is also another reason why the rule of locus standi needs to be liberalised. Today we find that law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change. The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilised for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons. This is not to say that individual rights have ceased to have a vital place in our society but it is recognised that these rights are practicably meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all. The new social and economic rights which are sought to be created in pursuance of the Directive Principles of State Policy essentially require active intervention of the State and other public authorities. Amongst these social and economic rights are freedom from indigency, ignorance and discrimination as well as the right to a healthy environment, to social security and to protection from financial commercial, corporate or even governmental oppression. More and more frequently the conferment of these socio-economic rights and imposition of public duties on the State and other authorities for taking positive action generates situations in which single human action can be beneficial or prejudicial to a large number of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, the discharge of affluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air, defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport. In cases of this kind it would not be possible to say that any specific legal injury is caused to an individual or to a determinate class or group of individuals. What results in such cases is public injury and it is one of the characteristics of public injury that the act or acts complained of cannot necessarily be shown to affect the rights of determinate or identifiable class or group of persons: public injury is an injury to an indeterminate class of persons. In these cases the duty which is breached giving rise to the injury is owed by the State or a public authority not to any specific or determinate class or

group of persons, but to the general public. In other words, the duty is one which is not correlative to any individual rights. Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power except what may be provided by the political machinery, which at best would be able to exercise only a limited control and at worst, might become a participant in misuse or abuse of power. It would also make the new social collective rights and interests created for the benefit of the deprived sections of the community meaningless and ineffectual.

19A. Now, as pointed out by Cappellatti in Vol III of his classic work on "Access to Justice" at page 520, "The traditional doctrine of standing (legitimatio ad causam) attributes the right to sue either to the private individual who 'holds' the right which is in need of judicial protection or in case of public rights, to the State itself, which sues in courts through its organs". The principle underlying the traditional rule of standing is that only the holder of the right can sue and it is therefore, held in many jurisdictions that since the State representing the public is the holder of the public rights, it alone can sue for redress of public injury or vindication of public interest. It is on this principle that in the United Kingdom, the Attorney-General is entrusted with the function of enforcing due observance of the law. The Attorney-General represents the public interest in its entirety and as pointed out by S.A. de Smith in "Judicial Review of Administrative Action" (Third edition) at page 403; "the general public has an interest in seeing that the law is obeyed and for this purpose, the Attorney General represents the public." There is, therefore, a machinery in the United Kingdom for judicial redress for public injury and protection of social, collective, what Cappelletti calls 'diffuse' rights and interests. We have no such machinery here. We have undoubtedly an Attorney General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field; see Sections 91 and 92 of the Civil Procedure Code, But, even if we had a provision empowering the Attorney General or the Advocate General to take action for vindicating public interest, I doubt very much whether it would be effective. The Attorney General or the Advocate General would be too dependent upon the political branches of Government to act as an advocate against abuses which are frequently generated at least tolerated by political and administrative bodies. Be that as it may, the fact remains that we have no such institution in our country and we have therefore to liberalise the rule of standing in order to provide judicial redress for public injury arising from breach of public duty or from other violation of the Constitution or the law. If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though they may not be directly injured in their own rights. It is for this reason that in public interest litigation -- litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest', It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable sections of the people by creating new social, collective 'diffuse' rights and interests and imposing new public duties on the State and other public authorities, infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the court in a particular case has sufficient interest to initiate the action.

20. It is interesting to note that the concept of public interest litigation had its origin in the United States and over the years, it has passed through various vicissitudes in the country of its origin. We do not propose to enumerate or examine various decisions given by the Supreme Court of the United States from time to time in regard to standing in public interest litigation, for no useful purpose would be served by such exercise. Suffice it to state that in that country, the strict requirement of legal interest has been watered down. Justice Douglas said in Association of Data Processing Service v. William B. Camp (1970) 397 US 150 : 25 Law Ed 2d 184 that "the legal interest test goes to the merits. The question of standing is different". Similarly Justice Brennan, citing Flast, observed that "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not...whether the plaintiff had a legally protected interest which the defendant's action invaded" Italics (herein underline) supplied). This view also found expression in Office of Communication of United Church of Christ v. FCC 123 US App DC 328 where the standing of television viewers was upheld with the following observations: Since the concept of standing is "one designed to assure that only one with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience." Vide article on "Evolving Trends in Locus Standi: Models For Decision-Making" by D.Y. Chandrachud. But of late, there has been a slight regression in this dynamic approach. See United States v. William B. Richardson (1974) 418 US 166 and Warth

v. Seldin (1974) 422 US 490, where the Supreme Court of United States seems to have recoiled a little against expansion of its judicial power.

21. So far as the United Kingdom is concerned, there have been remarkable developments in this area in recent times largely due to the dynamic activism of Lord Denning. The Mc Whirter case and the three well known Blackburn cases clearly establish that any member of the public having sufficient interest can maintain an action for enforcing a public duty against a statutory or public authority. We need not make a detailed reference to all these cases but it will be sufficient if we refer to the Mc Whirter case and one of the three Blackburn cases. The McWhirter case is reported in Attorney General v, Independent Broadcasting Authority (1973) 1. All ER 689. This was an action by McWhirter for injunction against the Broadcasting Authority which was threatening to show a film which did not comply with the statutory requirements and the showing of which would therefore be illegal. Lord Denning considered the question whether McWhirter had locus standi to bring the action when leave to bring a relator action was refused by the Attorney General, and answering this question in the affirmative, he said:

We live in an age when Parliament has placed statutory duties on government departments and public authorities for the benefit of the public -- but has provided no remedy for the breach of them. If a government department or a public authority transgresses the law laid down by Parliament, or threatens to transgress it, can a member of the public come to the Court and draw the matter to its attention...I am of the opinion that, in the last resort, if the Attorney General refuses leave in a proper case or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public who has sufficient interest, can himself apply to the court itself.

Lord Denning held that McWhirter had sufficient interest to bring the action since he had a television set for which he had paid licence fee and his susceptibility would be offended like that of many others watching television if the film was shown in breach of the statutory requirements. It may be noticed that in this case the duty which was sought to be enforced against the Broadcasting Authority was one which the Broadcasting Authority owed to the general public and not to any specific individual or class or group of individuals. The same principle was applied by Lord Denning in Reg v. Greater London Council, Ex parte Blackburn (1976) 3 All ER 184 to accord standing to Blackburn to maintain an action for an order of prohibition preventing the greater London Council from allowing, contrary to law, the exhibition of pornographic films. Here again the duty owed by the Greater London Council was to the general public and not to any specific or determinate class or group of persons and there was no one who could claim that a specific legal injury was caused to him by the exhibition of pornographic films. But even so Lord Denning held that Blackburn was entitled to maintain an action because he had sufficient interest, he was a citizen of London, his wife was a rate payer and he had children who might be harmed by the exhibition of pornographic films. The learned Master of the Rolls emphasized that if Blackburn had no sufficient interest, no other citizen had, and in that event no one would be able to bring an action for enforcing the law and the transgression of the law would continue unabated. The principle on which the learned Master of the Rolls proceeded was formulated by him in these words:

I regard it as a matter of high constitutional principle, that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of his Majesty's subjects, then anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.

The House of Lords, of course, in Gouriet v. UPW 1978 AC 482 took the view that the Attorney General alone can sue for enforcing the observance of the law and if he refuses to give his consent to a relator action, such refusal was not review-able by the courts and without such consent, a member of the public could not maintain his action. We do not think it necessary to examine this decision because it has no binding effect upon us. But we may point out that this decision Las been severely criticised by jurists in England and elsewhere. It is clearly erroneous and shows the high water mark of abdication of judicial power which is likely to stultify the development of public law in the United Kingdom. There is however one distinguishing feature which we must point out, namely, that the action in that case was a relator action and not application for a writ.

22. We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective "Law", as pointed out by Justice Krishna Iyer in Fertilizer Corporation Kamgar Union v. Union of India AIR 1981 SC 344 "is a social auditor and this audit function can be put into action when some one with real public interest ignites the jurisdiction. A fear is sometimes expressed that if we keep the door wide open for any member of the public to enter the portals of the Court to enforce public duty or to

vindicate public interest, the Court will be flooded with litigation. But this fear is totally unfounded and the argument based upon it is answered completely by the Australian Law Reforms Commission in the following words:

The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the court room (Prof. K.E. Scott "Standing in the Supreme Court: A Functional Analysis" (1973) 86)

A major expressed reason for limiting standing rights is fear of a spate of actions brought by busybodies which will unduly extend the resources of the courts. No argument is easier put, none more difficult to rebut. Even if the fear be justified it does not follow that present restrictions should remain. If proper claims exist it may be necessary to provide resources for their determination. However, the issue must be considered.

... Over recent years successive decisions of the United States Supreme Court have liberalised standing so as to afford a hearing to any person with a real interest in the relevant controversy. Surveying the result in 1973 Professor Scott commented: (Op Cit, 673)

'When the floodgates of litigation are opened to some new class of controversy by a decision it is notable how rarely one can discern the flood that the dissenters feared.

Professor Scott went on to point out that the liberalised standing rules had caused no significant increase in the number of actions brought, arguing that parties will not litigate at considerable personal cost unless they have a real interest in a matter.

We wholly endorse these remarks of the Australian Law Reforms Commission. We may add, with Justice Krishna Iyer: "In a society where freedoms suffer from atrophy, and activism is essential for participative public justice, some risks have to be taken and more opportunties open-ed for the public minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding locus standi." It is also interesting to note that in India, as in other Commonwealth countries, the strict rule of standing does not apply to a writ of quo warranto or a rate payer's action against a municipality, but there is no evidence that this has let loose the flood gates of litigation in these areas. The time, money and other inconveniences involved in litigating a case act as sufficient deterrents for most of us to take recourse to legal action vide article of Dr. S.N. Jain on "Standing and Public Interest Litigation."

23. But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that "political pressure groups who could not achieve their aims through the administrative process" and we might add, through the political process, "may try to use the courts to further their aims." These are some of the dangers in public interest litigation which the court has to be careful to avoid. It is also necessary for the court to bear in mind that there is a vital distinction between locus standi and justiciability and it is not every default on the part of the State or a public authority that is justiciable. The court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution. It is a fascinating exercise for the Court to deal with public interest litigation because it is a new jurisprudence which the court is evolving, a jurisprudence which demands judicial statesmanship and high creative ability. The frontiers of public law are expanding far and wide and new concepts and doctrines which will change the complexion of the law and which were so far as embedded in the womb of the future, are beginning to be born.

24. Before we part with this general discussion in regard to locus standi, there is one point we would like to emphasise and it is that cases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want.

25. If we apply these principles to determine the question of locus standi in the writ petition of Iqbal Chagla & Ors. in which alone this question has been sharply raised, it will be obvious that the petitioners had clearly and indisputably locus standi to maintain their writ petition. The petitioners are lawyers practising in the High Court of Bombay. The

first petitioner is a member of the Bombay Bar Association, petitioners, Nos. 2 and 3 are members of the Advocates Association of Western India and petitioner No. 4 is the President of the Incorporated Law Society. There can be no doubt that the petitioners have a vital interest in the independence of the judiciary and if an unconstitutional or illegal action is taken by the State or any public authority which has the effect of impairing the independence of the judiciary, the petitioners would certainly be interested in challenging the constitutionality or legality of such action. The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice. They assist the court in dispensing justice and it can hardly be disputed that without their help, it would be well nigh impossible for the Court to administer justice. They are really and truly officers of the Court in which they daily sit and practice. They have, therefore, a special interest in preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would naturally be concerned about it, because, they are equal partners with the Judges in the administration of justice. Iqbal Chagla and others cannot be regarded as mere bystanders or meddlesome interlopers in filing the writ petition; The complaint of the petitioners in the writ petition was that the circular letter issued by the Law Minister constituted a serious threat to the independence of the judiciary and it was unconstitutional and void and if this complaint be true, and for the purpose of determining the standing of the petitioners to file the writ petition, we must assume this complaint to be correct the petitioners already had locus standi to maintain the writ petition. The circular letter, on the averments made in the writ petition, did not cause any specific legal injury to an individual or to a determinate class or group of individuals, but it caused public injury by prejudicially affecting the independence of the judiciary. The petitioners being lawyers had sufficient interest to challenge the constitutionality of the circular letter and they were, therefore, entitled to file the writ petition as a public interest litigation. They had clearly a concern deeper than that of a busybody and they cannot be told off at the gates. We may point out that this was precisely the principle applied by this Court to uphold the standing of the Fertiliser Corporation Kamgar Union to challenge the sale of a part of the undertaking by the Fertiliser Corporation of India in Fertiliser Corporation Kamgar Union v. Union of India AIR 1981 SC 344 (supra). Justice Krishna Iyer pointed out that if a citizen "belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered." We must, therefore, hold that Iqbal Chagla and others had locus standi to maintain their writ petition. What we have said in relation to the writ petition of Iqbal Chagla and others must apply equally in relation to the writ petitions of S.P. Gupta and J.C. Kalra and others. So far as the writ petition of V.M. Tarkunde is concerned, Mr Mridul, learned advocate appearing on behalf of the Law Minister, did not contest the maintainability of that writ petition since S.N. Kumar to whom, according to the averments made in the writ petition, a specific legal injury was caused, appeared in the writ petition and claimed relief against the decision of the Central Government to discontinue him as an additional Judge. We must, therefore, reject the preliminary objection raised by Mr. Mridul challenging the locus standi of the petitioners in the first group of writ petitions.

Concept of Independence of the Judiciary

26. Having disposed of the preliminary objection in regard to locus standi of the petitioners, we may now proceed to consider the questions which arise for determination in these writ petitions. The questions are of great constitutional significance affecting the principle of independence of the judiciary which is a basic feature of the Constitution and we would therefore prefer to begin the discussion by making a few prefatory remarks highlighting what the true function of the judiciary should be in a country like India which is marching along the road to social justice with the banner of democracy and the rule of law, for the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned rational charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-economic destination and a creative function. It has to use the words of Glanville Austin, to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice. The British concept of justicing, which to quote Justice Krishna Iyer, is still "hugged by the heirs of our colonial legal culture and shared by many on the Bench" is that "the business of a Judge is to hold his tongue until the last possible moment and to try to be as wise as he is paid to look" and in the same strain are the words quoted by professor Gordon Reid from a memorandum to the Victorian Government by Irvin, C. J. in 1923 where the judicial function was idealised in the following words:

The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the king and the subject or between a subject and a subject presented in a form enabling judgment to be passed upon them, and when passed, to be enforced by a process of law. There begins and ends the function of the judiciary.

Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic un-equals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach. But this cannot be achieved unless we have judicial cadres who share the fighting faith of the Constitution and who are imbued with the constitutional values. The necessity of a judiciary which is in tune with the social philosophy of the Constitution has nowhere been better emphasized than in the words of Justice Krishna Iyer which we quote:

Appointment of Judges is a serious process where judicial expertise, legal learning, life's experience and high integrity are components, but above all are two indispensables -- social philosophy in active unison with the socialistic Articles of the Constitution, and second, but equally important, built-in resistance to pushes and pressures by class interests, private prejudices, government threats and blandishments, party loyalties and contrary economic and political ideologies projecting into pronouncements.

Justice Krishna Iyer goes on to say in his inimitable style:

Justice Cardozo approvingly quoted President Theodore Roosevelt's stress on the social philosophy of the Judges, which shakes and shapes the course of a nation and, therefore, the choice of Judges for the higher Courts which makes and declares the law of the land, mast be in tune with the social philosophy of the Constitution. Not mastery of the law alone, but social vision and creative craftsmanship are important inputs in successful justicing.

What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives. This has to be the broad blue-print of the appointment project for the higher echelons of judicial service. It is only if appointments of Judge are made with these considerations weighing predominently with the appointing authority that we can have a truly independent judiciary committed only to the Constitution and to the people of India. The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in Sankalchand Sheth's case MANU/SC/0065/1977 (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. If we may again quote the eloquent words of Justice Krishna Iyer:

Independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure.

The tycoon, the communalist the parochialist, the faddist, the extremist and radical reactionary lying coiled up and sub-consciously shaping judicial mentations are menaces to judicial independence when they are at variance with Parts III and IV of the Paramount Parchment.

Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we roust keep in mind while interpreting the relevant provisions of the Constitution. Can mandamus issue for fixation of strength of Judges in a High Court: Article 216:

27. We may first examine the true meaning and import of Article 216 which provides for the Constitution of High Courts. This Article when originally enacted in the Constitution consisted of the main provision and a proviso but the proviso was deleted by Section 11 of the Constitution (Seventh Amendment) Act, 1956 with the result that since 1st Nov., 1956 when the amending Act came into force, this Article consists of only one clause which reads as under:

Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.

This Article confers power on the President to appoint such number of Judges in a High Court as he may deem necessary. The Union of India has placed before us figures showing that as on 18th Mar., 1981 the aggregate sanctioned strength of permanent and additional Judges was 308 and 97 respectively while the aggregate actual strength was only 277 and 43 respectively. The figures given by the Union of India also show the large arrears pending in the different High Courts and it is clear from these figures that the total number of pending main cases has been steadily rising from 6,13,799 on 31st Dec. 1978 to 6,78,951 on 31st Dec., 1980. The average rate of disposals per Judge per year fixed at one of the Chief Justice' Conference was 650 but the figures produced by the Union of India show that the average rate of disposals of main cases per Judge per year during the years 1978-1979 and 1980 was higher namely, 860. It is obvious that even on the basis of the average rate of disposals per Judge per year being taken at the higher figure of 860; if no judicial reform is brought about and the present system continues as it is without any change, many more Judges would be required than the total sanctioned strength of permanent and additional Judges in order to dispose of the pending cases which include not only main cases but also interlocutory and miscellaneous cases which do take the time of the Court. It was therefore contended on behalf of the petitioners that the President has failed to discharge his constitutional duty under Article 216 by not appointing the requisite number of Judges necessary for the purpose of disposing of the pending cases. The argument was that the President was under a constitutional obligation to apply his mind to the question as to how many Judges were necessary to be appointed in each High Court for the purpose of disposing of the cases pending in that High Court, but the President had failed to apply his mind to this question and not taken the necessary steps for the purpose of appointing the requisite number of Judges in each High Court. The petitioners therefore sought a writ of mandamus against the Union of India requiring the Union of India to re-fix the strength of Judges in each High Court having regard to the number of pending cases in that High Court and on the basis of the average rate of disposals per judge per year. We do not think we can issue such a writ of mandamus against the Union of India for fixing a particular strength of judges in each High Court. The fixation of the strength of judges in each High Court is a purely executive function which is entrusted by Article 216 to the President, that is, the Government of India and it is entirely for the Government of India to decide in the exercise of its judgment as to what shall be the strength of judges in each High Court. How many judges are necessary to be appointed in a particular High Court is left to the discretion of the Government of India and there are no judicially manageable standards for the purpose of controlling or guiding the discretion of the Union of India in that respect. It is not possible for this Court to lay down any standards or norms on the basis of which it can require the Union of India to appoint a certain number of Judges in a particular High Court. The fixation of the number of judges necessary to be appointed in a particular High Court does not depend upon the application of a mathematical formula dividing the number of pending cases by the average rate of disposal per judge per year. It is singularly complex problem and merely increasing the number of judges in a High Court would not necessarily solve the problem of disposal of pending cases. Some times when the number of judges in a High Court is increased, the law of diminishing returns begins to operate and the disposal of cases do not increase commensurately with the addition to the number of judges. Sometimes it is difficult to recruit competent judges and no useful purpose is served by appointing mediocre judges who ultimately would not be able to make any impact so far as the arrears of pending cases are concerned and who would dilute the quality of justice administered in the High Court. Then there are also problems of finding court rooms for the new judges who might be appointed because at most places the High Court buildings are heavily congested and there is hardly any space which can be spared. There may also be many other constraints operating with the Government of India which may dissuade it from taking a decision to increase the number of judges in a High Court. The Government of India may legitimately feel that increasing the number of judges in a particular High Court may not solve the problem of arrears of pending cases but that some other strategies may have to be adopted for that purpose, such as the setting up of administrative tribunals or reducing the number of appeals etc. There would therefore be many policy considerations which would influence the Government of India in taking a decision as to what number of judges are necessary to be appointed in a particular High Court. It would not be possible to lay down any judicially manageable standards with reference to which the Government of India could be directed to appoint a particular number of judges in a High Court. What

should be the number of Judges necessary to be appointed in a particular High Court must essentially remain a matter within the discretion of the Government of India and if the Government of India does not appoint sufficient number of judges, the appeal must be to the legislature and not to the Court. All that the Court can do is to express the hope that the Govt. of India will periodically review the strength of judges in each High Court and appoint as many judges as are found necessary for the purpose of disposing of arrears of pending cases.

The power of Appointment of Judges Article 217.

28. The next question that arises for consideration is as to where is the power to appoint Judges of the High Courts and the Supreme Court located? Who has the final voice in the appointment of Judges of High Courts and the Supreme Court? The power of appointment of Judges of the Supreme Court is to be found in Clause (2) of Article 124 and this clause provides that every Judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose, provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. It is obvious on a plain reading of Clause (2) of Article 124 that it is the President, which in effect and substance means the Central Government, which is empowered by the Constitution to appoint Judges of the Supreme Court. So also Article 217, Clause (1) Vests the power of appointment of Judges of High Courts in the Central Government, but such power is exercisable only "after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court." It is clear on a plain reading of these two Articles that the Chief Justice of India, the Chief Justice of the High Court and such other Judges of the High Court and of the Supreme Court as the Central Government may deem it necessary to consult, are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government. It is not an unfettered power in the sense that the Central Government cannot (can?) act arbitrarily without consulting the constitutional functionaries specified in the two Articles but it can act only after consulting them and the consultation must be full and effective consultation.

29. The question immediately arises what constitutes 'consultation' within the meaning of Clause (2) of Article 124 and Clause (1) of Article 217, Fortunately, this question is no longer res integra and it stands concluded by the decision of this Court in Sankalchand Sheth's case MANU/SC/0065/1977 (supra). It is true that the question in Sankalchand Sheth's case (supra) related to the scope and meaning of 'consultation' in Clause (1) of Article 222, but it was common ground between the parties that 'consultation' for the purpose of Clause (2) of Article 124 and Clause (1) of Article 217 has the same meaning and content as 'consultation' in Clause (1) of Article 222. Chandrachud, J., as he then was in his judgment in Sankalchand Sheth's case (supra) quoted with approval the following passage from the judgment given by Justice Subba Rao,. when he was a Judge of the Madras High Court in R. Pushpam v. State of Madras MANU/TN/0194/1953 , "the word 'consult' implies a conference of two or; more persons or, an impact, of two or more minds in respect of a topic in order to enable them to evolve a correct or at-least a satisfactory solution" and added "In order that the two minds may be able to confer and produce a mutual impact, It is essential that each must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision". Krishna Iyer, J. speaking on behalf of himself and Fazal Ali, J. also pointed out that "all the materials in the possession of one whe consults must be unreservedly placed before the consultee" and further a reasonable opportunity for getting information, taking other steps and getting prepared for tendering effective and meaningful advice must be given to him," and "the consultant in turn must take the matter seriously since the subject is of grave importance." The learned Judge proceeded to add: "Therefore, it follows that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system." These observations apply with equal force to determine the scope and meaning of 'consultation' within the meaning of Clause (2) of Article 124 and Clause (1) of Article 217. Bach of the constitutional functionaries required to be consulted under these two articles must have for his consideration full and identical facts bearing upon appointment or non-appointment of the person concerned as a Judge and the opinion of each of them taken on identical material must be considered by the Central Government before it takes a decision whether or not to appoint the person concerned as a Judge. But, while giving the fullest meaning and effect to consultation', it must be borne in mind that it is only consultation which is provided by way of fetter upon the power of appointment vested in the Central Govt. and consultation cannot be equated with concurrence. We agree with what Krishna Iyer, J. said in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) that "consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur." It would therefore be open to the Central Government to override the opinion given by the constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court, so long as such decision is based on relevant considerations and is not otherwise mala fide. Even if the opinion given by all the constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion, though being a unanimous opinion of all the three constitutional functionaries, it would

have great weight and if an appointment is made by the Central Govt. in defiance of such unanimous opinion, it may become vulnerable to attack on the ground that it is mala fide or leased on irrelevant grounds. But we do not think that ordinarily the Central Government would make an appointment of a Judge in a High Court if all the three constitutional functionaries have expressed an opinion against it. We may, however, make it clear that on a proper interpretation of Clause (2) of Article 124 and Clause (1) of Article 217, it is open, to the Central Government to take its own decision in regard to appointment or non-appointment of a Judge in a High Court or the Supreme Court after taking into account and giving due weight to the opinions expressed by the constitutional, functionaries required to be consulted under these two Articles and the only ground on which such decision can be assailed is that it is mala fide or based on irrelevant considerations. Where there is a difference of opinion amongst the constitutional functionaries who are consulted, it is for the Central Government to decide whose opinion should be accepted and whether appointment should be made or not. It was contended on behalf of the petitioners that where there is difference of opinion amongst the constitutional functionaries required to be consulted, the opinion of the Chief Justice of India should have primacy, since he is the head of the Indian Judiciary and pater familias of the judicial fraternity. We find ourselves unable to accept this contention. It is difficult to see on what principle can primacy be given to the opinion of one constitutional functionary, when Clause (1) of Article 217 places all the three constitutional functionaries on the same pedestal so far as the process of consultation is concerned and does not make any distinction between, one constitutional functionary and another. Each of the three constitutional functionaries occupies a high constitutional office and Clause (1) of Article 217 provides that the appointment of a High Court Judge shall be made after consultation with all the three constitutional functionaries without assigning superiorty to the opinion of one over that of another. It is true that the Chief Justice of India is the head of the Indian judiciary and may be figuratively described as pater familias of the brotherhood of Judges but the Chief Justice of a High Court is also an equally important constitutional, functionary and it is not possible to say that so far as the consultative process is concerned, he is in any way less important than the Chief Justice of India. In fact, under the constitutional scheme, the Chief Justice of a High Court, is not subject to the administrative superintendence of the Chief Justice of India nor is he under the control or supervision of the Chief Justice of India. It is only the power of hearing appeals against the decision of the Chief Justice of a High Court that is possessed by the Chief Justice of India and there, his superiority over the Chief Justice of the High Court ends. If we look at the raison detre of the provision for consultation enacted in Clause (1) of Article 217, it will be obvious that the opinion given by the Chief Justice of the High Court must have at least equal weight as the opinion of the Chief Justice of India, because Ordinarily the Chief Justice of the High Court would be in a better position to know about the competence, character and integrity of the person recommended for appointment as a Judge in the High Court. The opinion of the Governor of the State, which means the State Government would also be entitled to equal weight, not in regard to the technical competence of the person recommended and his knowledge and perception of law oh which the Chief Justice of the High Court would be the proper person to express an opinion, but in regard to the, character and integrity of such person, his antecedents and his social philosophy and value-system. So also the opinion of the Chief Justice of India would be valuable because he would not be affected by caste, communal or other parochial considerations and standing outside the turmoil of local passions and prejudices, lie would be able to look objectively at the problem of appointment. There is therefore, a valid and intelligible purpose for which the opinion of each of the three constitutional functionaries is invited before the Central Government can take a decision whether or not to appoint a particular, person as a Judge in a High Court. The opinion of each of the three constitutional functionaries is entitled to equal weight and it is not possible to say that the opinion of the Chief Justice of India must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But as we pointed out earlier, it is only consultation and not. concurrence of the Chief Justice of India that is provided in Clause (1) of Article 217. When, in the course of debates in the Constituent Assembly, an amendment was moved that the appointment of a Judge of a High Court or the Supreme Court should be made with the concurrence of the Chief Justice of India, Dr. B.R. Ambedkar made the following comment which is very significant:

With regard to the question of the concurrence of the Chief Justice, it seems to me that those advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition.

It is, therefore, clear that where there is difference of opinion amongst the constitutional functionaries in regard to appointment of a Judge in a High Court, the opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of each of the constitutional functionaries and giving it due weight, the Central Government is entitled to come to its own decision as to which opinion It should accept in deciding whether or not to

appoint the particular person as a Judge. So also where a Judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted, but again it is not concurrence but only consultation and the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India. The ultimate power of appointment rests with the Central Government and that is in accord with the constitutional practice prevailing in all democratic countries. Even in the United Kingdom, a country from which we have inherited our system of administration of justice and to which many of our anglophiles turn with reverence for inspiration and guidance, the appointment of High Court Judges is made by or on the advice of the Lord Chancellor, who is a member of the Cabinet while appointments to the Court of appeal and the House of Lords and to the offices of Lord Chief Justice Master of the Rolls and President of the family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor. Thus the appointment of a Judge belonging to the higher echelons of judicial service is wholly in the hands of the Executive. So also in the commonwealth countries like Canada, Australia and New Zealand, the appointment of High Court and Supreme Court Judges is made by the Executive. This is, of course, not an ideal system of appointment of Judges, but the reason why the power of appointment of Judges is left to the Executive appears to be that the Executive is responsible to the Legislature and through the Legislature, it is accountable to the people who are consumers of justice. The power of appointment of Judges is not entrusted to the Chief Justice of India or to the Chief Justice of a High Court because they do not have any accountability to the people and even if any wrong or improper appointment is made, they are not liable to account to anyone for such appointment. The appointment of a Judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of justice, but also on several other considerations such as honesty, integrity and general pattern of behaviour which would ensure dispassionate and objective adjudication with an open mind, free and fearless approach to matters in issue, social acceptability of the person concerned to the high Judicial office in terms of current norms and ethos of the society, commitment to democracy and the rule of law, faith in the constitutional objectives indicating his approach towards the Preamble and the Directive Principles of State Policy, sympathy or absence thereof with the constitutional goals and the needs of an activist judicial system. These various considerations, apart from professional and functional suitability, have to be taken into account while appointing a Judge of a High Court or the Supreme Court and it is presumably on this account that the power of appointment is entrusted to the Executive. But, as pointed out above, there is a fetter placed upon the power of appointment by the requirement of consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India in case of appointment of a High Court Judge and with the Chief Justice of India in case of appointment of a Supreme Court Judge.

30. However, at this stage, it is necessary to point out that so far as appointment of a Supreme Court Judge is concerned, it is not consultation with the Chief Justice of India alone that is provided in Clause (2) of Article 124. Undoubtedly, consultation with the Chief Justice of India is a mandatory requirement but in addition "such of the Judges of the Supreme Court and of the High Courts" as the Central Government may deem necessary are also required to be consulted. One argument advanced on behalf of the petitioners was that when Clause (2) of Article 124 uses the expression "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose", it does not impose a mandatory obligation on the Central Government to consult one or more of the Judges of the Supreme Court or the High Courts but it leaves it to the discretion of the Central Government whether or not to consult one or more of the Judges of the Supreme Court or the High Courts before making appointment of a Judge of the Supreme Court. The petitioners contended that the Central Government may, if it thinks fit, consult one or more of the Judges of the Supreme Court and of the High Courts or it may not consult any and where it does not, the Chief Justice of India will be the only constitutional functionary required to be consulted and in such a case the Central Government must accept the opinion of the Chief Justice of India as binding upon it We do not think this argument is well founded. In the first place it is not justified by the plain language of Clause (2) of Article 124. This clause clearly provides for consultation as a mandatory exercise and the only matter which is left to the discretion of the Central Government is the choice of the Judge of the Supreme Court and the High Courts who may be consulted. The words "as the President may deem necessary" qualify only the preceding words "such of the Judges of the Supreme Court and of the High Courts' in the States". Which of the Judges of the Supreme Court and of the High Courts should be consulted is left to the discretion of the Central Government but consultation there must be with one or more of the Judges of the Supreme Court and of the High Courts. The Central Government must consult at least one Judge out of the Judges of the Supreme Court and of the High Courts before exercising the power of appointment conferred by Clause (2) of Article 124. This requirement is prescribed obviously because the Constitution makers did not think it desirable that one person alone, howsoever high and eminent he may be, should have a predominent voice in the appointment of a Judge of the Supreme Court. But it seems that this requirement is not complied with in making appointments on the Supreme Court Bench presumably under a misconception that it is not a mandatory but only an optional provision. The result is that the Chief Justice of India alone is consulted in the matter of appointment of a Supreme Court Judge and largely as a result of a healthy practice followed through the years, the recommendation of the Chief Justice of India is ordinarily accepted by the Central Government, the consequence being that in a highly important matter like the appointment of a Supreme Court Judge, it is the decision of the Chief Justice of India which is ordinarily, for all practical purposes final. But, as it happens, there are no criteria laid down or

evolved to guide the Chief Justice in this respect nor is there any consultation with wider interests. This is, to our mind, not a very satisfactory mode of appointment, because wisdom and experience demand that no power should be vested in a single individual howsoever high and great he may be and howsoever honest and well meaning. We are all human beings with our own likes and dislikes, our own predelictions and prejudices and our mind is not so comprehensive as to be able to take in all aspects of a question at one time and moreover sometimes, the information on which we base our judgments may be incorrect or inadequate and our judgment may also sometimes be imperceptibly influenced by extraneous or irrelevant considerations, It may also be noticed that it is not difficult to find reasons to justify what our bias or predeliction or inclination impels us to do. It is for this reason that we think it is unwise to entrust power in any significant or sensitive area to a single individual, howsoever high or important may be the office which he is occupying. There must be, checks and controls in the exercise of every power, particularly when it is a power to make important and crucial appointments and it must be exercisable by plurality of hands rather than be vested in a single individual. That is perhaps the reason why the Constitution makers introduced the requirement in Clause (2) of Article 124 that one or more Judges out of the Judges of the Supreme Court and of the High Courts should be consulted in making appointment of a Supreme Court Judge. But even with this provision, we do not think that the safeguard is adequate because it is left to the Central Government to select any one or more of the Judges of the Supreme Court and of the High Courts for the purpose of consultation. We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge, The recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential -- it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would Invest the judicial process with significance and meaning, for the deprived and exploited sections of humanity. We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary. As recently as July, 1977 the Chief Justice of Australia publicly stated that the time had come for such a commission to be appointed in Australia. So also in New Zealand, the Royal Commission on the Courts chaired by Mr. Justice Beattle, who has now become the Governor General of New Zealand, recommended that a Judicial Commission should consider all Judicial appointments including appointments of High Court Judges. This is a matter which may well receive serious attention of the Government of India. The position of an Additional Judge Article 224.

31. We then turn to consider what is the position of an additional Judge under the Constitution. This question is of the greatest importance because as against a total sanctioned strength of 308 permanent Judges, there is a total sanctioned strength of as many as 97 additional Judges, which means that the total sanctioned strength of additional Judges is almost one third the total sanctioned strength of permanent Judges. There are a large number of additional Judges in various High Courts whose tenure is short and precarious and their fate should therefore naturally be a matter of serious concern for this Court. The power to appoint an additional Judge in a High Court is to be found in Clause (1) of Article 224 which reads as follows:

If by season of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

Clause (2) of Article 224 provides for appointment of an acting Judge during the period when any Judge of a High Court other than the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office or is appointed temporarily as Chief Justice. It is obvious that the tenure of an acting Judge is by its very nature limited because he is appointed to act as a Judge only during the period when the permanent Judge in whose place he is acting is unable to perform the duties of his office and he would therefore cease to be a Judge as soon as the permanent Judge resumes his duties. We are not concerned in these writ petitions with the case of an acting Judge and we need not therefore dwell any further on this clause. Clause (3) of Article 224 provides inter alia that no person appointed as an additional Judge shall hold office after attaining the age of 62 years. Therefore even if an additional Judge has been appointed for a period of two years, he would cease to be a Judge if he attains the age of 62 years prior to the expiration of his term of two years.

32. It is clear from the provisions of Clause (1) of Article 224 that the maximum period for which an additional Judge can be appointed by the President is two years. This provision for appointment of a Judge for a period not exceeding two years seems to be peculiar to this country. There is no such practice of appointing a Judge for a short term either in the United Kingdom or in the United States of America. Even in India, there are no Judges either in the Supreme Court or in the subordinate judiciary whose tenure is so short. It is rather an unusual provision and in order to understand its true scope and effect, it is necessary to trace briefly its historical evolution.

33. There was no provision in the High Courts Act or the Charter Act, 1861 for appointment of an additional Judge with a restricted tenure in a High Court. It was for the first time in the Govt. of India Act, 1915 that a provision was enacted for appointment of additional Judges. Sub-section (2) of Section 101 provided that each High Court shall consist of the Chief Justice and as many other Judges as His Majesty may think fit to appoint and Clause (i) of the proviso to that sub-section authorised the Governor General in Council to appoint persons to act as additional Judges of any High Court for such period not exceeding two years as may be required. The additional Judges were to have all the powers of a Judge of the High Court appointed by His Majesty, The Government of India Act, 1915 was replaced by the Government of India Act, 1935 and Section 220 of that Act provided that every High Court shall consist of a Chief Justice and such other Judges as His Majesty may from time to time deem it necessary to appoint and there was a proviso to this section which said that the Judges so. appointed together with any additional Judges appointed, by the Governor General shall at no time exceed in number such maximum number as the Governor-General may by order fix in relation to that Court, Section 222 Sub-section (3) provided for appointment of additional Judges in these terms:

Section 222(3). If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such Court it appears to the Governor-General that the number of the Judges of the Court should be for the time being increased, the Governor-General (in his discretion) may, subject to the foregoing provisions of this chapter with respect to them maximum number of Judges, appoint persons duly qualified for appointment as Judges to be additional Judges of the Court for such period not exceeding two years as he may specify.

The System of appointment of additional Judges was therefore in vogue when the Constituent Assembly met to frame the Constitution. Article 199 of the Draft Constitution was almost in the same terms as Sub-section (3) of Section 222 of the Government of India Act, 1935. There was also Article 198 in the Draft Constitution which in Clause (1) provided for appointment of an acting Chief Justice and in Clause (2) for appointment of an acting Judge. The provision for appointment of an acting Judge made in Clause (2) of Article 198 was that when the office of any Judge of a High Court is vacant or when any such Judge is appointed to act temporarily as a Chief Justice or is unable to perform the duties of his office by reason of absence or otherwise, the President may appoint a person duly qualified for appointment as a Judge to act as a Judge of that Court, The acting Judge contemplated by this clause of Article 198 was therefore clearly a temporary Judge. Now when Articles 198 and 199 in the Draft Constitution came to be considered in the Constituent Assembly, a number of representations were received suggesting that both these articles should be deleted from the Constitution. It was felt by many that the practice of appointing acting or additional Judges was pernicious and it should be done away with. Tej Bahadur Sapru expressed his firm opposition to this practice of appointing, acting or additional Judges in the course of his speech in the Constituent Assembly. He said, decrying this practice in no uncertain terms:

Additional Judges, under the old Constitution were appointed by the Governor-General for a period not exceeding two years. I do not know whether that condition has been reproduced in the proposed Constitution. This prohibition, however, does not apply to acting judges or temporary judges. I think the rule in future should be that any barrister or advocate, who accepts a seat on the Bench, shall be prohibited from resuming practice anywhere on retirement. I would not, however, apply this to temporary judges taken from the services who hold a seat on the Bench for a few months. but I would add that the practice of appointing additional and temporary judges should be definitely given up. When I said at the Round Table Conference that there were acting, additional and temporary judges in India, some of the English lawyers not accustomed to India Law felt rather surprised. I am also of the opinion that temporary or acting judges do greater harm than permanent judges, when after their seat on the Bench for a short period they revert to the Bar. A seat on the Bench gives them a pre-eminence over their colleagues and embarrasses the subordinate judges who were at one time under their control and thus instead of their helping justice they act as a hindrance to free justice. I have very strong feeling in this matter and have during my long experience seen the evil effects of unchecked resumption of practice by barristers and advocates.

There were also many others who expressed the same view. The Drafting Committee agreed with this view and expressed the opinion that "it would be better to delete Articles 198 and 199 relating to the appointment of temporary and additional Judges, than to retain those articles without the ban on practice by persons who hold office as additional or temporary judges." The Drafting Committee took the view that "it was possible to discontinue the system of appointment of temporary and additional Judges in the High Courts altogether by increasing, if necessary, the total number of permanent judges of such Courts." The Constituent Assembly adopted the recommendation of the Drafting Committee to delete Articles 188(2) and 199 of the Draft Constitution providing for appointment of acting and additional Judges in High Courts, with the result that when the Constitution came to be enacted, there was no provision in the Constitution for appointment of acting or additional Judges.

34. It is clear from the discussions which took place in the Constituent Assembly that the Constitution makers realised that an acting or additional Judge would have to go back to the Bar on the expiration of his term of office and his tenure

was of a strictly limited duration. The Constitution makers did not oppose the practice of appointing acting or additional Judge on the ground that on the expiration of his term of office, an acting or additional Judge would have to go back to the Bar, but their anxiety was that after going back to the Bar he would resume his practice and this might lead to abuses and it was this undesirable consequence which they wanted to prevent and that is why they deleted Articles 198(2) and 199 with a view to abolishing the practice of appointing acting or additional Judges. The underlying postulate of Articles 198(2) and 199 was that an acting or additional Judge would come back to the Bar on the expiration of his term and start practice and this was intended to be stopped, but since it was not possible to debar an acting or additional Judge from practising after he came back on the expiration of term, it was decided that the institution of acting and additional Judges should be done away with. There was no assumption by the Constitution makers that an acting or additional Judge would necessarily be made permanent and he would not have to go back to the Bar. On the contrary, going back to the Bar was clearly contemplated and hence Articles 198(2) and 199 were deleted. The Constitution makers also thought that it would be possible to discontinue the system of appointing acting and additional Judges altogether without any detriment to early disposal of cases, if the total number of permanent Judges was sufficiently increased.

35. But within six years of the coming into force of the Constitution it was found that the arrears in the High Courts were increasing and it was becoming difficult to bring them under control. There was Article 224 in the Constitution which provided that the Chief Justice of a High Court may at any time with the previous consent of the President request any retired Judge to sit and act as a Judge of the High Court, but this provision for recalling retired Judges to function on the Bench of a High Court for short periods was found to be neither adequate nor satisfactory and it was of no assistance in reducing the arrears of cases which were mounting-up from year to year. Parliament in its constituent capacity, therefore, decided to introduce two provisions; one for appointment of additional Judges to clear off the arrears and the other for the appointment of acting Judges in temporary vacancies and with that end in view, enacted the Constitution (Seventh Amendment) Act, 1956. This amending Act substituted the existing Article 224 by a new Article 224 which read as follows:

Appointment of additional and acting Judges:

(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional judges of the Court for such period not exceeding two years as he may specify.

(2) When any judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent judge has resumed his office.

(3) No person appointed as an additional or acting judge of a High Court shall hold office after attaining the age of sixty-two years.

The existing Article 224 was added as new Article 224A after the new Article 224. Clause (1) of Article 217 was also simultaneously amended with a view to making provision in regard to an acting or additional Judge. We have already set out the amended Clause (1) of Article 217 in an earlier part of the Judgment and we need not, therefore, reproduce it here once again.

36. The first question which arises for determination under Article 224 Clause (1) is as to when can an additional Judge be appointed by the President. This article confers power on the President to appoint an additional Judge, if by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that Court should be for the time being increased and in that event, he can appoint an additional Judge for such period not exceeding two years as he may specify. It must appear to the President that either by reason of temporary increase in the business of the High Court or by reason of accumulation arrears of work in the High Court, it Is necessary to increase the number of the Judges of that Court for the time being. The power to appoint an additional Judge cannot therefore be exercised by the President unless there is either temporary increase in the business of the High Court or there is accumulation of arrears of work in the High Court and even when one of these two conditions exists, it is necessary that the President must be further satisfied that it is necessary to make a temporary increase in the number of Judges of that High Court, The words "for the time being" clearly indicate that the increase in the number of judges which the President may make by appointing additional Judges would be temporary with a view to dealing with the temporary increase in the business of the High Court or the arrears of work in the High Court. Article 224, Clause (1) did not contemplate that the increase in the number of Judges should be for an indefinite

duration. The object clearly was that additional Judge should be appointed for a short period in order to dispose of the temporary increase in the business of the High Court and/or to clear off the arrears of pending cases. There is sufficient indication in Clause (1) of Article 224 that the appointments of additional Judges were intended to be of short duration and Parliament expected that sufficient number of additional Judges would be appointed so as to dispose of the temporary increase in the work or the arrears of pending cases within a period of two years or thereabouts, That is why Clause (1) of Article 224 provided that additional Judges may be appointed for a period not exceeding two years. The underlying idea was that there should be an adequate strength of permanent Judges in each High Court to deal with its normal institutions and so far as the temporary increase in the work or the arrears of pending cases were concerned, additional Judges appointed for a period not exceeding two years should assist in disposing of such work. This was the reason why the Law Commission in its Fourteenth Report stated in paras. 54 and 57 of Chap. 6 in Vol. 1:

54. The large increase in the volume of annual institutions which has been referred to earlier must now, we think, be taken as a permanent feature. This position accordingly necessitates a thorough revision of existing ideas regarding the number of judges required for each High Court. The strength of the High Courts has been increased from time to time. In doing this, however, the post-Constitutional developments which have thrown a much heavier burden on the High Courts have, in our view, not been adequately taken into account. To expect the existing number of judges in the various High Courts to deal efficiently with the vastly increased volume of work is, in our opinion, to ask them to attempt the impossible. As pointed out to us by a senior counsel, if there is a congestion on the roads due to an increase in traffic, the remedy is not to blame the traffic but to widen the roads.

The first essential, therefore, is to see that the strength of every High Court is maintained at a level so as to be adequate to dispose of what may be called its normal institutions. The normal strength of a High Court must be fixed on the basis of the average annual institutions of all types of proceedings in a particular High Court during the last three years. This is essential in order to prevent what may be termed the Current file of the Court falling into arrears and adding to the pile of old cases. The problem of clearing the arrears can be satisfactorily dealt with only after the normal strength of each Court has been brought up to the level required to cope with its normal institutions. We suggest that the required strength of the High Court of each State should be fixed in consultation with the Chief Justice of that State and the Chief Justice of India and the strength so fixed should be reviewed at an interval of two or three years. Such a review, will be necessary not only by reason of changing conditions but because the implementation of our recommendations made elsewhere will lead to a quicker disposal of work in the subordinate Courts which, in its turn, will result in an increase in the work of the High Courts.

37. We are of the view that the provisions of Article 224 of the Constitution should be availed of and additional judges be appointed for the specific purpose of dealing with these arrears. The number of such additional judges required for each High Court for the purpose of dealing with the arrears will have to be fixed in consultation with the Chief Justice of India tad the Chief Justice of the State High Court after taking into consideration the arrears in the particular Court, their nature and the average disposal of that Court. The number of additional judges to be fixed for this purpose should be such as to enable the arrears to be cleared within a period of two years. The additional judges so appointed should, in our view, be utilised as far as possible exclusively for the purpose of disposing of arrears and not be diverted to the disposal of current work. Pari passu with the disposal of the arrears, the permanent strength of the High Court will have to be brought up to and maintained at the required level, care being taken to see that their normal disposal keeps pace with the new institutions and that they are not allowed to develop into arrears. The appointment of additional Judges for the exclusive purpose of dealing with the arrears is in our view, called for in a large number of High Courts.

The sentence underlined by us in para 57 clearly shows that according to the Law Commission also the intendment of Clause (1) of Article 224 was that sufficient number of additional Judges would be appointed "so as to enable the arrears to be cleared off within a period of two years," The same note was struck by P.N. Sapru when he said in the course of the Debates in Rajya Sabha during the discussion of the Constitution (Seventh Amendment) Bill; "It is necessary to have additional Judges for the disposal of arrears. These arrears, I hope, represent a temporary situation.... once these arrears have been cleared off, it will be possible for us to fix or to determine the permanent strength of our Courts with some degree of assurance." Now it is obvious that if additional Judges were appointed according to the true intendment of Clause (1) of Article 224, they would be temporary Judges appointed for a short duration to clear off the arrears and once the arrears are cleared off, which was expected by Parliament to be achieved within not more than two years they would, on the expiration of their term, go back to the Bar or to the District Judicial Service. Their tenure being for a short period limited by the time expected to be taken in clearing off the arrears -- such time, in any event, being hopefully not more than two years -- they would know that, on the expiration of their term, they would have to go back. They would have no right to be appointed or even to be considered for appointment as permanent Judges, because when they accepted appointment as additional Judges under Clause (1) of Article 224, they would have known that they were appointed only as temporary Judges for a short period in order to clear off the arrears.

37. But what happened in practice was that the true intendment and purpose of Clause (1) of Article 224 was never carried into effect. The Government did not increase the strength of permanent Judges in different High Courts adequately so as to be able to cope with the normal institutions. Though the Law Commission had recommended in its Fourteenth Report that the normal strength of a High Court must be fixed on the basis of average annual institution of all types of proceedings in the High Court during the last three years, this recommendation was not heeded with the result that even the current institutions in many of the High Courts could not be disposed of by the inadequate number of permanent Judges and they started adding to the existing arrears. Of course, it was not only the Government which was responsible for not increasing adequately the strength of permanent Judges but the Chief Justices of many High Courts were also remiss in looking after the interests of their High Courts, inasmuch they too did not ask the Government for increase in the strength of permanent Judges. Wherever the fault may lie and it is not necessary for the purpose of these writ petitions to fix the blame, the consequence was that the arrears in the High Courts started growing menacingly from year to year. The requisite number, of additional Judges was also not appointed by the Government though Clause (1) of Article 224 clearly contemplated that sufficient number of additional Judges would be appointed in order to clear off the arrears within a period of about two years. The old arrears therefore continued to exist and new arrears were added out of the current file of cases which remained undisposed of by the existing strength of Judges. The strength of additional Judges was not fixed realistically and a much lesser number of additional Judges than required far the purpose of clearing off the arrears within a period of about two years were appointed in the different High Courts from time to time with the result that the arrears continued to in-crease and the need for additional Judges continued to subsist. The unfortunate consequence was that the additional Judgeship became a gateway, for entering the cadre of permanent Judges. Whenever a person was appointed as a Judge in a High Court, he would be first appointed as an additional Judge and only when a vacancy occurred in the post of a permanent Judge, he would be confirmed as a permanent Judge in that vacancy in accordance with the seniority amongst the additional Judges. The practice therefore grew up of a person toeing first appointed as an additional Judge and then being confirmed as a permanent Judge in the same High Court. The Union of India at the instance of the petitioners filed before us a statement showing that in almost all cases barring a negligible few, every person was appointed first as an additional Judge in the High Court and then confirmed as a permanent Judge in the same High Court as soon as a vacancy in the post of a permanent Judge became available to him. The entire object and purpose of the introduction of Clause (1) of Article 224 was perverted and additional Judges were appointed under this Article not as temporary Judges for a short period who would go back on the expiration of their term as soon as the arrears are cleared off, but as Judges whose tenure, though limited to a period not exceeding two years at the time of each appointment as an additional Judge, would be renewed from time to time until a berth was found for them in the cadre of permanent Judges. By and large, every person entered the High Court judiciary as an additional Judge in the clear expectation that as soon as a vacancy in the post of a permanent Judge became available to him in the High Court he would be confirmed as a permanent Judge and if no such vacancy became available to him until the expiration of his term of office, he would be re-appointed as an additional Judge for a further term in the same High Court, Therefore, far from being aware that on the expiration of their term, they would have to go back because they were appointed only as temporary Judges for a short period in order to clear off the arrears -- which would have been the position if Clause (1) of Article 224 had been implemented according to its true intendment and purpose -- the additional Judges entered the High Court judiciary with a legitimate expectation that they would not have to go back on the expiration of their term but they would be either reappointed as additional Judges for a further term or if in the meanwhile, a vacancy in the post of a permanent Judge became available, they would be confirmed as permanent Judges. This expectation which was generated in the minds of additional Judges by reason of the peculiar manner in which Clause (1) of Article 224 was operated, cannot now be ignored by the Government and the Government cannot be permitted to say that when the term of an additional Judge expires, the Government can drop him at its sweet will. By reason of the expectation raised in his mind through a practice followed for almost over a quarter of a century, an additional Judge is entitled to be considered for appointment as an additional Judge for a further term on the expiration of his original term and if in the meanwhile, a vacancy in the post of a permanent Judge becomes available to him on the basis of seniority amongst additional Judges, he has a right to be considered for appointment as a permanent Judge in his high Court.

38. It is clear on a plain reading of Article 217, Clause (1) that when an additional Judge is to be appointed, the procedure set out in that article is to be followed. Clause (1) of Article 217 provides that "Every Judge" of a High Court shall be appointed after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. The expression "Every Judge" must on a plain natural construction include not only a permanent Judge but also an additional Judge. It is significant to note that whenever the Constitution Makers intended to make a reference to a permanent Judge, they did so in clear and explicit term as in Clause (2) of Article 224. Moreover, there is inherent evidence in Article 217 Clause (1) itself which shows that the expression "Every Judge" is intended to fake in an additional Judge as well Clause (1) of Article 217 says that "Every Judge ... shall hold office in case of an additional Judge... as provided in Article 224 which clearly suggest that the case of an additional Judge is covered by the opening words "Every Judge". We may also consider what would be the consequence of construing the word "Every Judge" as meaning only a permanent Judge. On that construction, Clause (1) of Article 217 will not apply in relation to appointment of an additional Judge and it would be open to the Central Government under Article 224. Clause (1) to appoint an additional Judge without consulting any of the constitutional functionary specified in Clause (1) of Article

217. This could never have been intended by the Constitution Makers, who made such elaborate provisions in the Constitution for safeguarding the independence of the judiciary. We must therefore, hold that no additional Judge can be appointed without complying with the requirement of Clause (1) of Article 217.

39. Now. when the term of an additional Judge expires he ceases to be a Judge and therefore, if he is to continue as a Judge, he must be either reappointed as an additional Judge or appointed as a permanent Judge. In either case, Clause (1) of Article 217 would operate and no reappointment as an additional Judge or appointment as a permanent Judge can be made without going through the procedure set out in Article 217 Clause (1). Of course, an additional Judge has a right to be considered for such reappointment or appointment, as the case may be, and the Central Government cannot be heard to say that the additional Judge need not be considered. The additional Judge cannot just be dropped without consideration. The name of the additional Judge would have to go through the procedure of Clause (1) Article 217 and after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, the Central Government would have to decide whether or not to reappoint him as an additional Judge or to appoint him as a permanent Judge. If the procedure for appointment of a Judge followed as a result of a practice memorandum issued by the Central Government is that the proposal for appointment of a Judge may ordinarily originate from the Chief Justice of the High Court and may then be sent to the Governor of the State and thereafter to the Chief Justice of India through the Justice Ministry for their respective opinions before a decision can be taken by the Central Government whether or not to appoint the person proposed, the name of the additional Judge must be sent-up by the Chief Justice of the High Court with his recommendation whether he should be reappointed as an additional Judge or appointed as a permanent Judge or not and it must go up to the Central Government with the opinions of the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, so that the Central Government may, after considering such opinions, make-up its mind on the question of reappointment or appointment as the case may be. But this is the only right possessed by the Additional Judge. The additional Judge is not entitled to contend that he must automatically and without any further consideration be appointed as an additional Judge for a further term or as a permanent Judge. He has to go through the process of Clause (1) of Article 217 and to concede to him the right to be appointed either as an additional Judge for a further term or as a permanent Judge would be to fly in the face of Article 217 Clause (1). If the additional Judge is entitled to be appointed without anything more, why should the process of consultation be gone through in regard to his appointment? Would consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court not be reduced to a farce? It would be a mockery of consultation with such high constitutional dignitaries. There can, therefore, be no doubt that an additional Judge is not entitled as a matter of right to be appointed as an additional Judge for a further term on the expiration of his original term or as a permanent Judge. The only right he has to be considered for such appointment and this right also belongs to him not because Clause (1) of Article 224 confers such right upon him, but because of the peculiar manner in which Clause (1) of Article 224 has been operated all these years.

40. But the question then arises what are the factors which can legitimately be taken into account by the Central Government in deciding whether or not to reappoint an additional Judge for a further term or to appoint him as a permanent Judge. The argument of the petitioners was that an additional Judge is not on probation. He is as much a Judge as a permanent Judge with the same jurisdiction and the same powers and to treat him as if he were on probation would not only detract from his status and dignity but also affect his independence by making his continuance as a Judge dependent on the good opinion of the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India. We find it difficult to accept this argument in the face of the clear and unambiguous language of Clause (1) of Article 217. There are no limitations in the language of Clause (1) of Article 217 as to what factors shall be considered and what factors shall not be, but having regard to the object and purpose of that provision namely, appointment of a High Court Judge, it is obvious that fitness and suitability, physical, intellectual and moral, would be the governing considerations to be taken into account in deciding the question of appointment. Now, when, on the expiration of the term of an additional Judge, the Central Government is again called upon to consider whether or not he should be re-appointed as an additional Judge or appointed as a permanent Judge, the Central Government would have to apply its mind to the question whether such additional Judge possesses the requisite fitness and suitability for being reappointed or appointed as the case may be. Public interest requires that only such person should be appointed as a Judge who is physically, intellectually and morally fit and suitable to be appointed as a Judge and it would be contrary to public weal to appoint a person, who does not possess the requisite fitness and suitability. The Central Government would therefore be under a constitutional obligation to consider whether the additional Judge, whose term has expired, is fit and suitable to be reappointed as an additional Judge or appointed as a permanent Judge. How can Clause (1) of Article 217 or Article 224 be so interpreted as to require the Central Government to reappoint an additional Judge for a further term or to appoint him as permanent Judge, even if at the time of such reappointment or appointment as the case may be, he is physically, intellectually or morally unfit or unsuitable to be appointed as a Judge. Of course, at the time when the question of reappointment of an additional Judge for a further term or his appointment as a permanent Judge comes up before the Central Government for consideration, the additional Judge would have two weighty circumstances in his favour; one, that he has experience as a Judge for one term and the other, that it would not be desirable to send an additional Judge back to the Bar. But even with these weighty circumstances in

his favour, he would have to satisfy the test of fitness and suitability, physical, intellectual and moral, before the Central Government can, consistently with its constitutional obligation and in public interest, decide to reappoint him as an additional Judge or appoint him as a permanent Judge. It is true that the fitness and suitability of, the additional Judge must have been considered by the Central Government at the time of his original appointment, out when the question again comes up for consideration on the expiration of his term, the Central Government has to consider afresh, in the light of the material then available, as to whether he possesses the requisite fitness and suitability for being appointed as a Judge. It would not be right to say that merely because the fitness and suitability of the additional Judge is required to be considered again for the purpose of deciding whether he should be reappointed for a further term or appointed as a permanent Judge, it would amount to treating him as if he were on probation. An additional Judge is certainly not on probation in the sense that his service cannot be terminated before the expiration of his term, unlike a probationer who can be Bent out any time during the period of probation. It would also not be open to the Chief Justice of the High Court or the Governor of the State or the Chief Justice of India to sit in judgment over the quality of the work turned out by the additional Judge during his term, because that would be essentially an appellate function which cam be discharged only by the court entitled to hear appeals from the decisions of the additional Judge. But every other consideration which bears on the physical, intellectual and moral fitness and suitability of the additional Judge can and must be considered and if the Central Government finds, after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India that the additional Judge is not fit and suitable for being appointed as a Judge, the Central Government may decide not to appoint ham as an additional Judge for a further term or as a permanent Judge. So long as the case of the additional Judge is considered by the Central Government for reappointment or appointment as the case may be, the decision of the Central Government cannot be questioned except on the ground that it was reached without full and effective consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India or that was based on irrelevant considerations.

41. There was also one other argument advanced by the learned Attorney General and it was that where an additional Judge is not appointed for a further term or as a permanent Judge, he cannot challenge the decision of the Central Government not to appoint him, because Clause (1) of Article 217 prescribes the procedure to be followed only where an appointment is made and it has no application where an appointment is not made. This argument is, in our opinion, without force and must be rejected. An additional Judge, as we have pointed out, has a right to be considered for appointment as an additional Judge for a further term or in case there is a vacancy in a permanent post, then for appointment as a permanent Judge, and he must therefore, be considered by the Government for such re-appointment or appointment as the case may be, and a decision must be taken in regard to him after consultation with Chief Justice of the High Court, the Governor of the State and the Chief Justice of India, and if it is found that there was no consultation with any of these three constitutional functionaries before the decision was taken by the Central Government not to appoint him or the decision of the Central Government is based on irrelevant grounds, it would not be, consideration by the Central Government as required by Clause (1) of Article 217 and he would, therefore, be entitled to challenge the decision of the Central Government which is based on what may be called 'non-consideration in law' and to require the Central Government to reconsider his case in accordance with Clause (1) of Article 217. This consequence would follow only because an Additional Judge has a right to be considered for appointment as an additional Judge for a further term or as a permanent Judge. No person, who is proposed for initial appointment as a Judge would be entitled to complain against the decision of the Central Government not to appoint him, because he would have no right to be considered for appointment as a Judge.

42. We must also deal with the argument of the petitioners that so long as there is a post of a permanent Judge vacant, no appointment of an additional Judge can be made under Clause (1) of Article 224. It is clear from the language of Clause (1) of Article 224 that it is only where permanent Judges of a High Court are unable to cope with the current institutions and the increased business or the arrears of pending cases and it is found necessary for the purpose of disposing of the increased business or the arrears of pending cases to increase the strength of the Judges of the High Court for the time being that additional Judges can be appointed. Clause (1) of Article 224 contemplates appointment of additional Judges to augment the strength of the existing Judges. It must therefore follow logically that there must be full strength of existing Judges before additional Judges can be appointed and so long as any post of existing Judges is not filled up, there can be no question of appointing additional Judges to augment their strength. When there is a vacancy in the post of a permanent Judge, it must first be filled up before any additional Judge can be appointed under Clause (1) of Article 224. It is therefore, necessary that the Central Government must periodically review the strength of permanent Judges in each High Court, so that there is a proper and adequate strength for the purpose of dealing with the normal institutions. Since there are large arrears pending almost in every High Court and it is not humanly possible to dispose of these arrears within a measurable distance of time even by appointment of additional Judges, we think it necessary that instead of appointing additional Judges for the purpose of disposing of the arrears, it would be desirable to increase the strength of permanent Judges because the arrears have come to stay and we do not think it is possible to wipe them out for a long period of time. We are glad that towards the close of the arguments Mr. Mridul submitted to us a statement on behalf of the Central Government assuring us that:

The Union Government has decided to increase the number of posts of permanent Judges in the various High Courts keeping in view the load of work, the guidelines prescribed and other relevant considerations. In fact in 1980 itself, on the basis of institution, disposal and arrears of cases and the guidelines prescribed, the Governments of seven States where the problem was more acute, had been addressed to consider augmentation of the Judge strengths of their High Courts. It has been decided that where necessary the guidelines prescribed will be suitably relaxed by taking into account local circumstances, the trend of litigation and any other special or relevant factors that may need consideration. The Union Government will take up the matter with the various State Governments so that after consulting the Chief Justices of the High Courts, they expeditiously send proposals for the conversion of a substantial number of posts of Additional Judges into those of Permanent Judges.

We hope and trust that the Central Government will soon take the necessary steps to increase realistically the strength of permanent Judges in each High Court.

43. One last argument now remains, when an additional Judge is appointed, what should be the term for which his appointment is made. Clause (1) of Article 224 provides that an additional Judge may be appointed for a period not exceeding two years. That is the outside limit prescribed by Article 224 Clause (1) and it was therefore, contended by the learned Attorney General that appointment of an additional Judge can be made for any term, howsoever short it be, so long as it does not exceed two years. The appointments of O.N. Vohra, S.N. Kumar and S.B. Wad for three months and the appointments of some other additional Judges for six months were thus defended by the learned Attorney General as being within the scope and ambit of Clause (1) of Article 224. We cannot accept this argument. It is no doubt true that Clause (1) of (the) Article fixes the outer limit for the term for which an additional Judge may be appointed, but that has been done because there may be cases where the temporary increase in the business or the arrears of pending cases are so small that it may be possible to dispose them of by appointing additional Judges for a term less than two years. If the temporary increase in the business or the arrears of pending cases can be disposed of within a shorter time, why should additional Judges be appointed for the lull period of two years. That is why Parliament provided that an additional Judge may be appointed for a term not exceeding two years. But when arrears of pending cases are so large that it would not be possible to dispose them of even within a period of ten years -- and when we say ten years, we are making a very conservative estimate -- what justification there can be for appointing additional Judges for a period of less than two years. That would be plainly outside the scope of the power conferred under Clause (1) of Article 224. When the arrears of pending cases are such that they cannot possibly be disposed of within a period of less than two years, additional Judges must be appointed for a term of two years and no less. Mr. Mridul informed us towards the close of the arguments that the Union Government had decided that ordinarily further appointment of additional Judge will not be made for a period of less than one year, but we cannot regard this statement as being fully in compliance with the constitutional requirement. The term for which an additional Judge is appointed must not be less than two years, unless the temporary increase in business or the arrears of pending cases are so small that they can reasonably be disposed of within a shorter period, which, of course, today is only an idle dream in most of the High Courts. We may also point out that an additional Judge cannot be appointed for a period of three months or six months in order to enable the Chief Justice of India or the Central Government to consider whether the additional Judge should be appointed for a further term or as a permanent Judge. That is a matter on which the Chief Justice of India must come to his opinion well in tune and the Government of India must also reach its decision sufficiently in advance so that the additional Judge would know quite some-time before his term is due to expire whether he is going to be appointed for a farther term or is going to be discontinued. There is no power in the Central Government to appoint an additional Judge for a short term in order to enable either the Chief Justice of India or the Central Government to make enquiries with a view to satisfying itself whether the additional Judge s fit and suitable for being appointed as an additional Judge or as a permanent Judge. We are, therefore, of the view that the Chief Justice of India acted under a misconception of the true constitutional position when he recommended the appointment of O.N. Vohra, S.N. Kumar and S.B. Wad for a period of six months and the Central Government was also in error in appointing them only for a period of three months.

Circular Letter of the Law Minister:

44. We must then turn to consider the question whether the circular letter issued by the Law Minister was unconstitutional and void. Now obviously the circular letter could be assailed as unconstitutional and void only if it could be shown to be in violation of some constitutional or legal provision. There was admittedly no provision of law, at least none could be pointed out by the learned Counsel appearing on behalf of the petitioners, which could be said to have infringed by the issuance of the circular letter, but the argument was that the circular letter offended against the provisions of Clause (1) of Article 217 and Clause (1) of Article 222. We shall presently examine this argument but before we do so, it would be worthwhile first to analyse the terms of the circular letter in order to determine what is it that the circular letter seeks to achieve which is constitutionally objectionable or impermissible. The learned Counsel appearing on behalf of the petitioners contended that the circular letter must be construed objectively with reference to

the language used in that letter and no extrinsic aid, such as a statement sub-sequently made by the Law Minister in the Lok Sabha, should be invoked for the purpose of arriving at its true interpretation. The decision of this Court in Cornmr. of Police v. Gordhandas Bhanji, MANU/SC/0002/1951 was referred to in this connection and strong reliance was placed on the following observations made by this Court, namely, "Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself," This principle of interpretation is indisputably a valid principle and no exception can he taken against it, but we do not think It can have any application in the present case, because the circular letter addressed by the Law Minister is not in the nature of a public order made by a public authority. The Law Minister is undoubtedly a member of the Cabinet and it is reasonable to assume that in issuing the circular letter he was acting on behalf of the Central Government but the circular letter does not appear to have been issued by the Law Minister in the exercise of any constitutional or legal power. The circular letter has no constitutional or legal sanction behind it and non-compliance with the request contained in it would not proprio vigore entail any adverse consequence to the additional Judge or to the person recommended for initial appointment, for not complying with such request. It may be that because an additional Judge does not give his consent to be appointed as a permanent Judge in another High Court, he may not be appointed as a permanent Judge in his own High Court and may be discontinued as an additional Judge on the expiration of his term, though this is not within the intendment of the circular letter and is clearly impermissible but in that event it would be his non-appointment as a permanent Judge or discontinuance as an additional Judge which would, if at all, give him a cause of action and not the circular letter asking for such consent. The circular letter is a document without any legal force and does not by itself of its own force, create or alter any legal relationship or arrangement or produce any legal consequence or effect. It is no more than a letter addressed to the Chief Minister of each State asking him to obtain the consent of the additional Judges as also of those recommended or to be recommended for initial appointment, for being appointed as Judges in a High Court outside the State. It would therefore seem that the principle of interpretation enunciated by this Court in Gordhandas Bhanji's case MANU/SC/0002/1951 (supra) cannot apply in the construction of the circular letter. We must construe the circular letter from a commonsense point of view having regard to the clarification, if any, given by the author of the circular letter, namely, the Law Minister.

45. The circular letter has been reproduced by us in extenso in an earlier part of the judgment while stating the facts giving rise to the writ petitions. The first paragraph of the circular letter begins by saying that it has repeatedly been suggested to the Government over the years "by several bodies and forums including the States Re-organization Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated." The learned Counsel appearing on behalf of the petitioners criticized this statement by observing that since the names of till "several bodies and formus" referred to in this statement were not specifically mentioned, it was not possible to deal with their credentials or to examine the validity of the reasons on which their conclusion was based. But Mr. Mridul appearing on behalf of the Law Minister convincingly dealt with this criticism and referred in detail to various bodies and forums which had from time to time expressed the view that one third of the Judges of every High Court should as far as possible be from outside this State in which that High Court is situated. The earliest point of time when this view was expressed by a high powered body was in the year 1951, when the States Re-organisation Commission in its report recommended that "at least one-third of the number of Judges in the High Court of a State should consist of persons who are recruited from outside that State" and this recommendation was guided by the consideration that "the principal organs of State should be so constituted as to inspire confidence and to help in arresting parochial trends". Then the Law Commission in its Fourteenth Report presented in 1958 expressed the same view: "The recent creation of various zones in the country and the efforts to treat the States forming part of these zones as one unit for various purposes would, we hope, lead to the States forming part of each zone to be the recruiting ground for appointments to the High Court from the members of the Bar in these States. It is hoped that in this manner the expectation of the States Reorganisation Commission that at least one third of the High Court Judges would be persons drawn from outside the State will be fulfilled." There was also a discussion on this proposal, namely, whether one third of the number of Judges in each High Court should be from outside the State, at the Chief Justices Conference held in March, 1965 and out of 15 Chief Justices of High Courts who attended the Conference, 8 were against the proposal, 6 were in favour and the remaining Chief Justice also supported the proposal, but with this qualification that the one-third number of Judges should be worked out by initial appointment. Chief Justice Subba Rao also in his letter dated 6th Oct., 1966, expressed the view that it would be better to bring Judges from outside at the time of initial appointment. Then came the Report of the Study Team of the Administrative Reforms Commission submitted in 1967 and this Report also examined the question of appointment of Judges in High Courts and came to the view that the recommendation of the States Reorganisation Commission should be implemented so that as far as possible one-third of the number of Judges in a High Court are from outside. The Study Team observed that a serious effort to implement this recommendation "will make its Own contribution to efficiency, independence and national integration." The same question once again came Up for consideration, before the Law Commission in the year 1978 and the Law Commission sent out a questionnaire to various individuals and associations for the purpose of eliciting their views inter alia in regard to the suggestion that there should be a convention according to which one-third of the judges in each High Court should be from, another

State. Mr. S.V. Gupte, who was then Attorney General of India and who is known for bold and courageous expression, of his views, stated in answer to the questionnaire that he was wholly in favour; of having one-third of the number of Judges in each High Court from outside the State "as that alone may perhaps secure some kind of freedom from bias on grounds of caste and class consideration or any close association with local people." The Bar Council' of India also in its. reply to the Questionnaire supported the proposal of one-third Judges in a High Court being from outside the State. It is interesting to note -- and this completely establishes the bona fides of the Law Minister, in issuing the circular letter--that even as far back as 26th Feb., 1979, when the political party to which the Law Minister belongs was not in power, the Law Minister stated clearly and unequivocally that he agreed with the view expressed by the Law Commission that one third of the Judges in each High Court must be from outside the State, because this would achieve better national integration in the field of judiciary. Whilst expressing this view, it is significant to note that the Law Minister made it clear that he would not support transfer of a High Court Judge "if it is based on extraneous considerations". Then followed the Eightieth Report of the Law Commission presided over by Mr. Justice H.R. Khanna. This Report was submitted to the Government of India in Aug., 1973, and in this Report, the Law Commission expressed its agreement with the recommendation made by the earlier Law Commission in its Fourteenth Report, namely, that "there should be a convention according to which one third of the Judges in each High Court should be from another State" and added that this should normally be done through the process of initial appointments and not by transfers. The Law Commission gave the following reasons for taking this view:

Evolving such a convention would in our opinion, not only help in the process of national integration but would also improve the functioning of various High Courts. It would secure on the Bench of each High Court the presence of a number of Judges who would not be swayed by local considerations or affected by issues which may rouse local passions and emotions. As observed by us in one of our earlier Reports, one of the essential things for the due administration of justice is not only the capacity of the Judges to bring a dispassionate approach to cases handled by them, but also to inspire a feeling in all concerned that dispassionate approach would underlie their decision, quite often, cases which arouse strong emotional sentiments and regional feelings come up before courts of law. To handle such cases, we need Judges who not only remain unaffected by local sentiments and regional feelings, but also appear to be so. None would be better suited for this purpose than Judges hailing from other States. It is a common feeling amongst old lawyers that apart from cases with political overtones, the English Judges showed a sense of great fairness and brought a dispassionate approach in the disposal of judicial cases handled by them. We in India are in the fortunate position of having a vast country. There can, therefore, be no difficulty in having a certain percentage of Judges who hail from other States. The advantages gained by having persons from other States as Judges would be much greater compared with any disadvantage which might result therefrom.

This question was also discussed at the meetings of the Consultative Committee of Parliament for the Law Ministry held on 7th June, 1980, 24th July 1980 and 17th December, 1980, and the unanimous view taken by the members of the Consultative Committee belonging to different political parties was that at-least one-third of the Judges in a High Court should be from outside the State. The Chief Justice of India also in a communication addressed to the Law Minister in March, 1978, expressed his view favouring outside appointments to High Courts and in a letter addressed by him to the Law Minister on 18th March, 1981, he opined that "it is high time that atleast a few of the new appointments to every High Court were made from outside the State." He also observed in a communication addressed in April, 1981, that "he had publicly proclaimed his opinion more than once that at least one-third of the new appointments should be from amongst persons from outside the particular States." The National Seminar on Judicial Appointments and Transfers convened by the Bar Council of India in Ahmedabad from 17th to 19th October, 1980 also yielded the same consensus view, namely:

The ideal of having one-third of High Court Judges from outside the State helps promotion of national integration and the preservation of a unifiled judicial system. However, it is desirable that this composition of the High Court should be accomplished by way of initial appointments rather than by transfers. Furthermore, in implementation of this formula care must be taken to preserve the legitimate representation of Steles and to maintain the sanctioned strength to each State.

It will thus be seen that, barring perhaps the Associations of Bombay Lawyers, all high powered bodies, forums and associations, which have anything to do with judicial system, have consistently over the years taken the view that one-third of the number of Judges in each High Court should be from outside the State. The unanimity of view has been so complete and overwhelming that it is impossible to contend that the policy of having one-third of the Judges in every High Court from outside the State, which the Law Minister is trying to implement by issuing the circular letter, is ill-conceived or mala fide or subversive of the independence of the judiciary. So long as the policy is evolved by the Government; after consultation with the Chief Justice of India and it is not otherwise unconstitutional, the Court cannot pronounce upon the wisdom of the policy or strike it down because it does not appeal to the court. Here the policy of having one-third of the number of Judges in each High Court from outside the State has been adopted after consultation

with the Chief Justice of India and, in fact, it has his complete approval and the Law Minister did not therefore act unconstitutionally or illegally in relying upon this policy in the first paragraph of the circular letter.

46. The circular letter after referring to the suggestion made by several bodies and forums that one-third of the Judges of the High Court should, as far as possible, be from outside the State, proceeded to add "Somehow no start could be made in the past in this direction." The learned Counsel appearing on behalf of the petitioners assailed the correctness of this statement and contended that an attempt was made during the emergency to transfer permanent Judges of one High Court to another and the transfers were sought to be defended by the Government of India on the same plea of national integration and removal of harrow parochial tendencies and therefore it was hot correct on the part of the Law Minister to state that no start could be made in the past for implementing the policy of having one-third Judges of the High Court from outside the State, Now it is difficult to appreciate how this statement in the circular letter could be branded as incorrect for the reason that the transfers effected during the emergency were sought to be defended on the plea of national integration and removal of narrow parochial tendencies. In the first place, what the circular letter seeks to do is to obtain the consent of the additional Judges, not for transfer to some other High Court, but for appointment as permanent Judges in another High Court, whereas what took place during the emergency were transfers of High Court Judges from one High Court to another. Secondly, it is true that the transfers of High Court Judges made during the emergency were sought to be defended by the Government of India on the plea of national integration and removal of narrow parochial tendencies, but this defence was found by the Court in Union of India v. Sankalchand Sheth MANU/SC/0065/1977 to be false, Chandrachud, J., as he then was, observed in his judgment in that case: "I would only like to add that the record of this case does not bear out the claim that any one of the 16 High Court Judges was transferred in order to further the cause of national integration. Far from it." What was held by the Court was that the transfers of High Court Judges during the emergency were made not for the purpose of furthering the cause of national integration but by way of punishment. The Law Minister was therefore right in stating in the first para of the circular letter that no start has been made in the past in the direction of having one-third Judges in a High Court from outside the State and that is why he was taking the initiative in the matter.

47. Coming to the merits of the challenge against the validity of the circular letter, the principal contention advanced on behalf of the petitioners was that the circular letter required the additional Judges as also those whose names were recommended or might in future be recommended for initial appointment, to give their consent for being appointed as Judges outside the State and obtaining of such consent in advance would reduce the consultation with the Chief Justice of India, the Chief Justice of the High Court in which the additional Judge or the prospective Judge is to be appointed and the Governor of the State illusory and an empty formality and this would be violative of Article 217 Clause (1) which provides that the appointment of a Judge of a High Court can be made only after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India. This contention is also, in our opinion, without force and must be rejected. It is clear from the language of Clause (1) of Article 217 that the appointment of a Judge of a High Court can be made by the President only after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India and, according to the interpretation placed by us, consultation within the meaning of this Article means full and effective consultations with each of the three constitutional functionaries after placing all relevant material before them. Now, if a person, who is an additional Judge in the High Court in one State or who is practising as a lawyer in that State is to be appointed as a Judge in another State, then obviously his willingness to be so appointed would be a highly relevant factor and that would have to be ascertained and placed before the three constitutional functionaries who are required to be consulted before an appointment can be made. It is obvious that the President cannot appoint a person to be a Judge of a High Court, without first ascertaining his willingness to be appointed as a Judge in that High Court and some one has to make an inquiry in that behalf in order to ascertain his willingness, It is only if the person concerned is willing to be appointed as a Judge in that High Court that the question would arise of processing his name and consulting the three constitutional functionaries in regard to the appointment of such person This inquiry has to be made before the process of consultation can start and the Law Minister therefore by addressing the circular letter requested the Chief Minister of each State to make this inquiry. It is true that Law Minister did not state in so many terms in the circular letter that the Chief Minister may make this inquiry through the Chief Justice of the High Court but that was clearly implicit in the circular letter, because a copy of the circular letter was also sent to the Chief Justice of each High Court with the endorsement "for necessary action" and moreover it must be presumed that the necessary inquiry would be made by the Chief Minister only through the Chief Justice of the High Court. The Chief Minister would not be expected to contact directly the additional Judges or the persons recommended for initial appointment, for the purpose of ascertaining whether they are willing to be appointed as Judges in any other High Court. Since the Chief Justice of the High Court is the head of the judiciary in the State, the Chief Minister would invariably route his inquiry through the Chief Justice of the High Court and request the Chief Justice of the High Court to ascertain whether any of the additional Judges or persons recommended for initial appointment are willing to be appointed to a High Court outside the State. This inquiry could have been made by the Law Minister by writing directly to the Chief Justice of each High Court but, instead of doing so, the Law Minister chose to address his inquiry to the Chief Minister of each State, presumably because he thought that it would be more appropriate for him to make this inquiry through the Chief Minister of the State rather

than by direct communication with the Chief Justice of the High Court. The Law Minister had to make this inquiry because without information as to whether an additional Judge or a person recommended for initial appointment was willing to be appointed as a Judge in another High Court, his name could not be processed for appointment as a Judge in that High Court This was the first step required to be taken after the willingness of the additional Judge or person recommended for Initial appointment, to be appointed as a Judge in another High Court was ascertained that the Law Minister could place the proposal for appointment of such person as a Judge for the consideration of the Chief Justice of that High Court, the Governor of the State in which that High Court is situated and the Chief Justice of India. It would then be for the Chief Justice of that High Court to consider whether the person proposed for appointment is fit to ha appointed in his High Court and, whether he would recommend him for such appointment. On this point, how ever, a serious objection was raised on behalf of the petitioners and a question was posed as to how the Chief Justice of a High Court can make any recommendation in regard to a person proposed to be appointed as a Judge in his High Court unless he knows such person and has seen his work either at the Bar or in the High Court or district court and is therefore in a position to assess his suitability for being appointed as a Judge. The argument was that the Chief Justice of the High Court in which the appointment is proposed to be made has a constitutional duty to give his opinion in regard to the suitability of the person proposed to be appointed and suitability would naturally include competence, character and integrity and how can the Chief Justice give an honest opinion in regard to the suitability of such person when he does not know him at all and has not even had an opportunity of seeing his work. We do not think this argument is well founded; the difficulty pointed out on behalf of the petitioners is more imaginary than real. The Chief Justice of the High Court where the appointment is proposed to be made need not blindly and unquestioningly accept the proposal made by the Law Minister, The Chief Justice of the High Court can make his own inquiries in regard to the suitability of the person proposed for appointment either through the Chief Justice of the High Court where such person is working as an Additional Judge or District Judge or practising as a lawyer or through other sources such as the Advocate General of that State, The Chief Justice of the High Court can also enquire from the Governor of the State where the person proposed to be appointed is working as an additional Judge or district Judge or practising as a lawyer and find out what are his antecedents and whether he possesses character and integrity. The social philosophy of the person proposed to be appointed as also his attitudes and habits of mind can also be ascertained by the Chief Justice of the such Court by making inquiries from the Chief Justice of the High Court where such person is working as an additional Judge or district Judge or practising as a lawyer as also from the Governor of that Stale and diverse other sources. It is not at all difficult for the Chief Justice of the High Court where an appointment is proposed to be made to gather the requisite information about the person proposed to be appointed so as to enable him to make up his mind in regard to the suitability of such person for appointment as a Judge. May we ask what happens when a person is recommended for appointment as a Judge in a High Court by the Chief Justice of India? There have been quite a number of instances where this has happened. There have been cases where the Chief Justice of India has recommended members of the Supreme Court Bar for appointment as Judges in different High Courts and equally there have been cases where members of the Income-tax Tribunal as also persona working in the legal department of the Government of India have been recommended by the Chief Justice of India for appointment as High Court Judges. In such cases, the Chief Justice of the High Court where the appointment is proposed to be made, would naturally gather the requisite information about the person proposed to be appointed from the Chief Justice of India and other sources available to him and decide whether such person is suitable for being appointed as a Judge in his High Court, He may agree with the recommendation of the Chief Justice of India or he may disagree with it. In fact, there have been cases, though very few, where the Chief Justice of the High Court has declined to accept the person proposed by the Chief Justice of India for appointment as a Judge in his High Court. Merely because a recommendation emanates from the Chief Justice of India, it does not mean that consultation with the Chief Justice of the High Court, where the person concerned is. proposed to be appointed, would be reduced to a. mockery. The proposal for appointment of a person as a Judge may be initiated by the Central Government or by any of the three constitutional functionaries required to be consulted and from whomsoever the proposal emanates, the other constitutional functionaries are required to be consulted in regard to it on the basis of full and identical material When the Chief Justice of the High Court is informed that a particular person is willing to be appointed as a Judge in his High Court and the proposal to appoint him as a Judge may therefore be considered, the Chief Justice of the High Court can ask the Central Government or the Chief Justice of India, whosoever has made the proposal, to place before him all the relevant material in regard to the person proposed to be appointed and also gather the necessary material from the Chief Justice of the other High Court as also from other sources available to him and then decide whether to recommend such person or not So also the Governor of the State where the appointment's proposed to be made, can make the necessary inquiries and after considering all relevant material decide what attitude it should adopt in regard to the proposed appointment. The Chief Justice of India also would have a very important role to play in the process of consultation. Before giving his opinion in regard to the proposed appointment, the Chief Justice of India may enquire directly from the person proposed to be appointed whether he is really willing to be appointed as a Judge in another High Court and whether the consent given by him is genuine and free. The person proposed to be appointed may also point out to the Chief Justice of India his problems and difficulties in accepting appointment in the other High Court and the Chief Justice of India will consider all this material before he gives his opinion to the President. The Chief Justice of India will also have to consider whether the proposed appointment is bona fide and in public interest or it is being made only with a view to favouring the person concerned so that by appointment in another High Court, he may get some benefit which he would not get in the High

Court of his own State. The Chief Justice of India may in such a case refuse to agree to the proposed appointment, even though the person proposed to be appointed has consented to it. These and many other relevant considerations will have to be taken into account by the Chief Justice of India before he gives his opinion to the President in regard to the proposed appointment. We therefore fail to see how the obtaining of the consent of the person proposed for appointment, in advance for being appointed as a Judge in another High Court can possibly have the effect of reducing consultation with the Chief Justice of India to a mockery or making it ineffective so as to be violative of Clause (1) of Article 217.

48. The next contention urged on behalf of the petitioners was that the circular letter held out a veiled threat to the additional Judges that if they do not consent to their appointment as Judges in a High Court other than their own, they may not be appointed as permanent Judges at all and may be dropped on the expiration of their term of office. The petitioners relied on the use of the word "obtain" in the circular letter and submitted that the use of this word conveyed a sense of compelled obedience with an implied threat that failure to give consent may entail adverse consequences. Whether such adverse consequences actually flowed or not was not material, contended the petitioners, but what was disturbing was that there was an implied threat of such adverse consequences and that was subversive of the independence of the judiciary. Moreover, consent obtained under such threat of adverse consequences could not be regarded as valid consent in law because consent to be valid must be free and must not be induced by threat, coercion or duress. Now we fail to see how from the mere use of the word 'obtain' in the circular letter, this entire edifice of an argument that there was an implied threat to the additional Judges that if they do not give their consent for being appointed as Judges in another High Court, they would be visited with adverse consequences, can be built up. The word "obtain is a transitive verb and it is obvious that when the Chief Minister of each State was asked by the Law Minister by issuing the circular letter to obtain the consent of the additional Judges for being appointed as permanent Judges in another High Court, what was meant was that the Chief Minister should obtain the consent of each additional Judge if he was willing to give such consent. It is clear as a matter of plain grammar that one person can obtain something from another provided that other is willing to give it. The use of the word obtain cannot possibly be construed to mean that the person from whom the consent is to be obtained must be coerced into giving it. To read the word 'obtain' in the circular letter as meaning that the Chief Minister was expected to coerce the additional Judges into giving their consent or as conveying an implied threat to the additional Judges that if they do not give their consent they might be dropped as additional Judges on the expiration of their term, would, in our opinion, be nothing short of torturing out of the language used in the circular letter, a meaning which the language does not bear and which could not possibly have been intended by the Law Minister.

49. The petitioners also sought to bolster up their case that the circular letter held out a veiled threat to the additional Judges by relying on the statement contained in the circular letter that the giving of consent by additional Judges would not necessarily involve any commitment on the part of the Central Government to appoint them as permanent Judges. But we do not see how this statement can be regarded as a veiled threat that if an additional Judge does not give his consent for being appointed as a Judge in another High Court, he may not be appointed as a permanent Judge at all and may be discontinued on the expiration of his term of office. We do not think it is possible to read any such sinister implication in this statement contained in the circular letter, This statement merely reiterated the legal position, too well-settled to admit of any doubt or debate, that merely because a person has given his consent to be appointed as a Judge in a High Court, it does not mean that he would necessarily be appointed as a Judge. He may not be appointed at all, if after consultation with the three constitutional functionaries as provided in Article 217 Clause (1), it is decided not to appoint him. Even if it is decided to appoint him, he may not be appointed as a Judge in the High Court of his choice because the Chief Justice of that High Court or the Governor of that State or the Chief Justice of India may object to his appointment in that High Court. He must not therefore remain under the impression that merely because he has given his consent for being appointed as a Judge outside his State and expressed his preference as regards the High Courts where he would like to be appointed, he would necessarily be appointed as a Judge and in the High Court of his choice. Far from this being a threat to the additional Judges, it was a dear intimation to them that they should not be under any wrong impression that giving of consent would ensure them appointment as a permanent Judge and in the High Court of their choice. Whether to appoint an additional Judge as a permanent Judge or to continue him as an additional Judge for a further term or to discontinue him on the expiration of his term would be decided in accordance with the procedure laid down in Clause (1) of Article 217 and giving of consent would not be a factor tilting the balance in favour of the additional Judge giving such consent. We are also not impressed by the argument urged on behalf of the petitioners that the omission to state in the circular letter that if an additional Judge does not give his consent to be appointed in any other High Court, it would not be held against him in considering his appointment as a permanent Judge, conveyed an implied threat that failure to give such consent would be held against the additional judge and he might be discontinued as an additional Judge on that account. It is difficult to spell out any such implied threat on a plain reading of the circular letter. On the contrary it is significant to note that the circular letter did not state, as it well might have, if such was the intention of the Law Minister, that if consent is not given by an additional Judge for being appointed as a permanent Judge in another High Court, he would run the risk of being discontinued as an additional Judge on the expiration of his term. It would be quite open to an additional Judge under the circular letter

to say that he is not willing to be appointed in any other High Court except Ms own and even so, when his term as an additional Judge expires, he could still be considered for appointment as an additional Judge for a further term or as a permanent Judge in his own High Court, there being nothing in the circular letter against it and the procedure set out in Clause (1) of Article 217 would then be followed. An additional Judge, as we have already pointed out above, is entitled to be considered for appointment as an additional Judge for a further term or as a permanent Judge in his own High Court and such appointment cannot be refused to him on the ground he has not given his consent for being appointed as a permanent Judge in another High Court, Such a ground for discontinuing an additional Judge on the expiration of his term would be a wholly irrelevant ground and we do not think it could ever have been intended by the Law Minister consistently with the constitutional requirement that an additional Judge who does not give his consent for being appointed as a permanent Judge outside his High Court should on that account be discontinued as an additional Judge on the expiration of his term. It would not be right to read the circular letter with a suspicious eye as if it was designed to cow down the additional Judges into submission by holding out an implied threat to them. There are, in fact, quite a few Judges who have not given their consent to be appointed as permanent Judges in another High Court and no adverse consequence has ensued to them. We do not think that our additional Judges are made of such weak stuff that they would submit to any supposed threats by the Executive and give their consent to be appointed as permanent Judges in another High Court out of fear that they might be discontinued as additional Judges if they do not give such consent.

50. There was also one other contention advanced on behalf of the petitioners, namely, that to require a person whose name is to be recommended for initial appointment as a Judge to give his consent for being appointed as a Judge in another High Court would be to introduce an irrelevant qualification for the appointment of a Judge. The argument was that to obtain such consent from a person whose name is to be recommended for appointment would be to introduce a requirement for appointing a Judge which is not prescribed by the Constitution and the obtaining of such consent would therefore be unconstitutional. It is, with the greatest respect to the learned Counsel appearing on behalf of the petitioners, extremely difficult for us to appreciate this argument. When the name of a person is being considered for appointment as a Judge because he is regarded as suitable for such appointment, we fail to see why he cannot be asked whether he is willing to be appointed as a Judge in another High Court. It is for him to decide whether or not to give his consent for such appointment. He may very well say that he is not agreeable to be appointed as a Judge in any High Court other than his own, but if, in the exercise of his own volition, he gives his consent for being appointed as a Judge in another High Court, it is difficult to see how it can ever be contended that by obtaining such consent, an irrelevant qualification for appointment of a Judge has been introduced. It is not as if a person who does not give his consent for being appointed as a Judge in another High Court would necessarily be refused appointment in his own High Court. It is significant to note that, in fact, even after the date of the circular letter, quite a few new appointments have been made in different High Courts of persons either practising as lawyers in those High Courts or working as District Judges under those High Courts.

51. The last contention urged, on behalf of the petitioners was that the circular letter was really an attempt on the part of the Government to transfer Judges from one High Court to another by circumventing the decision of this Court in Sankalchand Sheth's case MANU/SC/0065/1977 (supra). This contention urged on behalf of the petitioners is wholly unfounded and no amount of legal casuistry or ingenuity can sustain it. It is difficult to appreciate how the circular letter can at all be interpreted as an attempt to bring about transfer of Judges from one High Court to another. The circular letter deals with two categories of persons; one is the category of persons who are recommended or may in future be recommended for initial appointment as Judges and the other is the category of additional Judges who are appointed for a period of two years or less. So far as the first category of persons is concerned, it is impossible to contend and with all his ingenuity even Mr. Seervai appearing on behalf of the petitioners could not argue, that when a person who is recommended or proposed to be recommended for initial appointment as a Judge is asked whether he is willing to be appointed as a Judge in another High Court, any transfer is involved in such process. When such person is not a sitting Judge in any High Court and is appointed for the first time in another High Court, it is difficult to see how he can be said to be transferred. The transfer contemplated in Article 222 Clause (1) is not a mere act of physical locomotion or transfer of residence from one place to another, but it is an act by which a Judge in one High Court is transferred as a Judge of another High Court Equally there is no transfer involved where an additional Judge is, on the expiration of his term, appointed as an additional Judge in another High Court or is appointed as a permanent Judge in any other High Court. It is no doubt true that by reason of his appointment as an additional Judge or permanent Judge in another High Court he has physically to go to that High Court, but it is not while being a Judge of one High Court that he goes over as a Judge of the other High Court. His appointment as an additional Judge of one High Court comes to an end and he is appointed afresh as an additionnal or permanent Judge in another High Court. It is by virtue of fresh appointment that he becomes a Judge, whether additional or permanent, of another High Court and he is not transferred from one High Court to another within the meaning of Clause (1) of Article 222. If the contention of the petitioners were correct, it would not be necessary, white appointing an additional or permanent Judge in another High Court, to follow the procedure set out in Clause (1) of Article 217 and to consult the Chief Justice of the latter High Court and the Governor of that State as required by that article and it would be possible to appoint such person as an additional

OT permanent Judge in another High Court after consulting only the Chief Justice of India under Clause (1) of Article 222. This proposition has only to be stated in order to be rejected; it would clearly amount to circumventing the provisions of Clause (1) of Article 217. Take for example a case where a person who is an additional Judge in a High Court for a period of two years is, on the expiration of his term of two years, appointed as a permanent Judge in another High Court. Can such appointment of a permanent Judge be made in the other High Court without consulting the Chief Justice of that High Court and the Governor of that State under Clause (1) of Article 217? There is in such a case no transfer at all; it is a case of fresh appointment made in the other High Court and that can be done only after going through the procedure set out in Clause (1) of Article 217.

52. Mr. Seervai, appearing on behalf of the petitioners however relied strongly on a speech made by the Law Minister in the Lok Sabha on 16th April, 1981, where at columns 271 and 274 of the Lok Sabha Debates, the Law Minister himself had used the expression 'transfer' while speaking about the circular letter. The learned Counsel contended that the use of the expression transfer' by the Law Minister himself supported his argument that what the circular letter sought to do was to transfer Judges from one High Court to another. This contention is in our opinion wholly unsustainable and it is no better than relying on a broken reed. It is undoubtedly true that in columns 271 and 274, the Law Minister used the ex-pression 'transferl or 'transferred' while referring to the circular letter, but one cannot fasten upon a stray use of a loose expression for the purpose of determining what is the true effect of the circular letter. The speech ' of the Law Minister has to be read as a whole and if it is so read, it is clear that at more than one place, the Law Minister made it clear that what was contemplated by the circular letter was "not a case of transfer but a case . of an appointment under Article 217" vide Col. 273. The Law Minister also reiterated in Col; 223 that "in so far as additional Judges are concerned, the circular' letter seeks to obtain their consent to their appointment as permanent Judges to High Courts outside and these would be appointments under Article 217". Then again in Col. 270 the Law Minister clarified that the "appointment of an additional Judge as a permanent Judge could also be termed as an initial appointment." The expression 'transfer' or 'transferred' in columns 271 and 274 was obviously used in a loose sense meaning physical locomotion. It must be remembered that the pression happened to be used by the Law Minister in an ex-tempore speech made on the floor of the House and not in a document or letter prepaid after much care and deliberation. No undue reliance can therefore be placed on behalf of the petitioners on the use of the expression 'transfer' or 'transferred' in the speech of the Law Minister. Mr. Seervai also relied strongly on the circumstance that three associations of lawyers in Bombay had all taken the view that the circular letter contemplated transfer of additional Judges and sought their consent to such transfer. But this circumstance has very little relevance in the interpretation of the circular letter for it is not for the lawyers practicing in a particular High Court to construe the circular letter but for this Court to determine what is the true meaning of that document. We are clearly of the view -- in fact we find it impossible to take a different view -- that what was contemplated by the circular letter was not transfer of additional Judge from one High Court to another and it did not therefore, have to satisfy the requirements of Clause (1) of Article 222.

53. But quite apart from this consul duration, even if the view be taken that what the circular letter sought to achu eve was transfer of additional Judges from one High Court to another, it is difficult to see how by obtaining consent of the additional Judges in advance, the Law Minister would be circumventing the majority decision in Sankalchand Sheth's case MANU/SC/0065/1977 (supra). The majority view in Sankalchand Sheth's case (supra) was that a Judge can be transferred from one High Court to an-other without his consent, taut the transfer must be after full and effective consultation with the Chief Justice of India and it must not be by way of punishment but must be in public interest. Therefore, obviously it would be of no help to the Law Minister to obtain the consent of an additional Judge in advance to be appointed as a permanent Judge in any other High Court, because despite such consent, the additional Judge cannot be appointed as a permanent Judge in another High Court with out full and effective consultation with the Chief Justice of India and according to the majority decision in Sankalchand Sheth's case (supra), the opinion given by the Chief Justice of India would be entitled to , the greatest weight and any departure from it would have to be justified by the Central Government on strong and cogent grounds. In. such a case, even where the consent of the additional Judge has been obtained in advance, the Chief Justice of India would have to consider whether it is in public interest to appoint the additional Judge as a. permanent Judge in another High Court and the consent obtained in advance would not pre-empt the consultative exercise with the Chief Justice of India. The advance consent obtained from the additional Judge would have no meaning so far as the Chief Justice of India is concerned, because irrespective whether the additional Judge has given his consent or not, the Chief Justice of India would have to consider whether it would be in public interest to allow the additional Judge to be appointed as a permanent Judge in the other High Court. Therefore, even on the assumption that the appointment of an additional Judge as a permanent Judge in another High Court amounts to transfer, which of course we emphatically repudiate, it is difficult to see how the circular letter can be construed as an attempt to circumvent the majority decision in Sankalchand Sheth's case (supra).

54. We do not therefore find any Constitutional or legal infirmity or any abuse or misuse of authority on the part of the Law Minister in issuing the circular letter. The circular letter does not violate the provisions of Clause (1) of Article 217 or Clause (1) of Article 222 nor does it offend against any other constitutional or legal provision and the challenge against the validity of the circular letter must, therefore, fail. We may, however, while affirming the validity of the

circular letter, make it clear that since an additional Judge has a right to be considered for appointment as an additional Judge for a further term on the expiration of his original term, and in case of a vacancy in permanent post, for appointment as a permanent Judge in his own High Court, he cannot be discontinued as an additional Judge on he ground that he has not given his consent for being appointed as a permanent Judge in any other High Court, Such a ground for discontinuing an additional Judge would be a wholly irrelevant ground and if, on the expiration of his original term, an additional Judge is discontinued on any such ground, the decision of the President discontinuing him would be unconstitutional and void and the Union of India would be liable to be directed to reconsider his cage on the basis of relevant considerations after excluding the irrelevant, ground.

Disclosure of documents: Privilege.

55. We now come to a very important question which was agitated before us' at great length and which exercised our minds considerably before we could reach a decision, The question related to the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the non-appointment of O.N. Vohra and S.N. Kumar as additional Judges. The learned Counsel for the petitioners and S.N. Kumar argued before us with great passion and vehemence that these documents were relevant to the inquiry before the Court and they should be directed to be disclosed by the Union of India. This claim of the petitioners and S.N. Kumar for disclosure was resisted by the Solicitor General of India on behalf of the Union of India and Mr. Mridul on behalf of the Law Minister. They contended that so far as O.N. Vohra was concerned his case stood on an entirely different footing from that of S.N. Kumar since, unlike S.N. Kumar who allied himself with the petitioners and actively participated in the arguments almost as if he was petitioner, O.N. Vohra though made a party respondent to the writ petition of V.M. Tarkunde did not appear and participate in the proceedings or seek any relief from the Court in regard to his continuance as an additional Judge. Mr. Mridul on behalf of the Law Minister informed us that in fact O.N. Vohra had started practice in the Delhi High Court and his case could not be considered by us when he himself did not want any relief. So far as the case of S.N. Kumar was concerned the learned Solicitor General on behalf of the Union of India conceded that the documents of which disclosure was sought on behalf of the petitioners and S.N. Kumar were undoubtedly relevant to the issues arising before the Court, but contended -- and in this contention he was supported by Mr. Mridul on behalf of the Law Minister -- that they were privileged against disclosure for a twofold reason. One was that they formed part of the advice tendered by the Council of Ministers to the President and hence by reason of Article 74 Clause (2) of the Constitution the Court was precluded from ordering their disclosure and looking into them and the other was that they were protected against disclosure under Section 123 of the Indian Evidence Act since their disclosure would injure public interest. We propose to consider these rival arguments in the order in which we have set them out, first in regard to O.N. Vohra and then in regard to S.N. Kumar.

56. So far as O.N. Vohra is concerned, it is apparent that though he was joined as a party respondent to the writ petition filed by V.M. Tarkunde, he did not choose to appear and take part in the proceedings. He did not even file an appearance, presumably because he was not interested in wresting back the office of an additional Judge through a Judicial writ. He adopted a commendable attitude consistent with the dignity of the High office which he had the privilege to hold for over two years and scorned to be a party to any litigative adventure for getting back the office of a High Court Judge. He took the view that the office of a High Court Judge is no mean office for which one may canvass, lobby or fight but it is a high position which can only be offered and which one should regard as an honour to be invited to fill and if for any reason, justifiable or not, the Government chooses not to offer it to the deserving person, it may result in detriment to public interest for which the Government may have to account to the people through their elected representatives, but the person concerned should not litigate his claim to this high office. That would lower the dignity of the office by making it the subject matter of litigative controversy. It was presumably for this reason that O.N. Vohra did not appear in the writ petition or seek any relief from the Court in regard to his continuance as an additional Judge. In fact, we are told. O.N. Vohra has already started practice in the Delhi High Court, Now if O.N. Vohra has not come forward to seek any relief from the Court and is not claiming that he should be deemed to have been appointed a permanent Judge or that he should be reappointed as an additional Judge for a further term, it is difficult to see how the Court can be called upon to examine his case for the purpose of determining whether he was wrongly discontinued as an additional Judge. We have taken a broad and liberal view in regard to locus standi and held that any public spirited advocate acting bona fide and not for private gain or personal profit or political motivation or any other oblique consideration, may file a writ petition in the High Court challenging an unconstitutional or illegal action of the Government or any other constitutional authority prejudicially affecting the administration of justice and in such writ petition he may claim relief not for himself personally but for those who are the direct victims of such unconstitutional or illegal action, because granting such relief to them would repair the injury caused to administration of justice. But the persons for whom the relief is sought must be ready to accept it; they must appear and make it known that they are claiming such relief; it cannot be thrust upon them unless they wish it. If, in the present case. O.N. Vohra does not seek to go back as an additional Judge through judicial intervention, the petitioners cannot contend that he must still be continued as an additional Judge irrespective of his inclination. The relief sought by the petitioners being primarily for the benefit of O.N. Vohra, it is for O.N. Vohra to decide whether he would have it and if he does not want

it, it would be a fruitless exercise for the Court to determine whether the decision not to appoint him as an additional Judge was unconstitutional and he should have been appointed as an additional Judge for a further term. The Court does not decide issues in the . abstract. It undertakes determination of a controversy provided it is necessary in order to give relief to a party and If no relief can be given because none is sought, the Court cannot take upon itself a theoretical exercise merely for the purpose of deciding academic issues, howsoever important they may be. The Court cannot embark upon an inquiry whether there was any misuse or abuse of power in a particular case, unless relief is sought by the person who is said to have been wronged by such misuse or a bust of power. The Court cannot take upon itself the role of a commission of inquiry -- a knight errant roming at will with a view to destroying evil wherever it is found It was for this reason that we held that the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to non-appointment of O.N. Vohra was not relevant to the issues arising for determination in the writ petition and the Union of India could not be required to disclose it

57. That takes us to the case of S.N. Kumar which stands on a totally different footing, because S.N. Kumar has appeared in the writ petition, filed an affidavit supporting the writ petition and contested, bitterly and vehemently, the decision of the Central Government not to continue him as an additional Judge for a further term. Since S.N. Kumar has claimed relief from the Court in regard to his continuance as an additional Judge, an issue is squarely joined between the petitioners and S.N. Kumar on the one hand and the Union of India on the other which requires to be determined for the purpose of deciding whether relief as claimed in the writ petition can be granted to S.N. Kumar. Now, as we have already peinted out while discussing the scope and ambit of Article 217, there are only two grounds on which the decision of the Central Government not to continue an additional Judge for a further term can be assailed and they are, firstly, that there has been no full and effective consultation between the Central Government and the constitutional authorities required to be consulted under that Article and secondly, that the decision of the Central Government is based on irrelevant grounds. It was on both these grounds that the petitioners and S.N. Kumar impugned the decision of the Central Government, not to appoint S.N. Kumar as an additional Judge for a further term and there can be no doubt that the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India would be relevant qua both these grounds. The learned Solicitor General on behalf of the Union of India and Mr. Mridul on behalf of the Law Minister, with the usual candour and frankness always shown by them, did not dispute the relevance of these documents to the issues arising in the writ petition in regard to S.N. Kumar, but contended that they were protected against disclosure under Article 74 Clause (2) of the Constitution as also Section 123 of the Indian Evidence Act. This contention raised an extremely important, question in the area of public law particularly in the context of the open society which we are trying to evolve as part of the democratic structure and it caused great concern to us for it involved a clash between two competing aspects of public interest, but ultimately after inspecting these documents for ourselves and giving our most anxious thought to this highly debatable question, we decided to reject the claim for protection against disclosure and directed that these documents be disclosed by the Union of India. We now proceed to give our reasons for this decision taken by us by a majority of six against one.

58. The first ground on which protection against disclosure was claimed on behalf of the Union of India and the Law Minister was baaed on Article 74 Clause (2) of the Constitution. It is clear from the constitutional scheme that under our Constitution the President is a constitutional Head and is bound to act on the aid and advice of the Council of Ministers. This was the position even before the amendment of Clause (1) of Article 74 by the Constitution (42nd Amendment) Act 1976, but the position has been made absolutely explicit by the amendment and Article 74 Clause (1) as amended now reads as under:

There shall be a Council of Ministers with the Prime Minister at the Head to aid and advise the President who shall, in the exercise of his functions act in accordance with such advice.

What was Judicially interpreted even under the unamended Article 74 Clause (1) has now been given Parliamentary recognition by the constitutional amendment. There can therefore be no doubhat the decision of the president under Article 224 read with Article 217 not to appoint an additional Judge for a further term is really a decision of the Council of Ministers and the reasons which have weighed with the Council of Ministers in taking such decision would necessarily be part of the advice tendered by the Council of Ministers to the Preaident. Now Clause (2) of Art, 74 provides:

The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.

The Court cannot, having regard to this constitutional provision, embark upon an inquiry as to whether any and if so what advice was tendered by the Council of Ministers to the President and since the reasons which have prevailed with the Council of Ministers in taking a particular decision not to continue an additional Judge for a further term would form part of the advice tendered to the President, they would be beyond the ken of judicial inquiry. But the Government

may in a given case choose to disclose these reasons or it may be possible to gather them from other circumstances, in which event the Court would be entitled to examine whether they bear any reasonable nexus with the question of appointment of a High Court Judge or they are constitutionally or illegally prohibited or extraneous or irrelevant. But if these reasons are not disclosed by the Government and it is otherwise not possible to discover them, it would be impossible for the Court to decide whether the decision of the Central Government not to appoint an additional Judge for a further term is based on irrelevant grounds. There would however not be much difficulty by and large in cases of this kind to gather what are reasons which have prevailed with the Central Government in taking the decision not to continue an additional Judge. Article 217 requires that there must be full and effective consultation between the president, that is, the Central Government on the one hand and the Chief Justice of the High Court, the Governor, that is, the State Government and the Chief Justice of India on the other and the "full and identical facts" on which the decision of the Central Government is based must be placed before the Chief Justice the High Court, the State Government and the Chief Justice of India, The reasons which the Central Government is inclined to take into account for reaching a particular decision have therefore necessarily to be communicated to the Chief Justice of the High Court, the State Government and the Chief Justice of India and in the circumstances, it should ordinarily be possible for the Court to gather from such communication, the reasons which have persuaded the Central Government to take its decision. Of course there may be cases where there are several reasons discussed between the Central Government and the three constitutional authorities and some of these reasons' may be relevant, while some others may be irrelevant and without inquiring into the advice given by the Council of Ministers to President, it may not be possible to determine as to what are the reasons, relevant or irrelevant, which have weighed with the Central Government in taking its decision and in such a case, the Court may not be able to pronounce whether the decision of the Central Government is based on irrelevant grounds. But ordinarily the correspondence exchanged between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India would throw light on the question as to what are the reasons' which have impelled the Central Government to take any particular decision regarding the continuance of an additional Judge. This correspondence would also show whether the "full and detailed facts" on which the decision of the Central Government is based were placed before the Chief Justice of the High Court, the State Government and the Chief Justice of India before they gave their opinion in the course of the consultative process, Of course if the communication between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India has not taken place by correspondence but. has been the subject matter of only oral talk or discussion, it would become impossible for the Court to discover the reasons which have weighed with the Central Government in taking the decision not to continue the additional Judge for a further term, unless of retires the Central Government chooses to disclose such reason and it would also become extremely difficult for the Court to decide whether the "full and detailed facts" on which the decision of the Central Government is based were placed before the other three constitutional authorities and there was full and effective consultation as required by Article 217. The Court would then have to depend only on such affidavits as may be filed before it and the task of the Court to as-certain the truth would be rendered extremely delicate and difficult, as it has been in the writ petitions challenging the transfer of Mr. Justice K.B.N. Singh, Chief Justice of patna High Court. It is not at all desirable that when the Chief Justice of the High Court or the Chief Justice of India has to communicate officially with the State Government or the Central Government in regard to a matter where he is discharging a constitutional function, such communication should be only by way of oral talk or discussion unrecorded in writing. We thank it absolutely essential that such communication must, as far as possible, be in writing, whether by way of a note or by way of correspondence. The process of consultation, whether under Article 217 or under Article 222. must be evidenced in writing so that if at any point of time a dispute arises as to whether consultation had in fact taken place or what was the nature and content of such consultation, there must be documentary evidence to resolve such dispute and an ugly situation should not arise where the word of one constitutional authority should be pitted against the word of another and the Court should be called upon to decide which of them is telling the truth. Oral talk or discussion may certainly take place between the Central Government and any other constitutional authority required to be consulted but if must be recorded immediately either in a note or in correspondence. Besides eliminating future dispute or controversy, the practice of having written communication or record of oral discussion ensures greater care and deliberation in expression of views and considerably reduces the possibility of improper or unjustified recommendations or unholy confabulations or conspiracies which might be hidden under the veil of seereey... there were no written record Moreover, such a practice would tend to promote openness in society which is the hall-mark of a democratic polity. It would indeed be highly regrettable if, instead of following this healthy practice of having a written record of consultation, the Central Government or the Chief Justice of the High Court or the Chief Justice of India were to carry on the consultation process either on the telephone or by personal discussion without rendering it. But we find that fortunately in the present case, unlike K.B.N. Singh's case which falls for determination in the second batch of writ petitions, there was correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the continuance of S.N. Kumar and the question is whether this correspondence forms part of the advice tendered by the Council of Ministers to the President so to be protected against disclosure by reason of Clause (2) of Article 74.

59. The argument of the learned Solicitor General was this correspondence did not form part of the advice tendered by the Council of Ministers to the President and he sought to support this argument by adopting the following process of reasoning. He said that the Council of Ministers cannot advice the President to appoint or not to appoint an additional

Judge for a further term without consulting the Chief Justice of the High Court and the Chief Justice of India. It is only after consulting them that appropriate advice can be tendered by the Council of Ministers to the President. When advice is tendered by the Council of Ministers to the President, it is open to the President under the Proviso to Clause (1) of Article 74 not to immediately accept such advice butte require the Council of Ministers to reconsider the advice generally or otherwise. If in a given case the President finds that advice has been given by the Council of Ministers without consulting either the Chief Justice of the High Court or the Chief Justice of India or both or that there has been no full and effective consultation with them as required by the Constitution, he may and indeed he must, send the case back to the Council of Ministers and requite them to consider the advice after carrying out full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India. Now how can the President satisfy himself in regard to the fulfilment of the constitutional requirement of consultation with the Chief Justice of the High Court and the Chief Justice of India, unless the views expressed by the two Chief Justices are placed before him along with the advice tendered by the Council of Ministers. The exercise of the power of the President to appoint or not to appoint an additional Judge is so integrally connected with the constitutional requirement of full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India that at no stage can it be delinked from the views expressed by them on consultation and it would not be possible for the President to exercise this executive power in accordance with the Constitution unless the views of the two Chief Justices are placed before him. On the basis of this reasoning and as a logical consequence of it, argued the learned Solicitor General, the views of the Chief Justice of Delhi and the Chief Justice of India obtained on consultation must be regarded as forming part of the advice tendered by the Council of Ministers to the President. The learned Solicitor General sought to draw support for his argument from the decision of a Constitution Bench of this Court in the State of Punjab v. Sodhi Sukhdev Singh MANU/SC/0006/1960 . We shall Presently refer to this decision but before we do so, let 115 examine the argument of the learned Solicitor General on principle.

60. There can be no doubt that the advice tendered by the Council of Ministers to the President is protected against judicial scrutiny by reason of Clause (2) of Article 74. But can it be said that the views expressed by the Chief Justice of the High Court and the Chief Justice of India on consultation form part of the advice. The advice is given by the Council of Ministers after consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on "full and identical facts" and their views are obtained and it is after considering those views that the Council of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the formation of the advice and merely because they are referred to in the advice which is ultimately tendered by the Counsel of Ministers, they do not necessarily become part of the advice. What is protected against disclosure under Clause (2) of Article 74 is only the advice tendered by the Council of Ministers. The reasons which have weighed with the Council of Ministers in giving the advice would certainly form part of the advice, as held by this Court in State of Rajasthan v. Union of India MANU/SC/0370/1977 . Vide the observations of Beg C.J. at; p. 46 (of SCR): (at p, 1392 of AIR). Chandrachud J. (as he then was) at page 91 (of SCR): (at p. 1420 of AIR) Fazal Ali, J. at pp. 120 and 121 (of SCR) : (at pp. 1440, 1441 of AIR) where all the three learned Judges took the view that by reason Clause (2) of Article 74 the Court would be barred from inquiring into the grounds which might weigh with the Council of Ministers in advising the President to issue a proclamation under Article 356, because the grounds would form part of the advice" tendered by the Council of Ministers. But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot he sad to form the part of advice, The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law, The judgment would undoubtedly be based on the evidence led before the Court and it would refer to such evidence and discuss it but on that account can it be said that the evidence forms part of the Judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence On which the reasoning and the decision are based would not be part of the judgment Similarly the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly he held to be outside the exclusionary rule enacted in Clause (2) of Article 74.

61. We may now refer to the decision of the Constitution Bench of this Court in the State of Punjab v. Sodhi Sukhdev Singh MANU/SC/0006/1960 (supra) on which the greatest reliance was placed by the learned Solicitor General in support of his plea based on Clause (2) of Article 74. The respondent who was the District and Sessions Judge in the erstwhile state of Pepsu was removed from service by an order dated 7th April 1953 passed by the President who was then in charge of the Administration of the State. The respondent made a representation against the Order of removal which was considered by the Council of Ministers of the State as in the meantime the President's rule had come to an end and the Council of Ministers expressed its views in a Resolution passed on 28th Sept. 1955, But before taking any action it invited the Report of the Public Service Commission. On receipt of the Report of the Public Service Commission the Council of Ministers considered the matter again and ultimately on 11th Aug. 1956 it reached the final conclusion against the respondent and in accordance with the conclusion, the order was passed to the effect that the respondent must be re-employed on some suitable post. The respondent thereupon instituted a suit against the successor State of Punjab for a declaration that his removal from service was illegal and in that suit he filed an application for the

production of certain documents which included inter alia the proceedings of the Council of Ministers dated 28th Sept. 1055 and 11th Aug. 1956 and the Report of the Public Service Commission. The State objected to the production of these documents and ultimately the matter came before this Court. C(SIC)ajen-dragadkar, J. (as he then was) speaking on behalf of the majority of the Court upheld the claim of privilege put-forward on behalf of the State and so far as the Report of the Public Service Commission was concerned, the learned Judge held that it was protected against disclosure both under Clause (3) of Article 163 and Section 123 of the Indian Evidence Act, We are at present concerned only with the claim for protection under Clause (3) of Article 183 because that is an Article which corresponds to Clause (2) of Article 74 in so far as advice by the Council of Ministers to the Governor is concerned. The learned Judge speaking on behalf of the majority, accorded protection to the report of the Public Service Commission under Clause (3) of Article 163 on the ground that it formed part of the advice , tendered by the Council of Ministers to the Rajpramukh. This view taken by the majority does appear prima facie to support the contention of the learned Solicitor General, but we do not think we can uphold the claim for protection Put. forward by the learned Solicitor General by adopting a process of analogical reasoning from the majority view in this decision. In the first place, we do not know what were the circumstances in which the majority Judges came to regard the report of the Public Service Commission, as forming part of the advice tendered to the Rajpramukh. There is no reasoning in the judgment of the learned Judge showing as to why the majority held that the report of the Public Service Commission fell within the terms of Clause (3) of Article 163. The learned Judge has merely set out his ipse dixit, without any reasons at all, saying in just one sentence, "The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers." It is elementary that what is binding on the court in a subsequent case it not the conclusion arrived at in a previous decision but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion. Secondly, we may point out that we find it (SIC)lfrcult to accept the view taken by the majority in this case. We are unable to appreciate how the report of the Public Service Commission which merely formed the material on the basis of which the Council of Ministers came to its decision as recorded in the proceedings dated 11th Aug. 1956 could be said to form part of the advice tendered by the Council of Ministers to the Rajpramukh, We do not think the learned Solicitor General can invoke the aid of this decision in support of his claim for protection under Clause (2) of Article 74.

62. That takes us to the next question whether the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India is protected from disclosure under any other provision of law. We do not have in India any common law protection under the label of "Crown Privilege as it was known a decade ago and now castled "Public interest immunity" as there is in Eng-land and the only provision of law under which such immunity can be claimed is Section 123 of the' Indian Evidence Act and. therefore, it is this provision which we must now turn to consider. But, before we do so, we would like to indicate the socio-political background in the context of which this section has to be interpreted. It is true that this section was enacted in the second half of the 1ast century but its meaning and content cannot remain static. The interpretation of every statutory provision must keep pace with changing concepts and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirements of the fast changing (SIC)octety which is undergoing rapid special and economic transformation. The language of a statutory provision is not a static vehicle of ideas and concepts and as ideas and concepts change, as they are bound to do in a country like ours with the establishment of a democratic structure based on egalitarian values and aggressive developmental strategies, so must the meaning and content of the statutory provision undergo a change. It is elementary that law does not operate in a vacuum. It is not an antique to be taken dawn, dusted admired and put back on the shelf, but rather it is a powerful instrument fashioned by society for the purpose of adjusting conflicts and tensions which arise by reason of clash between conflicting interests. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform, a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonies, the law with the prevailing concepts and values and make it an effective, instrument for delivery of justice. We need not therefore be obsessed with the fact, that Section 123 is a statutory provision of old vintage or that it has been interpreted in a particular manner some two decades ago. It is not as if it has once spoken and then turned into muted silence. It is an instrument which can speak again and in a different voice in the content of a different milieu. Let us therefore try to understand what voice this statutory provision speaks today in a democratic society wedded to the basic values enshrined in the Constitution.

63. Mow it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.

"Knowledge" said James Madison, "will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it. is but a prologue to a farce or tragedy or perhaps both." The citizens' right, to know the facts, the true facts, about, the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world.

64. The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy, does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a moralities content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also emeralds sound judgment on the conduct of the government and the merits of public policies; so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government--an attitude and habit of mind. But this important role people can fulfill in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government,

65. There is also in every democracy a certain amount of public suspicion and distrust of government varying of course from time to time according to its performance, which prompts people to insist upon maximum exposure of its functioning. It is axiomatic that every action of the government must be actuated by public interest but even so we find cases, though not many, where governmental action is taken not for public good but for personal gain 6r other extraneous considerations. Sometimes governmental action is influenced by political and other motivations and pressures arid at tunes, there are also instances of misuse or abuse of authority on the part of the executive, NOW, if secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open government with means, of information available to the public there would be greater exposure of the functioning of government and it would help to assure the people a better and more efficient administration. There can be little doubt that' exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open government is dean government and a powerful safeguard against political and administrative aberration and inefficiency.

66. The Franks Committee of the United Kingdom also observed to the same effect while pleading for an Government. It said in its report at P 12:

A totalitarian government finds it easy to maintain secrecy. It does not come into the open until it chooses to declare its settled intentions and demand support for them. A democratic government, however, though it must compete with these other types of organisation, has a task which is complicated by its obligations to the people. It needs the trust of the governed. It. cannot, use the plea of secrecy to hide from the people its basic aims. On the contrary it must explain these aims: it must provide the justification for them and give the facts both for and against a selected course of action. Now must such information be provided only at one level and through one means of communication? A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propaganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy and they will disclose all that they can by whatever means, discover. As a result matters will be revealed when they ought to remain secret in the interests of the nation.

So also we find observations in the same strain by Mathew, J. in State of Uttar Pradesh v. Raj Narain MANU/SC/0032/1975

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets, The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate have no repercussion on public security. To cover with veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. Is generality derided for the (SIC) of parses and (SIC) interest or (SIC)the responsibility of (SIC)expioin and to justify there acts is the chief safeguard against oppression and corruption.

The need for an open Government where there is access to information in regard to the functioning of government has been emphasised and the arg(SIC)ments in support of it have been ably and succinctly summarised in the following passage from the book of Dr. S.R. Maheshwari on "Open Government in India" at pages 95 and 96:

Administrative India puts the greatest weight on keeping happening with-in its corridors secret, thereby denying the citizens access to information about them.

Such orientations produce deep contradictions in the larger socio-political system of the land which itself is in a state requiring nourishment and care, As the latter is still relatively new and in its infancy, its growth processes inevitably get retarded for want of information about the Government, which means from the Government. Over-concealment of governmental information creates a communication gap between the governors and the governed, and its persistence beyond a point is apt to create an alienated citizenry. This makes democracy itself weak and insecure. Besides, secrecy renders administrative accountability unenforceable in an effective way and thus induces administrative behavior which is apt to degenerate into arbitrariness and absolutism. This is not all.

The Government, today, is called upon to make policies on an ever increasing range of subjects, and many of these policies must necessarily Impinge on the lives of the citizens. It may sometimes happen that the data made available to the policymakers is of a selective nature, and even the policymakers and their advisers may deliberately suppress certain view points and favour others. Such bureaucratic habits get encouragement in an environment of secrecy; and openness in governmental work is possibly the only effective corrective to it, also raising, in the process, the quality of decision making. Besides, openness has an educational role inasmuch as citizens arnabled to acquire a fuller view of the pros and cons of matters of major importance, which naturally helps in building informed public opinion, no less than goodwill for the Government

This is the new democratic culture of an open society towards which every liberal democracy is s(SIC)ioving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest. It is in the context of this background that we must proceed to interpret Section 123 of the Indian Evidence Act.

67. We might begin by reproducing Section 123 which reads as follows:

Section 123 : Evidence as to affairs of State -- No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

It is also necessary for arriving at a proper interpretation of Section 123 to refer to Section 162 which says:

Section 162. Production of documents -- A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.

The court, if sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents -- If for such a purpose it is necessary to causing document to be translated, the court may, if it thinks fit. direct the translator to keep the contents secret, unless the document is to be given in evidence and if the interpreter disobeys such directions, he shall be held to have committed an offence under Section 166 of the Indian Penal Code, 1860 (45 of 1860).

These two sections came up for consideration for the first time before this Court in State of Punjab v. Sodhi Sukhdev Singh MANU/SC/0006/1960 (supra). Gajendragadkar, J. (as he then was), speaking on behalf of him-self, Sinha, C.J. and Wanchoo, J. pointed out that the principle behind the exclusionary rule enacted in Section 123 is that a document should not be allowed to be produced in court if such production would cause injury to public interest and where a conflict arises between public interest in non-disclosure and private interest in disclosure, the latter must yield to the

former. The learned Judge emphasized that though Section 123 does not expressly refer to injury to public interest, that principle is obviously implicit in it and indeed it is the sole foundation and proceeded to add that even though administration of justice is a matter of very high public importance, if there is a real "conflict between public interest and the interest of an individual in a pending case, it may reluctantly have to be conceded that the interest of the individual cannot prevail over the public interest." Now we agree with the learned Judge that public interest lies at the foundation of the claim for protection against disclosure enacted in Section 123 and it seeks to prevent production of a document where such production would cause public injury but we do not think the learned Judge was right in observing that the interest which comes into conflict with the claim for non-disclosure is the private interest of the litigant in disclosure, It is rather the public interest in fair administration of justice that comes into dash with the public interest sought to be protected by nondisclosure and the court is called upon to balance these two aspects of public interest and decide which aspect predominates. We shall have to discuss this problem of balancing different aspect of public interest a little later, but in the meanwhile let us continuith the examination of the decision in Sukhdev Singh's case (supra). Gajendragadkar, J. (as he then v/as) after pointing out that public interest was the sole foundation for the claim for protection under Section 123 proceeded to consider when a document can be said to be relating to "affairs of State" within the meaning of that section. The learned Judge observed that three different views are possible on this question. The first view is that documents relating to affairs of State are broadly divisible into two classes, one the disclosure of which will cause no injury to public interest and which may therefore be described as innocuous documents and the other the disclosure of which may cause injury to public interest and may therefore be described as noxious documents; it is the head of the department who decides to which class the document in respect of which the claim for protection against disclosure is made, belongs; if he comes to the conclusion that the document is innocuous, he will give permission for its production; if, however, he comes to the conclusion that the document is noxious, he will withhold such permission; in any case the court does not materially come into the picture. The second view is that documents relating to affairs of State should be confined only to the class of noxious documents and when a question arises, it is for the court to deter mine the character of the document and if necessary, to enquire whether its disclosure would lead to injury to public interest, The third view which does not accept either of the two extreme positions would be that the court can determine the character of the document and if it comes to the conclusion that the document belongs to the noxious class, it may leave it to the head of the department to decide whether its production should be permitted or not, for it is not the policy of Section 123 that in the case of every noxious document, the head of the department must always withhold permission. The learned Judge then proceeded to consider which of the three views represents the correct legal position and for that purpose, turned to examine Section 162 and after discussing the true import of that section and holding that where an objection to the disclosure of a document is raised under Section 123 on the ground that it relates to affairs of State toil cannot (SIC)pect the (SIC)dreaming for the purpose of deciding the objection, the learned juge(SIC) accepted the third view as courecs and sammarised his conclusion in the following words:

Thus our concussion is that reading Sections 123 and 162 together the court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the (SIC)rsa-thority concerned to decide; but the Court is competent, and indeed is bond to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry in the question as to whether the evidence relates to an affairs of State under Section 123 or not.

In this enquiry the court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not.

The learned Judge thus took the view in no uncertain terms that documents relating to affairs of State are documents belonging to the noxious class, that is, documents which by reason of their contents or the class to which they belong, are such that disclosure may cause injury to public interest. The learned Judge agreed that it is for the court to determine whether a particular document in respect of which the claim for non-disclosure is made is a document relating to affairs of the State or in other words, it is a document falling within the noxious class, but introduced a serious impediment in the way of the court making such determination by holding that the court cannot for this purpose inspect the document or hold "an enquiry into the possible injury to public interest which may result from the disclosure of the document." Now, if the court has no power to inspect the document, it is difficult to understand how the court can find, without conducting an enquiry as regards the possible effect of the disclosure of the document upon public interest, that the document is one relating , to affairs of State, as ex hypothec document can be said to relate to affairs of State only if its disclosure will cause injury to public interest. It right be that there are certain classes of decrements which are of such a (SIC)araeter that even without inspecting them or cedictomg an enquiry, it might be possible to say that by virtue of their character, their diselosure would be injurious to public interest and therefore they are documents relating to affairs of State. But. there might be other documents which do not fall within (SIC)tais description and yet whose discloiure might be injurious to public interest and in case of such documents it would not be

possible for the court without inspecting them or at any rate without holding an enquiry, to determine whether their disclosure would be injurious to public interest and they should therefore be classified as documents relating to affairs of State. Even so, according to Gajendragadkar, J. and the other learned Judges, the court can and must determine whether such documents relate to affairs of State without inspecting them and without even holding an enquiry into the possible injury to public interest which might result from their disclosure. The view taken by Gajendragadkar, J. and the other learned Judges in Sodhi Sukhdev Singh's case MANU/SC/0006/1960 (supra) thus runs into an inconsistency and creates an illogical situation.

68. There is also another infirmity from which the view taken in Sodhi Sukhdev Singh's case (supra) suffers. Gajendragadkar, J. speaking on behalf of himself and the other learned Judges observed that when an objection against the disclosure of a document is raised under Section 123, the court must first determine the character of the document and if it conies to the conclusion that the document relates to affairs of State, it should leave it to the Head of the department to decide whether he should permit its production of not. Now even according to Gajendragadkar, J. and the other learned Judges, a document can be said to relate to affairs of State only if it is a document of such a character that its disclosure will injure public interest and therefore the court would have to reach the conclusion that the disclosure of the document will be injurious to public Interest before it can find that the document related to affairs of State. If that be to is difficult to understand, after the court has enquired into the objection and come to the couelusiori that disclosure of the document would be injurious to public interest, what purpose would be served by reserving to the head of the department the power to permit its disclosure, because the question to be decided by him would practically be the same, namely, whether disclosure of the document would be injurious to public interest--a question already decided by the court. In other words, if injury to public interest is the foundation of this immunity from disclosure, when once the court has inquired into the question and found that the disclosure of the document will injure public interest and therefore it is a document relating to affairs of State, it would in most cases be a futile exercise for the head of the department to consider and decide whether its disclosure should be permitted as he would be making an enquiry into the identical question. There may be a few rare cases where in regard to a document which by reason of the class to which it belongs may be regarded as relating to affairs of State, the head of the department may be able to take the view that though it belongs to the noxious class, its disclosure would not be injurious to public interest and therefore allow it to be disclosed. But, by and large, once the court has found that the document is of such a character that its disclosure will cause injury to public interest, it would be futile to leave it to the head of the department to decide whether he should permit its production or not. We are therefore unable 1o accept the decision in Sodhi Singh's case MANU/SC/0006/1960 (supra) as laying down the correct law on this point. The court would allow the objection if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest in the administration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document. The basic question to which the court woulherefore have to address itself for the purpose of deciding the validity of the objection would be whether the document relates to affairs of State or in other words, it is of such a character that its disclosure would be against the interest of the State or the public service and if so, whether the public interest in its non-disclosure is so strong that it must prevail over the public interest in the administration of justice and on that account, it should not be allowed to be disclosed. The final decision in regard to the validity of an objection against disclosure raised under Section 123 would always be with the court by reason of Section 162.

69. Now an objection against the disclosure of a document on the ground that it relates to affairs of State may be made before the court either because it would be against the interest of the State or the public service to disclose its contents or because it belongs to a class of document which in the public interest ought not to be disclosed, whether or not it would be harmful to disclose the contents of the particular document. Where immunity from disclosure is claimed on the ground that disclosure of the contents of the document would be injurious to the interest of the State or the public service it would not be difficult to decide the claim because it would almost invariably be supported by an affidavit made either by the Minister or -by the head-of the department and if the Minister or the head of the department asserts that to disclose the contents of the document "would or might do to the nation or the public service a grave injury, the court will be slow to question his opinion or to allow any interest, even that of justice, to prevail over it" unless there can be shown to exist some factor suggesting either lack of good faith or an error of judgment or an error of law on the-part of the minister or the head of the department. But, even in such cases it is now well-settled that the court is not bound by the statement made by the minister or the head of the department in the affidavit and it retains the power to balance the - injury to the State or the public service against the risk of injustice, before reaehing its decision. Vide observations of Lord Scarman in Burma Oil v. Bank of England (1970) 3 All ER 700 at p 732. But the claim in the present case to withold disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi. High Court and the Chief Jastice of India in regard to can-tinuonce of S.N. Kumar is not based on the ground that the contents of these particolar documents are such that their discinsure would barm the na(SIC)onat interest or the interemr of public service. The claion put forwaud by the learned Solicitor General on behalf of the Union of India is that these documents are entitled to immunity from disclosure because they belong to a class of documents, which it

would be against national interest or the interest of the judiciary to disclose. It is settled law, and it was so clearly recognised in Raj Narain's case MANU/SC/0032/1975 (supra) that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level interdepartmental communications and dispatches from ambassadors abroad (vide : Conway v. Rimmer, 1968 AC 910 at pp. 952, 973, 979, 987 and 993 and Reg v. Lewes J.K. Ex parte Home Secy., 1973 AC 388 at p. 412). Papers brought into existence for the purpose of preparing a submission to cabinet (vide Commonwealth Lanyon Property Ltd. v. Commonwealth. 129 LR 650) and indeed any documents which relate to the framing of government policy at a high level (vide : Re Grosyenor Hotel. London). It would seem that according to the decision in Sodhi Sukhdey Singh's case AIR 1961 SC 4931 (supra) this class may also extend to "notes and minute made by the pespective officers on the relevant files, information expressed or reports made and gist of official decisions reached" in the course of determination of questions of policy Lord Reid in Conway v. Rimmer (supra) at page 952 proceeded also to include in this class "all documents concerned with policy-making within departments including, it may be minutes and the fire by quite junior officials and correspondence with outside bodies". It is not necessary for us for the purpose of this case to consider what documents legitimately belong to this class so as to be entitled to immunity from disclosure, irrespective of what they contain. But. it does appear that canbinet, papers, minutes of discussions of heads of departments and high level documents relating to the inner working of the government machine or Concerned with the framing of government policies belong to this class which in the public interest must be regarded as protected against disclosure,

70. Now, one reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions and the possibility that documents night ultimately be published might affect the frankness and candour of those preparing them. This reason based on the need for frankness and candour, though suggested by some Judges, has not found universal acceptance. In Conway v. Rimmer 1968 AC 910 (supra) Lord Reid dismissed the "candour argument" summarily at page 952 and Lord Upjohn pointed out at page 993 that immunity of this class of documents against disclosure has nothing whatever to do with candour or uninhibited freedom of expression", for it is not possible to believe "that any minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies, of some colleague, by the thought that his observation might one day see the light of day." Lord Morrieg of Borth-Y-Gest also said in the same case at page 957:

in many decided cases there have been references to a suggestion that, ihere were knowledge that certair documents (for example reports) might in some circumstances be seen by eyes for which they were never intended, the result would be that in the making of similar documents in the future candour would be lacking. Here is a sug-ge-'tion of doubtful validity. Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated." Lord Radcliffe also remarked in Glasgow Corporation v. Central Land Board, 1956 SC (HL) 1 at p. 20 that he would have supposed Crown servants to be "made of sterner stuff", a view shared by Harmen L.J. in the Grosvenor Hotel case at page 1255. Lord Salmon too rejected the "candour theory" in Reg v. Lewes Justices; Ex parte Secretary of State for Home Doptt (1073 AC 388) (supra) at p. 433 by referring to it as "the old fallacy" that "any official in the government service would be inhibited from writing frankly and possibly at all unless he could be sure that nothing which he wrote could ever be exposed to the light of day". The candour argument has also not prevailed with Judges and jurists in the United States and it is interesting to note what Raoul Berger while speaking about the immunity claimed by President Nixon against the demand for disclosure of the Watergate Tapes, says in his book "Executive Privilege": A Constitutional Myth" at page 264:

Candid interchange" is yet another pretext for doubtful secrecy. It will not explain Mr. Nixon's claim of blanket immunity for members of his White House staff on the basis of mere membership without more; it will not justify Kleindienst's assertion of immunity from congressional inquiry for two and one-half million federal employees. It is merely another testimonial to the greedy expansiveness of power, the costs of which patently outweigh its benefits. As the latest branch in a line of illegitimate succession, it illustrates the execss bred by the claim of executive privitege.

We agree with these learned Judges that the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbos A.C.J. in Sarikey v. Whitlam

(supra), it would not be altogether unreal to suppose "that in some matters at least communications between ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure" because not all Crown servants can be expected to be made of "sterner stuff". The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it (vide: the observations of Lord Denning in Neilson v, Lougharre (1981) 1 All ER at P. 835.

71. There was also one other reason suggested by Lord Reid in Conway v. Rimmer 1968 AC 910 (supra) for according protection against disclosure of documents belonging to this case: "To my mind", said the learned Law Lord : "the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind." But this reason does not commend itself to us. The object of granting immunity to documents of this kind is to ensure the proper working of the government and not to protect the ministers and other government servants from crit-cism however intemperate and unfairly based. Moreover, this reason can have little validity in a democratic society which believes in an open government. It is only through exposure of its functioning that a democratic government can hope to win the trust of the people. If full information is made available to the people and every action of the government is bona fide and actuated only by public interest, there need be no fear of "ill-informed or captious public or political criticism". But at the same time it must be conceded that even in a democracy, government at a high level cannot function without some degree of secrecy. No minister or senior public servant can effectively discharge the responsibility of his office if every document prepared to enable policies to be formulated was liable to bo made public. It is there-fore in the interest of the State and necessary for the proper functioning of the public service that some protec-tion be afforded by law to documents belonging to this class. What is the measure of this protection is a matter which we shall immediately proceed to discuss.

72. We have already pointed out that whenever an objection to the disclosure of a document under Section 123 is raised, two questions fall for the determination of the court, namely, whether the document relates tq affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the non-disclosure would thwart the administration of justice by keeping back from the court a material document. There are two aspects of public interest clashing .with each other out of which the court has to decide which predominates. The approach to this problem is admirably set out in a passage from the judgment of Lord Reid in Con way v. Rimmer 1968 AC 910 (supra)

It is universally recognised that there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the witholding of documents; which must be produced if justice is to be done. There are many cases where the nature of the injury which would of might be done to the nation, or the public service is of so grave a character that no other interest, public Or private, can be allowed to preyail ovet. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the docu-ment in question, would put the interest of the State in jeopardy. But there are many other eases where the posseble injury to the public service is much less and there one would think that it would he proper to balance the public interests involved.

The court has to balance the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-disclosure of the document though relevant to the proceeding. Vide the observations of Lord Pearson in Reg, v. Lewes JJ. Ex parte Home Secy 1973 AC 388 (supra) at page 406 of the report. The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence. The court has thus to perform a balancing exercise and after weighing the pne competing aspect of public interest against the other, decide where the balance lies. If the court comes to the conclusion that, on the balance, the disclosure of the document would cause greater injury to public interest than its non-disclosure, the court would uphold the objection and not allow the document to be disclosed but if, on the other hand, the court finds that the balance between competing public interests lies the other way, the court would order the disclosure of the document. This balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class. Even in Conway v. Rimmer at P. 952, Lord Reid recognised an exception that cabinet minutea and the like

can be disclosed when they have become only of historical interest, and in Lanyon Pvt. Ltd. v. Commonwealth (129 Commonwealth LR 650) (supra) Menzies J, agreed that there might be "very special circumstances" in which such documents might be examined. Lord Scarman also pointed out in the course of his speech in Burmah Oil v. Bank of England 1979-3 All ER 700 (supra) that he did not accept "that there are any classes of documents which, however harmless their content and however strong the requirement of justice, may never be disclosed until they are only of historical interest". The learned Law Lord said and we are quoting here his exact words since they admirably express our own approach to the subject:

But, is the secrecy of the inner workings of the government machine so vital a public interest that it must prevail over even the most imperative demands of justice ? If the contents of a document concern the national safety, affect diplomatic relations or relate to some state secret of high importance, I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret government that it must be protected even at the price of injustice in our courts?

The reasons given for protection the secrecy of government at the level of policy making are two. The first is the need for candour in the advice offered to Ministers; the second is that disclosure 'would create or fan ill-informed or captious public or political criticism,' Lord Reid in Con way v. Rimmer thought the second "the most important reason'. Indeed, he was inclined to discount the candour argu-nent. I think both reasons are factors legitimately to be put into the balance which has to be struck between the public interest in the proper functioning of the public service (i. e. the executive arm of the government) and the public interest in the administration of justice, Sometimes the public service reasons will be decisive of the issue; but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be dis-closed."

The same view was expressed by Gibhs A.C.J. in Sankey v. Whitlam (supra) 1982 S. C./16 II G-8 where the learned acting Chief Justice said:

I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with special care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it will not treat all such documents as entitled to the same measure of protection -- the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned.

There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to any one by withholding relevant evidence. This is a balancing task which has to be performed by the Court in all cases.

73. What should be the technology and methodology of this balancing task is a matter which we shall presently examine. But, before we do so, it is necessary to point out that class immunity is not confined merely to that class of documents in respect of which nondisclosure is really necessary for the proper functioning of the public service, though mostly it is in respect of documents falling within this class that the claim for class immunity is usually made. There is also another class of documents which has always been recognised by the Court as entitled to the same immunitnd that class consists of documents evidencing the sources from which the police obtain information. Now we agree with the learned Counsel on behalf of the petitioners that this immunity should not be lightly extended to any other class of documents, but, at the same time, boundaries cannot be regarded as immutably fixed. The principle is that whenever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from discolsure. If a new class comes into existence to which this principle applies, then that class would enjoy the same immunity. This is the basis on which in Reg. v. Lewes, JJ. Ex parte Home Secy. 1973 AC 388 (supra) the House of Lords extended this immunity to a new class of documents, namely, all such documents as were supplied to the Gaming Board and related to the "character, reputation and financial standing... of the applicant". Lord Reid pointed out in that case that the claim for protection made on behalf of the Gaming Board was not based on the contents of the particular letter of which disclosure was sought by the appellant, but it was "based on the fact that the Board cannot adequately perform their statutory duty unless they can preserve the confidentiality of all communications to them regarding the character, reputation or antecedents of applicants for their consent". The learned Law Lord posited the question for consideration in the following words: "Here the question is whether the withholding of this class of documents is really necessary to

enable the Board adequately to perform its statutory duties" and proceeded to hold that "if there is not to be very serious danger of the Board being deprived of information essential for the proper performance of their task, there must be a general rule that they are not bound to produce any document which gives information to them about any applicant". Lord Morris of Borth-Y-Gest also observed to the same effect at p. 405 of the Report:

However honourable and public spirited a person might be, he would undoubtedly feel somewhat inhibited in the future if he found that as a result of his last response to a request for information he had himself become a defendant or an accused. The test, however, is not in personal terms. It rests upon a consideration of the necessities of the public service arising out of the rather speciauties and functions imposed and recognised by Parliament." The House of Lords accordingly held that "on balance the public interest clearly requires that documents of this kind should not be disclosed" and thus upheld the claim of immunity in respect of the letter which gave information to the Gaming Board about the character, reputation and antecedents of the appellant. The question is whether immunity of this kind -- what we have described as class immunity -- should be extended to the class of documents consisting of correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court and the Chief Justice of India in regard to appointment or non-appointment of a High Court or Supreme Court Judge.

74. Now we may conveniently at this stage consider the question as to how a claim for immunity against disclosure should be raised under Section 123. It is necessary to repeat and re-emphasize that this claim of immunity can be justifiably made only, if it is felt that the disclosure of the document would be injurious to public interest. Where the State is a party to an action in which disclosure of a document is sought by the opposite party, it is possible that the decision to withhold the document may be influenced by the apprehension that such disclosure may adversely affect the head of the department or the department itself or the minister or even the Government or that it may provoke public criticism or censure in the legislature or in the press, but it is essential that such considerations should be totally kept out in reaching the decision whether or not to disclose the document. So also the effect of the document on the ultimate course of the litigation whether its disclosure would hurt the State in its defence -- should have no relevance in making a claim for immunity against disclosure. The sole and only consideration must be whether the disclosure of the document would be detrimental to public interest in the particular case before the Court. It has therefore been held since long before Conway v. Rimmer 1968 AC 910 (supra) was decided in England and since the decision in Sodhi Sukhdev Singh's case MANU/SC/0006/1960 (supra) in India that a claim for immunity against disclosure should be made by the minister who is the political head of the department concerned or failing him, by the secretary of the department and the claim should always be made in the form of an affidavit. Where the affidavit is made by the secretary, the Court may in an appropriate case require an affidavit of the minister concerned. The affidavit should show that the document in question has been carefully read and considered and the person making the affidavit has formed the view that the document should not be disclosed either because of its actual contents or because of the class of documents to which it belong. If in a given case no affidavit is filed or the affidavit filed is defective, the Court may give an opportunity to the State to file a proper affidavit. The reason is that the immunity against disclosure claimed under Section 123 is not a privilege which can be waived by the State. It is an immunity which is granted in order to protect public interest and therefore even if the State has not filed an affidavit or the affidavit filed is not satisfactory, the court cannot abdicate its duty of deciding whether the disclosure of the document in question would be injurious to public interest and the document should not therefore be allowed to be disclosed. That is why in England this immunity is no longer described as "Crown Privilege" but is called "public interest immunity". This aspect of the immunity was emphasized by Lord Reid in Reg v. Lewes Ex parte Home Secretary (1973 AC 388) (supra) where the learned Law Lord observed that the expression 'Crown Privilege' is wrong and may be misleading and there is no question of any privilege in the ordinary sense of the word, as the real question is whether the public interest requires that the document shall not be produced. Lord Simon of Glaisdale also pointed out in the same case; "Crown privilege is a misnomer and apt to be misleading. It refers to the rule that certain evidence is inadmissible on the ground that its adduction would be contrary to the public interest... it is not a privilege which may be waived by the Crown or by anyone else", It is therefore clear that if a document is entitled to immunity against disclosure, it cannot be adduced in evidence by either party and even if neither of the parties claims such immunity, the Judge himself must take the objection for the rule that the public interest must not be put in jeopardy by the disclosure of a document which would injure it, is one upon which the courhould, if necessary, insist, even though no objection has been taken by any party or by any government department. In Conway v. Rimmer 1968 AC 910 (supra) Lord Reid said that it is the duty of the Court to prevent the disclosure of a document without the intervention of any minister, "if possible serious injury to the national interest is readily apparent". In Reg v. Lewes Ex parte Home Secy. 1973 AC 388 (supra) Lord Simon of Glaisdale pointed out that even a litigant or a witness may draw the attention of the Court to the nature of the document with a view to its being excluded Since the immunity is founded on public interest, it is necessary that the court should have the power and the duty to prevent the disclosure of a document when it would be injurious to public interest to disclose it, even if the proper procedure for objection by or on behalf of the minister or the secretary has not been followed. The Court must intervene proprio motu if it appears that the public interest requires the document to be protected from disclosure,

75. This being the correct legal position, it is immaterial whether in the present case appropriate affidavit claiming immunity was filed on behalf of the Union of India. The learned Attorney General sought to tender on an affidavit sworn by Burney, the then Secretary to the Home and Judiciary Department claiming immunity against disclosure in respect of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to the non-appointment of S.N. Kumar but since the affidavit was sworn on 7-9-1981 and yet not tendered until 16-9-1981 even though the arguments had begun long back, we expressed our displeasure at the delay in filing the affidavit whereupon the learned Attorney General stated that he would not rely upon the affidavit. Thereafter when the learned Counsel for S.N. Kumar sought answers to certain querries in regard to this correspondence, the learned Attorney General filed an affidavit sworn by T.N. Chaturvedi, Secretary to the Home and Judiciary Department claiming protection against disclosure of this correspondence, strong objection was taken to the filing of this affidavit by the learn-ed counsel on behalf of the petitioners ana S.N. Kumar on the ground that the learned Attorney General having made a statement that he would not rely upon previous affidavit, it was not competent and in any event not proper (or the Union of India to file trie affidavit of T.N. Chatur-vedi which was almost in the same terms as the previous affidavit. But we overruled this objection, because, as would be clear from what we have discussed bove, even if no affidavit were filed earher on behalf of the Union of India claim-Ing immunity against disclosure, the Union of India could always file an affidavit claiming such immunity at any stage before the claim for immunity was considered and decided by the court -and once the claim for immunity was raised the court could also on its own direct the Union of India to file a proper affidavit, if no such affidavit were already filed. We therefore took the affidavit of T.N. Chaturvedi on file and allowed the Union of India to rely upon it. We may point out that even if this affidavit had not been filed, the Court would still have had to consider on the basis of the other material before it including the nature of the correspondence whether its disclosure would be injurious to public interest and hence it should not be allowed to be disclosed.

76. We may also point out that we were invited to inspect for ourselves the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India for the purpose of deciding whether that correspondence was entitled to immunity against disclosure. Now the view taken in Sodhi Sukhdev Singh's case MANU/SC/0006/1960 was that where an objection is raised against the disclosure of a document under Section 123, the Court has no power to inspect the document under Section 162 for the purpose of deciding the ob-jectien. But with the greatest respect to the learned Judges who decided that case, we do not think this view is correct and in fact subsequent decisions of this Court seem to be against it. So far as English Law is concerned it is now well-settled as a result of the decision of the House of Lords in Conway v. Rimmer 1968 AC 910 (supra) that there is a residual power in the Court to inspect the document. If the Court finds it necessary to do so for the purpose of deciding whether on balance the disclosure ef the document would causa greater injury to public Interest than its non-disclosure. Vide Conway v. Rimmer (supra) at pages 953, 979, 981 and 993. This residual power of the Court to inspect the document has also beeecognised in Australian Law by the decision of the High Court of Australia in Sankey v, Whitlam (21 Aus. L.R. 505). We do not see any reason why under Indian Law the Court should be denied this residual power to inspect the document. It 19 true that under Section 162 the Court cannot inspect the document if it relates to affairs of Stale, but this bar comes into operation only if the document is established to be one relating to affairs of State. If, however, there is any doubt whether the document does relate to affairs of State, the residual power which vests in the Court to inspect the document for the purpose of determining whether the disclosure of the document would be injurious to public interest and the document is therefore one relating to affairs of State, is not excluded by Section 162. This Court in fact held in no uncertain terms in Raj Narain's case MANU/SC/0032/1975 (supra) where an objection against the disclosure of the Blue Book was taken on behalf of the State under Section 123, that if the Court was not satisfied with the affidavit objecting to the disclosure of the document, the Court may inspect the document. Ray, C.J, observed at two places while dealing with the objection against the disclosure of the Blue Book under Section 123 that "If the Court would yet like to satisfy itself, the Court may see the document. This will be the inspection of the document by the Court," and "If the Court in spite of the affidavit wishes to inspect the document, the Court may do so." M athew, J. also pointed out that in Amarchand Butail v. Union of India MANU/SC/0330/1964 this Court inspected the document in order to see whether it related to affairs of State, There can therefore, be no doubt that even where a claim for immunity against disclosure of a document is made under Section 123, the Court may in an appropriate case inspect the document in order to satisfy itself whether its disclosure would, in tha particular case before it, be injurious to public interest and the claim for immunity must therefore be upheld. Of course this power of inspection is a power to be sparingly exercised, only if the Court is in doubt, after considering the affidavit, if any, filed by the minister or the secretary, the issues in the case and the relevance of the document whose disclosure is sought. Since, in the present case, the affidavit of T.N. Chaturvedi claiming immunity against disclosure waade at a late stage of the proceedings and the claim for immunity was in respect of a new class of documents which has so far not come up for judicial conr sideration and we were in doubt, even after considering the affidavit, whether the correspondence whose disclosure was sought on behalf of the petitioners and S.N. Kumar was of such a character that its disclosure would, on an overall view after weighing the two aspects of public interest referred to above, be injurious to public interest, we inspected the correspondence for ourselves for tha purpose of deciding whether or not it should be ordered to be disclosed.

77. Now as we have already pointed out above, it is for the court to decide the claim for immunity against disclosure made under Section 123 by weighing the competing aspects of public interest and deciding which, in the particular casa before the court, predominates, Tha court is not bound by the affidavit made by the minister or the secretary be-cause the minister or the secretary would be concerned primarily and almost exclusively with the assertion of tha public interest which would be injured by the disclosure of the document and he would have very little concern, if at all, with the public interest in the fair administration of justice and in fact he would not be in a position to appreciate and assess the relative importance of the two competing public interest so as to be able to judge as to which in the particular case before the Court should be allowed to prevent. What should be tha relative weight to be attached to each aspect of public interest is a question which the court would be best qualified to decide and not the minister or the secretary. That is why in Conway v. Rimmer 1968 AC 910 (supra) Lord Reid, while rejecting the notion that a minister's claim of immunity was conclusive, pointed out at page 943 that the minister who withholds production of a document has no duty to consider the degree of public interest involved in a particular case in frustrating the due administration of justice, it not mattering to the minister at all whether the result of withholding the document would merely be to deprive a litigant of some evidence on a minor issue in a case of little importance or on the other hand, to make it impossible to do justice in a case of the greatest importance. The court would of course consider the affidavit made by the minister or the secretary and give it due weight and importance, but ultimately it is the court which will have to determine which aspect of public interest must prevail and whether the claim for immunity against disclosure should be upheld or not. This was most felicitously expressed by Lord Radcliffe in the Scottish appeal of Glasgow Corporation v. Central Land Board 1956 SC (HL) 1 (supra) where the learned Law Lord said:

The power reserved to the court is therefore a power to order production even though the public interest is to some extent affected prejudicially. This amounts to a recognition that more than one aspect of the public interest may have to be surveyed in .reviewing the question whether a document which would be available to a party in a civil suit between private parties is not to be available to the party engaged in a suit with the Crown. The interests of government, for which the Minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that impartial justice should be done in the Courts of law, not least between citizen and Crown, and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason. It does not seem to me unreasonable to expect that the court would be better qualified than minister to measure the importance of such principles in application to the particular case that is before it.

Mathew, J, also observed to the same effect in his concurring opinion in Raj Narain's case MANU/SC/0032/1975 (supra):

The claim of the executive to exclude evidence is more likely to operate to subserve a partial interest, viewed exclusively from a narrow departmental angle. It is impossible for it to see or give equal weight to another matter, namely, that justice should be done and seen to be done. When there are more aspects of public interest to be considered, the court will, with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates.

The court will therefore have to put in the scales against the injury to public interest which may be caused by this closure of the document, the likely injury to the cause of injustice by non-disclosure and both will have to be assessed and weighed and it will have to -be determined on which side the balance tilts.

78. Now obviously the weight of the likely injury to the cause of justice will vary according to the nature of the proceeding in which the disclosure is sought, the relevance of the document and the degree of likelihood that the document will be of importance in the litigation, The particular nature of the proceeding and the importance of the document in the determination of the issues arising in it are vital considerations to be taken into account in determining what are the relevant aspects of public interest which are to be weighed and what is the outcome of that weighing process. Perhaps the most striking example of the way in which the nature of the case will bear upon the judicial process of weighing aspects of public interest is afforded by the well recognised rule that where a document is necessary to support the defence of an accused person whose liberty is at stake in a criminal trial, it must be disclosed whatever be the nature of the document, because, as observed by Lord Simon of Glaisdale in D. V. National Society for the Prevention of Cruelty to Children (1977) 2 WLR 201 (207) "the public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest" which might be injured by the disclosure of the document. Lord Keith also emphasized the necessity of taking the particular nature of the proceeding into account in the balancing process, when he said in Glasgow Corporation v, Central Land Board 1956 SC (HL) 1 (supra) that "everything must depend on the particular circumstances of the case. It is impossible to lay down broad and general rules." So also a Sankey v. Whitlam (supra) the High Court of" Australia pointed out that the character of the proceeding in which the claim for immunity against disclosure is raised and the importance of the document in the determination of the issues arising in the proceeding are of extreme relevance in deciding which way the balance of

public interest lies. There, the question was whether in a proceeding alleging offences against Mr. Whitlam, a former Prime Minister and others, certain papers and documents which wear relevant the issues arising in the proceeding were entitled to public interest immunity so as to be protected against disclosure. The High Court of Australia negatived the claim for immunity and in the course of his judgment, Stephen, J. laid the greatest stress on the character of the proceeding and pointed out its triple significance in the determination of the claim:

First, it makes it very likely that, for the prosecution to be successful, its evidence must include documents of a class hitherto regarded as undoubtedly the subject of Crown privilege. But then to accord privilege to such documents as a matter of course is to come close to com furring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices. Those in whom resides the power ultimately to decide whether or not to claim privilege will in fact be exercising a far more potent powers by a decision to claim privilege dismissal of the charge will be well-nigh ensured, Secondly, and assuming for the moment that there should prove to be any substance in the present charges, their character must raise doubts about the reasons customarily given as justifying a claim to Crown privilege for classes of documents, being the reasons in fact relied upon in this case. Those reasons, the need to safeguard the proper functioning of the executive arm of government and of the public service, seem curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges; inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it. Thirdly, the high offices which were occupied by those charged and the nature of the conspiracies sought to be attributed to them in those offices must make it a matter of more than usual public interest that in the disposition of the charges the course of justice be in no way unnecessarily impeded. For such charges to have remained pending and unresolved for as long as they have is bad enough; if they are now to be met with a claim to Crown privilege, invoked for the protection of the proper functioning of the executive government, some high degree of public interest for non-disclosure should be shown before the privilege should be accorded.

The nature of the proceeding in which the claim for immunity arose was regarded as an important factor influencing the decision of the Court in rejecting the claim and ordering production of the documents. It would thus seem clear that in the weighing process which the court has to perform in order to decide which of the two aspects of public interest should be given predominance, the character of the proceeding, the issues arising in it and the likely effect of the documents on the determination of the issues must form vital considerations, for they would affect the relative weight to be given to each of the respective aspects of public interest when placed in the scales,

79. Bearing these observations in mind, we must now proceed to examine the claim for immunity against disclosure in respect of the correspondence between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to non-appointment of S.N. Kumar. It was a class immunity which was claimed in respect of this correspondence and the protected class was said to consist of correspondence between the Law Minister or other high level functionary of the Central Government the Chief Justice of the High Court, the Chief Minister or the Law Minister of the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or a Supreme Court Judge or transfer of a High Court Judge and the nothings made by these constitutional functionaries in that behalf. The argument was that the documents belonging to this class are immune from disclosure, irrespective of their contents, because it is in national interest and also necessary for maintaining the dignity of the judiciary and preserving the confidence of the people in the integrity of the judicial process that documents belonging to this class should be withheld from disclosure. Now there are a few prefatory remarks we would like to make before embarking upon an examination of this argument. In the first place, it is necessary to bear in mind that the burden of establishing a claim for class immunity is very heavy on the person making the claim. Lori Reid pointed out in Eeg. v. Lewes Justices, Ex Parte Home Secy. 1973 AC 388 (supra) that the speeches in Conway v. Rimmer 1968 AC 910 (supra) made it clear that there is a heavurden of proof on any authority which makes a claim for class immunity. The claim for class immunity is an extraordinary claim because it is based not upon the contents of the document in question but upon its membership of a class whatever be its contents and therefore the court should be very slow in upholding such a broad claim which is contradictory, if not destructive, of the concept of open government. Secondly, it is true, as pointed out earlier, that classes of documents to which the immunity may be accorded are not closed and in the life of a fast changing society rapidly growing and developing under the impact of vast scientific and technological advances new class or classes of documents may come into existence to which the immunity may have to be granted in public interest, but that should only be as a highly exceptional measure. It is only under the severest compulsion of the requirement of public interest that the court may extend the immunity to any other class or classes of documents and in the context of our commitment to an open government with the concommitant right of the citizen to know what is happening in the government, the court should be reluctant to expand the classes of documents to which immunity may be granted. The court must on the contrary move in the direction of attenuating the protected class or dasses of documents, because by and large secrecy is the badge of an authoritarian government. We may point out once again, though it be at the cost of repetition, that even in regard to documents belonging to the class which has been judicially recognised as entitled to immunity, the law must now be taken to be well-settled that the immunity is not absolute. The public interest in nondisclosure of a document belonging to this class may in an appropriate case yield to the public

interest that in the administration of justice, the court should have the fullest possible access to every relevant document and in that event, the document would be liable to be disclosed even though it belongs to the protected class. The executive cannot by merely invoking the scriptural formula of class immunity defeat the cause of justice by withholding a document which is essential to do justice between the parties, for otherwise the doctrine of class immunity would become a frightful weapon in the hands of the executive for burying its mistakes, covering up itnefficiencies and sometimes even hiding its corruption. Every claim for immunity In respect of a document, whatever be the ground on which the immunity is claimed and whatever be the nature of the document, must stand scrutiny of the court with reference to one and only one test, namely, what does public interest require -- disclosure or non-disclosure. The doctrine of class immunity is therefore no longer impregnable; it does not any more deny judicial scrutiny, it is no more a mantra to which the court pays obeisance, Whenever class immunity is claimed in respect of a document, the Court has to weigh in the scales the one aspect of public interest which requires that the document should not be disclosed against the other that the court in performing its functions should not be denied access to relevant document and decide which way the balance lies. And this exercise has to be performed in the context of the democratic ideal of an open government.

80. If we approach the problem before us in the light of these observations, it will be clear that the class of documents consisting of the correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or Supreme Court Judge or the transfer of a High Court Judge and the notes made by these constitutional functionaries in that behalf cannot be regarded as a protected class entitled to immunity against disclosure. It is undoubtedly true that appointment or non-appointment of a High Court Judge or a Supreme Court Judge and transfer of a High Court Judge are extremely important matters affecting the quality and efficiency of the judicial institution and it is therefore absolutely essential that the various constitutional functionaries concerned with these matters should be able to freely and frankly express their views in regard to these matters, But we do not think that the candour and frankness of these constilutional functionaries in expressing their views would be affected if they felt that the correspondence exchanged between them would be liable to be disclosed in a subsequent judicial proceeding. The constitutional functionaries concerned in this exercise are holders high constitutional offices such as the Chief Justice of a High Court and the Chief Justice of India and it would not be fair to them to say that they are made of such weak stuff that they would hesitate to express their views with complete candour and frankness if they apprehend subsequent disclosure. We have no doubt that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would not be deterred from performing their constitutional duty of expressing their views boldly and fearlessly even if they were told that the correspondence containing their views might subsequently be disclosed, If, to quote the words of Lord Pearce in Conway v. Rimmer 1968 AC 910 (supra) "there are countless teachers at schools and universities, countless employers of labour, who write candid reports, unworried by the outside chance of disclosure" here is no reason to suspect that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would flinch and falter in expressing their frank and sincere views when performing their constitutional duty. We have already dealt with the argument based on the need for candour and frankness and we must reject it in its application to the case of holders of high constitutional offices like the Chief Justice of a High Court and the Chief Justice of India. Be it noted -- and of this we have no doubt -- that our Chief Justices and Judges are made of sterner stuff; they have inherited a long and ancient tradition of independence and impartiality they are by training and experience as also by their oath of office dedicated to the cause of justice administered without fear or favour, affection or ill-will and in fact there is no power on earth which can deflect them from the path of rectitude. They are, to quote the words from the famous verse from Manasollasa jkt}"k foi£trk and fo{kkHkk ;= o£tr% and we find it difficult to believe that they would not act as Judges but as weak kneed and ef-fete individuals afraid to express their views lest they might come to be known to others and provoke criticism. The Chief Justice of a High Court and the Chief Justice of India would undoubtedly expect confidentiality while expressing their views but that is no ground for upholding a claim for class immunity in respect of the correspondence exchanged been them and the Central Government or the State Government, Confidentiality is not a head of privilege and the need for confidentiality of high level communications without more cannot sustain a claim for immunity against disclosure. Vide Science Research Council v. Nassa (1979) 3 All ER 673 and particularly the observations of Lord Scarman at pp. 697 and 698. Even if a document be confidential, it must be produced, notwithstanding its confidentiality, if it is necessary for fairly disposing of the case, unless it can be shown that its disclosure would otherwise be injurious to public interest.

81. Now we fail to see how in cases of this kind where non-appointment of an additional Judge for a further term or transfer of a High Court Judge is challenged, the disclosure of the cores pondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant nothings made by them, could at all be said to be injurious to public interest. We have already pointed out above that so far as non-appointment of an additional Judge for a further term is concerned, the only two grounds on which the decision not to appoint can be assailed are: firstly, that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India before

reaching the decision and secondly, that the decision is mala fide or based on irrelevant considerations, Now obviously these two grounds cannot be made good by a petitioner unless the correspondence between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant nothings made by them are disclosed, for they alone would furnish the relevant evidence showing whether these two grounds are satisfied or not. These documents would show or at least shed light on the question whether there was full and effective consultation between the Central Government on the one hand and the Chief Justice of the High Court, the State Government and the Chief Justice of India on the other, because, as already pointed out by us, such consultation would ordinarily be in writing--as it ought to be--and they would also, in cases where such consultation has taken place, indicate the reasons which have weighed with the Central Government in reaching its decision. Apart from these documents, there would be no other documentary evidence available to the petitioner to establish that there was no full and effective consultation or that the decision of the Central Government was based on irrelevant considerations and if an affidavit is made by an appropriate authority of the Central Government or by the Chief Justice of the High Court or by the Chief Justice of India stating that every relevant aspect of the question was discussed and there was full and effective consultation, it would be well-nigh impossible for the petitioner to successfully challenge the decision of the Central Government, It is only through these documents that the petitioner can, if at all, hope to show that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India or that the decision of the Central Government was mala fide or based on irrelevant grounds and therefore, to accord immunity against disclosure to these documents would be tantamount to summarily throwing out the challenge against the discontinuance of the additional Judge. It would have the effect of placing the Union of India, whose decision is challenged, in an unassailable --almost invincible position where it can, by claiming class immunity in respect of these documents, ensure the rejection of the writ petition, The harm that would be caused to the public interest in justice by the non-disclosure of these documents would in the circumstances far outweigh the injury which may possibly be caused by their disclosure, because the nondisclosure would almost inevitably result in the dismissal of the writ petition and consequent denial of justice even though the claim of the petitioner may be true and just. Moreover, it may be noted that the discontinuance of an additional Judge by the Central Government is a serious matter and if such discontinuance is mala fide or based on irrelevant grounds, it would tend to affect the independence of the judiciary and it is therefore necessary in order to maintain public confidence in the independent functioning of the judiciary that the people should know whether the constitutional requirements were complied with before the decision was taken not to continue the additional Judge and whether any oblique motivations or irrelevant considerations influenced the Central Government leaching that decision. The charge against the Central Government in the first group of present writ petitions was that there was no full and effective consultation with the Chief Justice of India before the decision was reached by the Central Government in regard to S.N. Kumar and in any event, the decision of the Central Government was actuated by oblique or improper motives. This was a serious charge against the Central Government and there can be no doubt that it would be very much in public interest that the necessary documents throwing light on the truth or otherwise of this charge should be disclosed, so that the full facts may be known to the public and the doubts raised and entertained about the influence of extraneous factors in the case of S.N. Kumar should be resolved and removed. It is significant to note that had there not been disclosure of these documents, a certain doubt or misgiving would have continued to prevail in the public mind that the decision to discontinue S.N. Kumar as an additional Judge was taken by the Central Government without full and effective consultation of the 'Chief Justice of India and that this decision was motivated by oblique or irrelevant considerations. But, as we shall presently point out these documents when disclosed helped to clear this doubt and remove this misgiving by explaining to the people what were the true facts behind the decision to discontinue S.N. Kumar as an additional Judge. Furthermore, it may be noted that when the charge against the Central Government is that it has discontinued S.N. Kumar as an additional Judge for oblique or improper reasons and there by sought to interfere with the independence of the judiciary, it would be singularly inappropriate to exclude these documents which consilute the only evidence, if at all for establishing this charge, by saying that the disclosure of these documents would impair the efficient functioning of the judicial institution. The interest of the wider community in getting to the bottom of this charge is so great that it cannot be allowed to be impeded by a mere rule of evidence. Nor can the decision to admit or exclude be safely left to the Central Government which is itself charged with wrongful or improper conduct.

82. These self-same reasons must apply equally in negativing the claim for immunity in respect of the corresponence between the Law Minister and the Chief Justice of India and the relevant nothings made by them in regard to the transfer of a High Court Judge including the Chief Justice of a High Court. These documents are extremely material for deciding whether there was full and effective consultation with the Chief Justice of India before effecting the transfer and the transfer was made in public in-terest, both of which are, according to the view taken by us, justifiable issues and the non-disclosure of these documents would seriously handicap the petitioner in showing that there was no full and effective consultation with the Chief Justice of India or that the transfer was by way of punishment and not in public interest. It would become almost impossible for the petitioner, without the aid of these documents to establish his case, even if it be true. Moreover, the transfer of a High Court Judge or Chief Justice of a High Court is a very serious matter and if made arbitrarily or capriciously or by way of punishment or without public interest motivation, it would erode the independence of the judiciary which is a basic feature of the Constitution and therefore when such a charge is made, it is in public interest that it should be fully investigated and all relevant documents should be produced

before the Court so that the full facts may coma before the people, who in a democracy are the ultimate arbiters. It would be plainly contrary to public interest to allow the inquiry into such a charge to be baulked or frustrated by a claim for immunity in respect of documents essential to the inquiry. It is also important to note that when the transfer of a High Court Judge or Chief Justice of a High Court is challenged, the burden of showing that there was full and effective consultation with the Chief Justice of India and the transfer was effected in Public interest is on the Union of India and it cannot withhold the relevant documents in its possession on a plea of immunity and expect to discharge this burden by a mere statement in an affidavit Besides, if the reason for excluding these documents is to safeguard the proper functioning of the higher organs of the State including the judiciary, then that reason is wholly, inappropriate where what is charged is the grossly improper functioning of those very organs. It is therefore obvious that, in a proceeding where the transfer of a High Court Judge or Chief Justice of a High Court is challenged, no immunity can be claimed in respect of the correspondence exchanged between the Law Minister and the Chief Justice of India and the nothings made by them, since, on the balance, the non-disclosure of these documents would cause greater injury to public interest than what may be caused by their disclosure.

83. But, quite apart from these considerations, we do not understand how the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court the State Government and the Chief Justice of India and the relevant notes made by them in regard to non-appointment of an additional Judge for a further term or transfer of High Court Judge can be detrimental to public interest. It was argued by the learned Solicitor General on behalf of the Union of India that if the Chief Justice of the High Court and the Chief Justice of India differ in their views in regard to the suitability of an additional Judge for further appointment, the disclosure of their views would cause considerable embarrassment because the rival views, might be publicly debated and there might be captious and un-informed criticism which might have the effect of undermining the prestige and dignity of one or the other Chief Justice and shaking the confidence of the people in the administration of justice. If the difference in the views expressed by the Chief Justice of the High Court and the Chief Justice of India becomes publicly known, contended the learned Solicitor General, it might create a difficult situation for the Chief Justice of the High Court vis-a-vis the Chief Justice of India and if despite the adverse opinion of the Chief Justice of the High Court, the additional Judge is continued for a further term, and the additional Judge knows that he has been so continued overruling the view of the Chief Justice of the High Court, it might lead to a certain amount of friction which would be detrimental to the proper functioning of the High Court. So also if an additional Judge is continued for a further term accepting the view expressed by the Chief Justice of the High Court and rejecting the opinion of the Chief Justice of India, it would again create a piquant situation because it would affect the image of the Chief Justice of India in the public eyes. Moreover, a feeling might be created in the mind of the public that a person who was regarded as unsuitable judicial appointment by one or the other of the two Chief Justices, has been appointed as a Judge and the litigants would be likely to have reservations about him and the confidence of the people in the administration of justice would be affected. The learned Solicitor General contended that for these reasons It would be injurious to public interest to disclose the correspondence exchanged between the Law Minister, the Chief Justice of the High Court and the Chief Jus-lice of India.

84. We have given our most anxious thought to this argument urged by the learned Solicitor General, but we do not think we can accept it. We do not see any reason why, if the correspondence between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India and the relevant notes made by them, in regard to discontinuance of an additional Judge are relevant to the issues arising in a judicial proceeding, they should not be disclosed. There might be difference of views between the Chief Justice of the High Court and the Chief Justice of India but so long as the views are held bona fide by the two Chief Justices, we do not see why they should be worried about the disclosure of their views? Why should they feel embarrassed by public discussion or debate of the views expressed by them when they have acted bona fide with the greatest care and circumspection and after mature deliberation. Dr. Judges sitting in a Division Bench not differ from each other in assessment of evidence and reach directly contrary conclusions on questions of fact? Do they not express their judicial opinions boldly and fearlessly leaving it to the jurists to decide which of the two differing opinions is correct? If two Judges do not feel any embarrassment in coming to different findings of fact which may be contrary to each other, why should two Chief Justices feel embarrassed if the opinions given by them in regard to the suitability of an additional Judge for further appointment differ and such differing opinions are made known to the public. Not only tolerance but acceptance of bona fide difference of opinion is a part of judicial discipline and we find it difficult to believe that the disclosure of their differing opinions might create a strain in the relationship between the Chief Justice of the High Court and the Chief Justice of India. We have no doubt that, the Chief Justice of the High Court would come is own independent opinion on the material before him and he would not surrender his judgment to the Chief Justice of India, merely because the Chief Justice of India happens to be head of the judiciary having a large voice in the appointment of Judges on the Supreme Court Bench. Equally we are confident that merely because the Chief Justice of the High Court has come to a different opinion and is not prepared to change that opinion despite the persuation of the Chief Justice of India, no offence would be taken by the Chief Justice of India and he would not harbour any feeling of resentment against the Chief Justice of the High Court, Both the Chief Justices have trained judicial minds and both of them would

have the humility to recognise that they can be mistaken in their opinions. We do not therefore see any real possibility of estrangement or even embarrassment for the two Chief Justices, if their differing views in regard to the suitabilty of an additional Judge for further appointment are disclosed. We also find it difficult to agree that if the differing views of the two Chief Justices become known to the outside world, the public discussion and debate that might ensue might have the effect of lowering the dignity and prestige of one or the other of the two Chief Justices. When the differing views of the two Chief Justices are made public as a result of disclosure, there would certainly be public discussion and debate in regard to those views with some criticizing one view and some criticizing the other, but that cannot be helped in a democracy where the right of free speech and expression is a guaranteed right and if the views have been expressed by the two Chief Justices with proper care and deliberation and a full sense of responsibility in discharge of a constitutional duty, there is no reason why the two Chief Justices should worry about public criticism. We fail to see how such public criticism could have the effect of undermining the prestige and dignity of one or the other Chief Justice. So long as the two Chief Justices have acted honestly and bona fide with full consciouness of the heavy responsibility that rests upon them in matters of this kind, we do not think that any amount of public criticism can affect their prestige and dignity. But if either of the two Chief Justices has acted carelessly or improperly or irresponsibly or out of oblique motive, his view would certainly toe subjected public criticism and censure and that might show him in poor light and bring him down in the esteem of the people, but that will be the price which he will have to pay for his remissness in discharge of his constitutional duty, No Chief Justice or Judge should be allowed to hide his improper or irresponsible action under the cloak of secrecy. If any Chief Justice or Judge has behaved improperly or irresponsibly or in a manner not befitting the high office he holds, there is no reason why his action should not be exposed to public gaze. We believe in an open Government and openness in Government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterise the functioning of the judicial apparatus including judicial appointments and transfers. Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how Judges are selected and appointed or transferred and whether any and if so what, principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely, the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government and tha Chief Justice of India in case of appointment or non-appointment of a High Court Judge and the Law Minister of the Central Government and the Chief Justice of India in case of appointment of a Supreme Court Judge or transfer of a High Court Judge. The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled cut that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off. We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should be protected against disclosure at all events and in all circumstances. Where it becomes relevant in a judicial proceeding, why should the Court and tha opposite party and through them theople not know what are the reasons for which a particular appointment is made or a particular additional Judge is discontinued or a particular transfer is effected. We fail to see what harm can be caused by the disclosure of true facts when they become relevant in a judicial proceeding, In fact, the possibility of subsequent disclosure would act a an effective check against carelessness, impetuosity, arbitrariness or mala fides on the part of the Central Government, the Chief Justice of the High Court and the Chief Justice of India and ensure bona fide and correct approach, objective and dispassionate consideration, mature thought and deliberation and proper application of mind on their part in discharging their constitutional duty in regard to appointments and transfers of Judges. It is true that if the views ex-pressed by the Chief Justice of the High Court and the Chief Justice of India in regard to the suitability of an additional Judge for further appointment become known to the public, they might reflect adversely on the competence, character or integrity of the additional Judge, but the additional Judge cannot legitimately complain about it, because it would be at his instance that the disclosure would be ordered and the views of the two Chief Justices made public. If the additional Judge is appointed for a further term either accepting the opinion expressed by the Chief Justice of the High Court in preference to that of the Chief Justice of India or vice versa, the question of disclosure of differing opinions of the two Chief Justices would not arise, because no one would know that the two Chief Justices were not agreed on continuing the additional Judge for further term and therefore, ordinarily, there would be no challenge to the appointment of the additional Judge, It is only if the additional Judge is not continued for a further term that he or some one on his behalf may challenge the decision of the Central Government not to continue him and in that event, if he asks for disclosure of the relevant correspondence embodying the views of the two Chief Justices, and if such disclosure is ordered, he has only himself to thank for it and in any event, in such a case, there would be no harm done to public Interest if the views expressed by the two Chief Justices become known to the public.

85. We are therefore of the view that (in the two groups of writ petitions which before us, the injury which would be caused to the public interest in administration of justice by non-disclosure of the correspondence between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India and the relevant nothings made by them in regard to non-appointment of S.N. Kumar and the correspondence between the Law Minister and the Government of India and the relevant nothings made by them in regard to transfer of the Chief Justice of Patna, far outweighs the injury which may, if at all, be caused to the public interest by their disclosure and hence these documents were liable to be disclosed

in response to the demand of the learned Counsel appearing on behalf of the petitioners and S.N. Kumar. These were the reasons for which we directed by our Order dated 16th Oct., 81 that these documents be disclosed to the petitioners and S.N. Kumar, Facts of S.N. Kumar's Case I Whether full & Effective consultation.

86. That takes us to the next question as to whether there was full and effective consultation between the President which means the Central Government on the one hand and the Chief Justice of India on the other, Article 217 provides that every Judge of the High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, We have already rejected the contention urged on behalf of the respondents that the requirement of consultation is necessary only where a person is being appointed a Judge of the High Court and not where a decision is taken not to appoint him. We have, of course, made it clear that where the name of a person is proposed for appointment as a Judge of the High Court for the first time, he. having no right to be considered for such appointment, is not entitled to insist that the proposal for his appointment, whether initiated by the Chief Justice of the High Court or the State Government or the Chief Justice of India, should be subjected to the process of consultation set out in Article 217 and his name can be dropped without any such consultation. But, as pointed out by us in an earlier portion of the Judgment, the position is different in case of sin additional Judge, for though an additional Judge has no right, on the expiration of his term, to be appointee additional Judge for a further term or to be appointed a permanent Judge, he has still a right to be considered for such appointment and the Central Government has to decide whether or not to appoint him after consultation with the three constitutional functionaries mentioned in Article 217. Here, in the present case, Shri S.N. Kumar was an additional Judge whose term expired on 6th June, 1981 and he was entitled to be considered for appointment as an additional Judge for a further term and the Central Government certainly could after considering his name, decide in the bona fide exercise of its power, not to appoint him, but that could be done only after consultation with the three constitutional functionaries specified in Article 217 which included the Chief Justice of India. It therefore becomes necessary to consider whether the Central Government arrived at its decision not to appoint Shri S.N. Kumar as an additional Judge for a further term after consultation with the Chief Justice of India. We have already discussed the true nature and scope of consultation required under Article 217 and pointed out that the consultation contemplated by that Article is full and effective consultation where the relevant facts bearing upon appointment or non-appointment are brought to the notice of the Central Government and the three constitutional functionaries required to be consulted and the opinion of each of the three constitutional functionaries is taken on identical material and then a decision is reached by the Central Government whether or not to appoint the person concerned as a Judge, whether additional or permanent. Now Article 217 does not require that any particular procedure should be followed for full and effective consultation nor does it insist that the relevant facts on which the final decision of the Central Government is based should be conveyed to the other three constitutional functionaries in any particular manner or by the Central Government itself. What is necessary to ensure full and effective consultation within the meaning of Article 217 is that the Central Government as well as each of the three consitutional functionaries required to be consulted "must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision" and it is immaterial as to how such "full and identical facts" are conveyed by one authority to thither. It is sufficient compliance with the constitutional requirement of Article 217 if the self-same facts on which the final decision is taken by the Central Government are placed before each of the three constitutional functionaries required to be consulted and their opinion is taken on the basis of such facts. Whatever be the manner in which those facts are brought to their notice. Let us examine whether in the present case this constitutional requirement was satisfied before the decision was taken by the Central Government not to appoint S.N. Kumar as an additional Judge for a further term or to paraphrase it in the context of the controversy raised on behalf of the petitioners, whether the full and identical facts on which the decision was taken by the Central Government were placed be-fore the Chief Justice of India.

87. The unfortunate drama leading to the non-appointment of S.N. Kumar as an additional Judge for a further term begins with the letter dated 19th February, 1981 addressed by the Chief Justice of Delhi to the Law Minister. This letter was written by the Chief Justice of Delhi to the Law Minister, because the term for which S.N. Kumar was originally appointed as an additional Judge was due to expire on 6th March. 1981. The Chief Justice of Delhi pointed out in this letter that the arrears pending in the Delhi High Court undoubtedly justified the appointment of additional Judges but he was not in a position to recommend the "extension for Justice Kumar" for an additional term for three reasons, namely (1) There were serious complaints against S.N. Kumar both oral and in writing, These complaints had been received by him direct as well as through the Law Minister. He had examined these complaints and 'found that some of the complaints were not without basis (2) S.N. Kumar had not been very helpful in disposing of cases; and (3) some responsible members of the Bar and some of the colleagues of the Chief Justice (whom he did not think it proper to name) had also expressed doubts about S.N. Kumar's integrity. The Chief Justice frankly stated that he had no investigating agency to conclusively find out whether the complaints against S.N. Kumar were genuine or not, but added that "all the same the complaints have been persistent." He pointed out that in the circumstances it was his painful duty, not to recommend an extension for S.N. Kumar but added that the Law Minister might examine the matter at his Mid and take such steps as he thought proper. Now a suggestion was made by Mr. R.K. Gag, learned advocate appearing on behalf of S.N. Kumar that this letter was addressed by the Chief Justice of Delhi to the Law Minister pursuant to a

conspiracy between the two to discontinue S.N. Kumar as an additional Judge. The suggestion was that the Chief Justice of Delhi had played into the hands of the Law Minister and written this letter recommending non-appointment of S.N. Kumar in order to oblige the Law Minister. We are afraid we cannot term this suggestion as anything but unfounded. There is absolutely not a title of evidence in support of such a suggestion. The charge of conspiracy is at all times a very serious charge and it must not be lightly made more particularly when it is directed against persons holding high offices, Here it is difficult to see any justification at all for levelling a charge of conspiracy against the Chief Justice of Delhi and the Law Minister, The Chief Justice of Delhi was appointed acting Chief Justice on 27th June. 1980 and he was confirmed as permanent Chief Justice with effect from 8th January, 1981 and therefore on the date of the letter, his position as Chief Justice was not at all in jeopardy and he was not dependent on the Central Government or the Law Minister for his office. There were also no disputes or differences between the Chief Justice of Delhi and S.N. Kumar prior to the date of the letter and no suggestion has been made on behalf of S.N. Kumar that the Chief Justice of Delhi had any animus or prejudice against him. Nothing had transpired between the Chief Justice of Delhi and S.N. Kumar which might have induced the Chief Justice of Delhi, to make a false allegation or imputation against him. Nor was any reason suggested as to why the Law Minister should have gone out of his way to see that S.N. Kumar was not continued as an additional Judge, It would indeed be going too far to suggest without shred of evidence that the Chief Justice of Delhi was so depraved as to yield to the pressure of the Law Minister and make a deliberately false imputation of lack of integrity against his colleague merely in order to oblige the Law Minister. It is impossible to conceive of any, earthly reason why the Chief Justice of Delhi should have gone to the length of condemning his colleague unless he had received complaints against him and he bona fide believed that some of those complaints were not without basis. The letter dated 19th February, 1981 in fact, contains inherent evidence to show that the Chief Justice of Delhi was acting bona fide in addressing that letter to the Law Minister. He pointed out in the letter that he had received complaints against S.N. Kumar both oral and in writing and on examining these complaints he had found that same of them were not without basis but he frankly stated that he had no investigative machinery at his disposal and it was therefore not possible for him to find conclusively whether these complaints were genuine or not. This was a correct and proper approach to be adopted by a careful and responsible Chief Justice who had heard complaints against his colleague some of which appeared to him not without basis but in respect of which he was not in a position to state definitely whether they were true or not. Since some of the complaints appeared to him not without basis and responsible members of the Bar and some of his colleagues had also complained to him against S.N. Kumar, he naturally thought that it would not be right for him to recommend continuance of S.N. Kumar as an additional Judge, But, at the same time, he made it clear that the Law Minister might examine the matter at his end and take such action as he thought fit. It is impossible to conclude from this letter that the Chief Justice of Delhi acted improperly or irresponsibly in not recommending the continuance of S.N. Kumar as an additional Judge. If what was stated by the Chief Justice of Delhi in this letter were true -- and for the purpose of inquiry as to whether there was full and effective consultation, we must accept the facts as given in the letter as true for we are not concerned to inquire whether the facts on which the Chief Justice of Delhi based his opinion were true or not -- the Chief Justice of Delhi could not be said to be unjustified in taking the view that S.N. Kumar should not be recommended for continuance as an additional Judge. While making his recommendation whether S.N. Kumar should be continued as an additional Judge or not, the Chief Justice of Delhi had to consider the fitness and suitability of SN. Kumar the time and if there were complaints against S.N. Kumar, some of which he did not find to be without basis and doubts about the integrity of S.N. Kumar were expressed by responsible members of the Bar and some of his own colleagues, the Chief Justice of Delhi could not be said to have acted unreasonably in declining to recommend S.N. Kumar for an extension. It may be that on full and detailed investigation through an independent and efficient investigative machinery, the complaints and doubts against S.N. Kumar might have been found to be unjustified but such a course would have been neither practicable nor desirable. In the first place, as pointed by the Chief Justice of Delhi himself, he had no investigative machinery at his disposal and if he wanted the complaints and doubts against S.N. Kumar to be investigated, he would have had to ask the Central Government to carry out such investigation through the Central Bureau of Investigation or the Intelligence Bureau or some such investigating agency and that would have been clearly subversive of the independence of the judiciary. It would have been most improper for the Chief Justice of Delhi to ask the Central Government to investigate into complaints or doubts against a sitting Judge of his Court. This Court has in unhesitating terms condemned the adoption of such a course by the High Court in the case of subordinate judiciary and much more so would it be reprehensible in the case of a sitting Judge of a High Court. Moreover, leaving the investigation of complaints and doubts against a sitting Judge in the hands of an investigative agency under the Control of a Political Government would not be desirable because, apart from exposing the sitting Judge to unhealthy political pressures, it may not yield satisfactory result in all cases, because such an Investigation would not have the benefit of the guidance of a mature and experienced person like the Chief Justice who has lived a whole lifetime in the Courts and who is closely and intimately connected with lawyers and Judges in the Court over which he presides, It would Indeed be impossible for any one unfamiliar with the legal profession and the functioning of the Courts to judge the genuineness or veracity of the sources from which information might be obtained in regard to a sitting Judge. It must, therefore, necessarily bad left to the Chief Justice of the High Court to give his opinion in regard to the suitability of an additional Judge for further appointment on the basis of such information as he may gather by, making his own inquiries. The Chief Justice of the High Court would have sufficient opportunities for judging the suitability of an additional Judge for further appointment, because the additional Judge would be working with him in the same Court and he would be in close

contact with the members of the Bar and his own colleagues and if there is anything wrong with the functioning of the Court or tha Judges, he would be best in a position to know about it If an additional Judge does not enjoy good reputation for integrity, the Chief Justice of the High Court would ordinarily come to know about it. Of course, the possibility cannot be ruled out that the information received by tha Chief Justice of the High Court may at times be motivated or prejudiced, because the additional Judge has offended some member of the Bar or decided some case against a litigant. These occupational hazards which beset the life of an additional Judge -- in fact, even of a permanent Judge whether in the High Court or in the Supreme Court have unfortunately increased in recent times, because there has been a steady erosion of values and not only some interested politicians but also a few -- and fortunately their tribe is still small -- lawyers and members of the public are prone to make wild and reckless allegations against Judges and impute motives for the decisions given by them. It is not realised by many that very often the judgments given by the High Courts and the Supreme Court are value judgments, because there are conflicting values competing for recognition by the Judge and the choice made by the Judge is largely dictated by his social philosophy and it a not possible to emphatically assert that a particular view taken by one Judge is wrong and a different view taken by and other Judge is right, The nature of the judicial process being what it is, it is inevitable that the view taken by a Judge, perfectly bona fide though it may be, may not accord with the expectations of a section or group of persons believing in a particular social or political philosophy, but that cannot be a ground affording Justification for making imputation against the Judge or accusing him of lack of been fides or charging him with surrender subservience to the executive or to any other interest. Those who indulge in such personal attacks against Judges for the decisions given by them do not realise what incalculable damage they are doing to the judicial institution by destroying the confidence of the public in the integrity and inviolability of administration of justice. Unfortunately, it is the easiest thing to make false, reckless and irresponsible allegations against Judges in regard to their honesty and integrity and in recent times the tendency has grown to make such allegations against Judges because they have decided the case in a particular manner either against a dissatisfied litigant or contrary to the view held by a group or, section of politicians or lawyers or members of the public. The Judge against whom such allegations are made is defenceless because, having regard to the peculiar nature of the office held by him, he cannot enter the arena of conflict and raise or join a public controversy, This pernicious tendency of attributing motives to Judges has to be curbed, if the judicial institution is to survive as an effective instrument for maintenance of the rule of law in the country and this can happen only if politicians, lawyers and members of the public accept the judgments rendered by the Judges as bona fide expressions of their views and do not impute motives to Judges for the judgments given by them, even though they be adverse to the views held by them. But unfortunately, the situation being what it is, we must emphasise with all the strength and earnestness at our command that the Chief Justice of the High Court should exercise the greatest care and circumspection in judging the veracity of the information which he may receive from time to time in regard to the conduct or behaviour or integrity of an additional Judge of his Court. The Constitution has entrusted to him the task of giving his opinion in regard to the suitability of an Addl. Judge for further appointment and on the basis of the information received by him or gathered as a result of inquiries made by him, he has to decide wisely and with responsibility whether or not he should recommend the appointment of an additional Judge for a further term.

88. Now where the Chief Justice of the High Court is reasonably satisfied after the greatest care and circumspection exercised by him as the holder of a high constitutional office to whom the Constitution has assigned an important function and in whom it has reposed a sacred trust, that the additional Judge in regard to whose suitability he has to give opinion, does not enjoy good reputation for integrity, he obviously cannot recommend such additional Judge for further appointment. It is possible that the Chief Justice of the High Court may go wrong in a given case and arrive at an erroneous opinion in regard to the suitability of an additional Judge for appointment for a further term and that may result in injustice to the additional Judge who may suffer by reason of such erroneous opinion but that cannot be helped because ultimately some constitutional functionary has got to be entrusted with the task of assessing the suitability of the person to be appointed an additional Judge or a permanent Judge and no better person can be found for this purpose than the Chief Justice of the High Court. The Chief Justice of the High Court may err in his assessment as anyone else may, fallibility being the attribute of every human being. But that is a risk which has necessarily to be taken and it cannot be avoided howsoever perfect may be the mechanism which human ingenuity can evolve. It may happen that the Chief Justice of the High Court, not being aware that the additional Judge whose term is about to expire does not enjoy, good reputation for integrity may recommend his name for appointment for a further term though he is clearly unsuitable for such appointment and equally it may happen that on the basis of the information available with him which information may be incorrect, the Chief Justice of the High Court may come to the opinion that the additional Judge whose suitability he is called upon to consider does not possess good reputation for integrity though in fact he is a person of sterling character and possesses a high degree of honesty and integrity. These errors are inevitable in every process of assessment and the Constitution has sought to minimise them by entrusting the task of assessment to a high dignitary like the Chief Justice of the High Court who would be expected to act with a high sense of responsibility and, who by reason of training and experience, would be able to sift the grain from the chafed arrive at a correct opinion on the material before him.

89. We might also at this stage refer to one contention seriously pressed on behalf of the petitioners, namely, that what would be material to consider for the purpose of assessing the suitability of an additional Judge for further appointment would be not whether the additional Judge enjoys good reputation for honesty and integrity but whether in fact he possesses honesty and integrity. The argument of the petitioners was that if the additional Judge has the hall-mark of honesty and integrity "he cannot be removed or dropped because unconfirmed reports say that he is lacking in honesty and integrity", for otherwise "the reputation of every Judge would be at the mercy of rumours, gossips and unconfirmed reports". We do not think this argument is well founded. In the first place, it must be remembered that when the Chief Justice of the High Court is called upon to give his opinion in regard to the suitability of an additional Judge for further appointment, he is not required to adjudicate upon various matters bearing upon his suitability and to come to a definitive finding or conclusion in regard to such matters. Where the complaint against an additional Judge is in regard to his integrity, the Chief Justice of the High Court is not expected to hold a Judicial or quasi-judicial inquiry for the purpose of adjudicating whether the additional Judge is, in fact, lacking in honesty and integrity. Such an .inquiry against a Judge whether additional or permanent would not be permissible except in a proceeding for his removal. What the Chief Justice of the High Court has to do is merely to assess the suitability of the additional Judge for further appointment and where lack of integrity is alleged against him, the assessment can only be on the basis of his reputation for integrity. The point we are making will become abundantly clear if we take the case of a member of the Bar or the senior most District Judge who is for the first time considered for appointment as an additional or permanent Judge. The integrity of the person under consideration would undoubtedly be a relevant factor to be taken into account, but in assessing such factor the Chief Justice of the High Court would not be expected to hold a judicial OF quasi-judicial inquiry for the purpose of determining whether the person concerned does, in fact, possess honesty and integrity or is lacking in these qualities. The Chief Justice of the High Court would have to proceed on the basis of the reputation for honesty and integrity enjoyed by the person under consideration and if, on the basis of the information gathered by him, the Chief Justice of the High Court comes to the view that such person does not enjoy good reputation for integrity, the Chief Justice of the High Court would be justified in not recommending such person for appointment Where a question of honesty and integrity of a Judge is concerned, it is almost impossible to come to a conclusive determination whether he is lacking in integrity or not because experience shows that most persons are not willing to speak if they know that they may be quoted and that in any event they are not prepared to testify in any judicial or quasi-judicial inquiry. It is therefore not enough in order to be able to recommend a person for appointment as a Judge to say that there is no proof of lack of integrity against him, because, if such were the test to be applied, there would be grave danger of persons lacking in integrity being appointed as Judges. The test which must be applied for the purpose of assessing the suitability of a person for appointment as a Judge must be whether the Chief Justice of the High Court or for the matter of that, any other constitutional authority concerned in the appointment, is satisfied about the integrity of person under consideration; If the person under consideration does not enjoy reputation for honesty and integrity, it would not be possible for the Chief Justice of the High Court to say that he is satisfied about the integrity of such person and in such an event, the Chief Justice of the High Court would be justified in not recommending such person for appointment 9 in fact, it would be his duty not to recommend such person. The public injury which may be caused by appointment of a Judge lacking in integrity would be infinitely more than tha public injury which may result from non-appointment of a competent Judge possessing integrity. If therefore the Chief Justice of Delhi found on inquiries made by him that some of the complaints made against S.N. Kumar were not without basis and doubts about the integrity of S.N. Kumar were expressed by responsible members of the Bar as also by some of his own colleagues, the Chief Justice of Delhi could not be said to be unjustified in writing the letter dated 19th February, 1981 declining to recommend S.N. Kumar for appointment as an additional Judge for a further term. We may once again repeat that this assessment of S.N. Kumar by the Chief Justice of Delhi may have been erroneous and, as we shall point out a little later, the Chief Justice of India took the view that it was erroneous, but on no account can lack of bona fides be attributed to the Chief Justice of Delhi. On the bona fide view taken by him, the Chief Justice of Delhi did what it was his plainest duty in the circumstances to do.

90. There was also one other argument urged on behalf of the petitioners which we might conveniently dispose of at this stage, since it is an argument closely allied to the one which we have just discussed and rejected. The petitioners contended that fair play and justice required that before an additional Judge is dropped on the ground that he is lacking in integrity or that he does not enjoy good reputation for integrity, he must have an opportunity of showing cause against such a serious imputation made against his honour and integrity, This contention is also in our opinion without merit and the answer to it is provided by what we have already discussed above. What the Chief Justice of the High Court is required to do is to give his opinion in regard to the suitability of the additional Judge for further appointment and he has therefore to consider various matters relevant to the question of appointment and give his opinion to the President. He does not hold a judicial or quasi-judicial inquiry into the honour and integrity of the additional Judge nor does he arrive at any conclusive finding or determination. He merely gives his personal opinion in regard to the suitability of the additional Judge in discharge of the constitutional duty laid upon him and there Is there-fore no question of any opportunity being afforded to the additional Judge before the Chief Justice of the High Court arrives at his opinion. When the Chief Justice of the High Court gives Ms opinion, it is a confidential communication which would not ordinarily be known to the public and in the case of S.N. Kumar too, but for the disclosure of documents vehemently pressed and passionatelought not only by the counsel for the petitioners but also by the counsel for S.N.

Kumar, the world would never have known that the Chief Justice of Delhi has given an adverse opinion against the continuance of S.N. Kumar on the ground that his integrity was doubtful. It is obvious that in cases of this kind where the Chief Justice of the High Court gives his personal opinion or assessment on consultation by the President, there is neither adjudication nor condemnation and hence there is no basis or justification for importing the requirement of fair play or natural justice.

91. When a copy of this letter dated 19th Feb., 1981 was received by the Chief Justice of India, he took the view that what was stated in the letter was "too vague to accept that Shri Kumar lacks integrity" and he therefore stated in a note dated 3rd Mar., 1981 submitted by him to the Central Government that he "would like to look carefully into the charges against Shri S.N. Kumar" and recommended extension of the term of S.N. Kumar by six months. The reason which prevailed with the Chief Justice of India in recommending extension of the term of S.N. Kumar for six months was twofold. In the first place, he felt that since he had recommended extension of the term of O.N. Vohra by six months and O.N. Vohra was senior to S.N. Kumar, the interests of propriety required that the term of S.N. Kumar should also be extended by six months and secondly, he desired to look carefully into the charges against S.N. Kumar before deciding whether to recommend bus further appointment or not. Now having regard to the scope and purpose of Article 224 which we have discussed in some detail in an earlier portion of this judgment, it is clear that the Chief Justice of India misconceived the true legal position when he recommended extension of S.N. Kumar for a period of six months in order to enable him to look carefully into the charges against S.N. Kumar, We have already pointed out that on a trua interpretation of Article 224 no short term appointment of an additional Judge can be made for the purpose of enabling the constitutional authorities to examine and decide whether the complaints or charges against the additional Judge arc justified or not, so that if the complaints or charges are found to be not without basis, the constitutional authorities may advise the Central Government not to anoint the Additional Judge for a further term. We have held that such short term appointment being for a purpose other than that warranted by Article 224, would be outside the scope and ambit of that Article. But even so the Chief Justice of India recommended, though Constitution felly it was impermissible to do so, that the appointment of S.N. Kumar be extended for a further term of six months in order that he should in the meantime be able to examine carefully the charges against S.N. Kumar, The Law Minister thereupon submitted a note to the Prime Minister on 3rd March, 1981 pointing out that the letter of the Chief Justice of Delhi dated 19th Feb., 1981 made a serious complaint against the integrity of S.N. Kumar but he did not propose to go into the merits of the case at that stage since he was suggesting a short extension of three months for S.N. Kumar, But while so staling, he added that he strongly felt that in matters of this nature, "the views of the Chief Justice of the "High Court" are paramount as it is in his association that the Judge concerned discharges his duties" yet "out of sheer reverence to the views of the Chief Justice, of India" he proposed that the term of S.N. Kumar as additional Judge be extended for three months, Thus, while the Chief Justice of India recommended extension of the term of S.N. Kumar for six months, the Law Minister proposed an extension for only three months, presumably because he took the view that whatever inquiries are to be made in regard to the complaints and doubts against S.N. Kumar should be carried out as quickly as possible and the decision on such a sensitive issue as to whether an additional Judge should be continued or not should not be unduly 'delayed The result was that S.N. Kumar was appointed as an additional Judge for a period of three months from 7th Mar., 1981.

92. The Law Minister thereafter ad-dressed a letter dated 19th Mar., 1981 to the Chief Justice of Delhi drawing his attention to the observations made by the Chief Justice of India in regard to his earlier letter dated 19th Feb., 1981 and requesting him that in the light of those observations he should offer his "further comments on the question of continuance or otherwise" of S.N. Kumar. The Law Minister stated that since the term of S.N. Kumar as an Additional Judge was expiring on 6th June, 1981, he would be grateful if the Chief Justice of Delhi could send his comments so as to reach him latest by 15th April, 1981. This communication addressed by the Law Minister to the Chief Justice of Delhi shows clearly beyond any doubt that the Law Minister was not party to any conspiracy for discontinuing S.N. Kumar as an additional Judge. Since the Chief Justice of India had observed that the letter dated 19th Feb., 1981 addressed by the Chief Justice of Delhi was too vague to form the basis of an opinion that S.N. Kumar was lacking in integrity, the Law Minister naturally asked the Chief Justice of Delhi to offer his further comments in answer to this remark of the Chief Justice of India. It appears that the Chief Justice of India also addressed a letter dated 14th Mar., 1981 to the Chief Justice of Delhi asking him, with reference to the observations made by him in his letter dated 19th Feb., 1981, to furnish "details and concrete facts in regard to the allegations against Justice Kumar". The Chief Justice of Delhi thereupon met the Chief Justice of India and had discussion with him on 26th March, 1981, There was considerable controversy between the parties as to what were precisely the facts which were discussed between the Chief Justice of Delhi and the Chief Justice of India at this meeting, but the subsequent correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India throws considerable light on this controversy and we must therefore proceed to examine it. It appears that subsequent to this meeting held on 26th Mar., 1981, the Chief Justice of Delhi address-'ed a letter dated 28th March, 1981 to tha Chief Justice of India recording that since receipt of the letter of the Chief Justice of India dated 14th Mar., 1981, the Chief Justice of Delhi had an opportunity "to discuss this delicate matter" with the Chief Justice of India and observing, to quote the exact words used by Chief Justice of Delhi:

There were three points mentioned in my D.O. 275-HCJ/PPS, dated 19th Feb., 1981, addressed to the Law Minister, a copy of which was forwarded to you. I had also mentioned in that letter that I have no investigating agency to conclusively find out whether the complaints are genuine or not. Understandably there will be some who would support the allegations and there will be some who would refute them. Therefore it is natural that there may be variance between the views that may be expressed by different people. Indeed, my experience is that people are hesitant in speaking out frankly.

With regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us. About Justice Kumar not being very helpful in disposing of cases, I enclose a statement of disposal by Justice Kumar in 1980. Just by way of comparison I have also included the figures of disposal in the same period of my other two colleagues whose cases for reappointment are under consideration.

The Chief Justice of Delhi also addressed a letter dated 28th March, 1981 to the Law Minister pointing out that since receipt of the letter of the Chief Justice of India, he had an opportunity "to discuss the entire matter in detail with the Chief Justice of India" and that after this discussion he had addressed a letter dated 28th March, 1981 to the Chief Justice of India, a copy of which was being enclosed by him. The Chief Justice of Delhi then proceeded to add in this letter addressed to the Law Minister:

Perhaps you will consider this to be sufficient "comments" on my part as desired by you in your letter under reply about the 'Observations of the Chief Justice of India which you have quoted in your letter.

Now it is clear from this letter addressed by the Chief Justice of Delhi to the Law Minister that the Chief Justice of India asked the Chief Justice of Delhi to furnish him "Details and concrete facts in regard to the allegations against Justice Kumar" and in response to this request, the Chief Justice of Delhi met the Chief Justice of India on 26th Mar., 1981 and discussed "the entire matter in detail with the Chief Justice of India." Obviously all "the details and concrete facts" In regard to the allegations against S.N. Kumar which were required by the Chief Justice of India must have been discussed in detail between the Chief Justice of Delhi and the Chief Justice of India at this meeting held on 26th March, 1981, There is no reason to believe that any facts which were in the possession of the Chief Justice of Delhi in regard to the complaints and doubts against S.N. Kumar were not disclosed and discussed him with the Chief Justice of India. There is also inherent evidence in the letter dated 28th March, 1981 addressed by the Chief Justice of Delhi to the Chief . Justice of India that the entire matter relating to the integrity of S.N. Kumar was discussed between the Chief Justice of Delhi and the Chief Justice of India. The Chief Justice of Delhi stated at the commencement of this letter that he had an opportunity to discuss "this delicate matter" with the Chief Justice of India. The reference to "this delicate matter" could not be to any matter other than that relating to the integrity of S.N. Kumar. Then the Chief Justice of Delhi proceeded to state that there were threat points mentioned in his letter dated 19th Feb., 1981 and obviously there was no reason for him to refer to these three points in his letter dated 28th March, 1981 unless he had discussed these three points with the Chief Justice of India. It was with reference to the meeting which the Chief Justice of Delhi had with the Chief Justice of India that the Chief Justice of Delhi adverted to the three points in his letter to the Chief Justice of India, One of the three points was that serious complaints against S.N. Kumar had been received by him direct as well as through the Law Minister and some of these complaints were found to be not without basis and the second point was that some responsible members of the Bar as also some of his own colleagues had expressed doubts about the integrity of S.N. Kumar. These two points must have been discussed between the Chief Justice of Delhi and the Chief Justice of India, for otherwise there is no reason why the Chief Justice of India, and the Chief Justice of Delhi should have referred to them in his letter to the Chief Justice of India and if these two points were discussed, it is difficult to believe that the Chief Justice of Delhi should not have disclosed all the facts bearing upon these two points to the Chief Justice of India. The Chief Justice of Delhi emphatically reiterated in the last paragraph of his letter to the Chief Justice of India that the matter in regard to the complaints against the integrity of S.N. Kumar had already been discussed between them, Now, a stated in the letter of the Chief Justice of Delhi dated 19th February, 1981, complaints against the Integrity of S.N. Kumar were received by the Chief Justice of Delhi direct as also through the Law Minister and doubtgainst the integrity of S.N. Kumar had Men expressed by responsible members of the Bar as also by some of the Judges Of the Delhi High Court and therefore the inference is Irresistible that when the matter in regard to the complaints against the integrity of S.N. Kumar was discussed, these facto must have been disclosed by the Chief Justice of Delhi to the Chief Justice of India. The Chief Justice of India had with him a copy of the letter dated 19th Feb., 1081 where reference was made to complaints against S.N. Kumar, said to have been received by the Chief Justice of Delhi and to doubts against the integrity of S.N. Kumar said to have been expressed by responsible members of the Bar and some of his own colleagues and it is impossible to believe that when the matter relating to the integrity of S.N. Kumar was discussed, the Chief Justice of India should not have asked the Chief Justice of Delhi to apprise him as to what were the complaints received against S.N. Kumar and who were the responsible members of the Bar and Judges who had expressed doubts against the integrity of S.N. Kumar, If the Chief Justice of Delhi refused to disclose these fact to the Chief Justice of India, we have no doubt that the Chief Justice of India would have remonstrated with

the Chief Justice of Delhi for such refusal and expressed his displeasure about it to the Law Minister, There is no doubt in our mind that the Chief Justice of Delhi must have disclosed all the facts relating to the complaints and doubts expressed against the integrity of S.N. Kumar to the Chief Justice of India but, as is evident from a subsequent letter dated 22nd May, 1981 addressed by the Chief Justice of India to the Law Minister, the Chief Justice of India had already, prior to the date of the meeting, made his own inquiries in the matter and as a result of such inquiries he was not inclined to agree with the opinion given by the Chief Justice of Delhi and it is obvious therefore that he must have told the Chief Justice of Delhi that in the course of the inquiries made by him he had been told by persons that there was nothing against the Integrity of S.N. Kumar and he was consequently unable to agree with the view expressed by the Chief Justice of Delhi The Chief Justice of Delhi apparently remained unconvinced and that is why he stated in his letter to the Chief Justice of India that there was bound to variance between the views expressed by different persons in regard to the integrity of a Judge, since there would be some who would support the allegations of lade of integrity while there would be some others who would refute them, This was a courteous and respectful way of expressing disagreement with the Chief Justice of India, But, at the same time, the Chief Justice of Delhi politely, yet firmly pointed out to the Chief Justice of India, by way of answer to his view, that experience showed that "persons are hesitant in speaking out frankly" when the question relates to the integrity of a Judge, suggesting clearly that merely because persons questioned by the Chief Justice of India in the course of the inquiries made by him did not choose to say anything against the integrity of S.N. Kumar, it did not necessarily follow that the integrity of S.N. Kumar was above board, This letter addressed by the Chief Justice of Delhi to the Chief Justice of India clearly shows that there was full discussion between the Chief Justice of Delhi and the Chief Justice of India in regard to complaints and doubts against the integrity of S.N. Kumar but at the end of the discussion the Chief Justice of Delhi stuck to his opinion and that is why in the letter addressed by him to the Law Minister, he did not go back upon his refusal to recommend S.N. Kumar for further appointment and maintained his original recommendation not to continue S.N. Kumar for further term, The Chief Justice of Delhi expressed the hope that what he had stated in his letter to the Chief Justice of India would be considered sufficient comments on his part in regard to the observations of the Chief Justice of India quoted in the letter of the Law Minister dated 19th March, 1081, The criticism of the Chief Justice of India voiced in that letter was that what was stated by the Chief Justice of Delhi in his letter dated 19th February, 1981 was vague and the Chief Justice of Delhi therefore pointed out to the Law Minister that he had discussed the entire matter in detail with the Chief Justice of India and met his objection and hence there was no question of any vagueness and he therefore hoped that his reply would be sufficient answer to the observations of the Chief Justice of India. The effect and substance of what the Chief Justice of Delhi stated in his letter to the Law Minister was that he had cleared the charge of vagueness by discussing all thatch in regard to the allegations against S.N. Kumar with the Chief Justice of India.

93. This was followed by a letter dated 15th April, 1981 addressed by the Law Minister to the Chief Justice of Delhi, We have already pointed out that since what was stated in the letter of the Chief Justice of Delhi dated 19th February, 1981 was vague, the Law Minister had, by his letter dated 19th March, 1981 requested the Chief Justice of Delhi to offer further comments in support of his recommendation against the discontinuance of S.N. Kumar. The only reply which the Law Minister got from the Chief Justice of Delhi was that the 'Chief Justice of Delhi had met and discussed the entire matter in detail with the Chief Justice of India and removed the objection based on vagueness by giving him "details and concrete facts" in regard to the allegations against S.N. Kumar. But the Law Minister was not informed as to what was discussed between the Chief Justice of Delhi and the Chief Justice of India and what were the "details and concrete facts" disclosed by him to the Chief Justice of India. It was obvious from the reply given by the Chief Justice of Delhi that despite the discussion with the Chief Justice of India he stuck to his original recommendation not to continue S.N. Kumar for a further term and the Law Minister therefore naturally enquired from him by his letter dated 15th April, 1981 as to what was the material which provided the basis on which he concluded that S.N. Kumar's reputation for integrity was not above board and recommended that he may not be continued. Ultimately, it was the Law Minister who had to take a decision on behalf of the Government of India as to whether S.N. Kumar should be continued or not and in order to be able to discharge this constitutional function fairly and honestly, it was necessary for the Law Minister to know what was the material on the basis of which the Chief Justice of Delhi had reached the opinion that S.N. Kumar did not enjoy good reputation for integrity and that he could not therefore be recommended for reappointment. The Law Minister obviously could not accept the opinion of the Chief Justice of Delhi blindly and unquestioningly because that would have amounted to abdication of his constitutional obligation and he therefore asked the Chief Justice of Delhi to furnish him the material on which the opinion of the Chief Justice of Delhi was based. This letter addressed by the Law Minister to the Chief Justice of Delhi provides the clearest evidence that tha Law Minister was not a party to any conspiracy to throw out S.N. Kumar as an additional Judge. The Law Minister if ha was a party to any such conspiracy, would not have required the Chief Justice of Delhi to provide the material which formed the basis of his opinion and instead, he would have accepted the opinion of tha Chief Justice of Delhi and after formally inviting the opinion of the Chief Justice of India, decided to discontinue S.N. Kumar. But, obviously, the Law Minister wanted to satisfy himself that them was material on the basis of which it could be said that the integrity of S.N. Kumar was doubtful, and that is why ha did not regard it as sufficient that tha Chief Justice of Delhi had discussed tha matter with the Chief Justice of India but asked for the material which formed the basis of the opinion of the Chief Justice of Delhi so that the Central Government could come to its own decision whether or not to continue S.N. Kumar

as an additional Judge. This action on the part of the Law Minister clearly establishes his bona fides in the matter of discontinuance of S.N. Kumar.

94. Now we come to a very important letter which formed the subject matter of bitter controversy between the parties. This was a letter dated 7th May, 1981 addressed by the Chief Justice of Delhi to the Law Minister in response to the request contained in the letter of the Law Minister dated 15th April, 1981. The Chief Justice of Delhi by his letter supplied to the Law Minister the material on which his opinion against the continuance of 8. N. Kumar was based. This letter contained at the top the words "Secret (For personal attention only)", It contained in the second paragraph a prefatory statement by way of preamble to the facts set out in the subsequent paragraphs. This prefatory statement is extremely important and it may be set out in extensor in the following words:

Hon'ble the Chief Justice of India had made certain observations with regard to my recommendation about Mr. Justice S.N. Kumar and the same were communicated to me by you for my comments in your D.O. No. 50/2/81-Jus., dated 19th March, 1981, The Chief Justice had also written to me a letter dated 14th March, 1981 asking for "details and concrete facts in regard to the allegations against Justice Kumar." As I wrote to you in my D.O. No. 293-HCJ/PPS, dated 28th March, 1981. I discussed the matter with Hon'ble the Chief Justice and as desired by him, in reply to his letter, wrote my D. O. No. 292-HCJ/PPS dated March 28, 1981, a copy of which was forwarded to you. Accordingly, it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's integrity was not above board, I give below some facts.

(Underlining is ours)

The Chief Justice of Delhi reiterated in this prefatory statement that pursuant to the letter dated 14th March, 1981 addressed by the Chief Justice of India asking for "details and concrete facts in regard to the allegations against Justice Kumar", he had met the Chief Justice of India and discussed the matter with him and the letter dated 2.8th March 1981 was written by him as desired by the Chief Justice of India and accordingly -- for that reason -- it was not only embarrassing but painful for him to write this letter but since the Law Minister desired to know what material provided the basis for him to conclude that the integrity of S.N. Kumar was not above board, he was proceeding to give some facts. It is clear from this prefatory statement that it was as per the desire of the Chief Justice of India that the letter dated 28th March, 1981 was addressed by the Chief Justice of Delhi in the terms in which he did. There is an undercurrent of suggestion here that the Chief Justice of India did not approve of the idea of the Chief Justice of Delhi setting out in a letter the facts discussed by him with the Chief Justice of India and perhaps that is why the Chief Justice of Delhi stated that it was both embarrassing and painful for him to write that letter setting out the facts on which his opinion was based. The Chief Justice of Delhi then proceeded to state the facts on the basis of which he had formed the view that S.N. Kumar did not enjoy good reputation for integrity. It is not necessary for us to refer to these facts in any detail but suffice it to state that several facts were set out by the Chief Justice of Delhi which made him conclude "that the reputation for integrity of Justice Kumar was not as should for a Judge of the High Court". The Chief Justice of Delhi pointed out that some time early in May, 1980 one of his colleagues had told him that he had information to the effect that "if a substantial amount was paid to Justice Kumar, suits brought by a particular party against an Insurance Company would be decided in favour of that party". The reference here was obviously to suits Nos. 1408, 1409 and 1417, of 1979 which were filed by Jain Sudh Vanaspati Limited and Jain Export Private Limited against the New Indian Insurance Company Limited. The Chief Justice of Delhi stated that even though original side of work was taken away from S.N. Kumar and he was put on the appellate side in the second half of the year, 1980, that is, after the summer vacation, S.N. Kumar did not release these three suits as also some other suits which were part-heard before him and continued to deal with them, In August, 1980, observed the Chief Justice of Delhi, the same colleague of his who had talked to him earlier as also another colleague mentioned to him that doubts were being expressed about the integrity of S.N. Kumar vis-a-vis these three cases and some others whereupon he "made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations". The Chief Justice of Delhi also found that besides the above mentioned three cases there were a number of other cases which had been retained by S.N. Kumar on his board despite his transfer to the appellate side and in some of these cases "the parties involved were rich and influential including some former Princes". The Chief Justice of Delhi was at that time acting Chief Justice and after his appointment as permanent Chief Justice early in January, 1981, he looked into this matter a little more closely and made further inquiries and found that some of the lawyers were noncommittal but there were others who "asserted with some force that Justice Kumar's reputation was not above board". The Chief Justice of Delhi also talked to some other colleagues besides the two who had spoken to him and they also said that "unconfirmed reports have been circulated in the Bar which were not very complimentary to Justice Kumar". The Chief Justice of Delhi pointed out that these were the facts on the basis of which he had come to the opinion that S.N. Kumar did not enjoy good reputation for integrity. Now it was sought to be argued by learned Counsel appearing on behalf of S.N. Kumar that these facts were not true and the Chief Justice of Delhi was not justified in reaching an adverse opinion against S.N. Kumar on the basis of these facts. The learned Counsel for S.N. Kumar submitted that it was a well established practice of the Delhi

High Court that a part-heard matter always went with the Judge and was heard by him whether he was' transferred from the original side to the appellate side or vice versa and S. N. Kumar did not therefore act improperly in taking up part-heard matters even after he was transferred to the appellate side and no inference of lack of integrity could therefore be drawn against him merely because he continued to take up the part-heard matters. We are afraid this argument which seeks to assail the credibility of the opinion expressed by the Chief Justice of Delhi cannot be entertained by us. It is not open to the Court to hold an' inquiry and determine for itself the correctness of the opinion of any of the constitutional authorities required to be consulted by the President. The opinion given by any such constitutional authority may be mistaken or erroneous but the corrective for such mistake or error is to be found in the constitutional provision itself and it cannot be provided by judicial intervention. The Court cannot take evidence for the purpose of determining whether the facts on which the opinion of a constitutional authority required to be consulted is based are true or not or whether the opinion expressed by such constitutional authority is well-founded or not. That is a function entrusted by the Constitution to the President, that is, the Central Government and it is for the Central Government to Judge whether the opinion expressed by the constitutional authority such as the Chief Justice of the High Court is well-founded or not and whether it should be accepted or rejected. The court cannot be invited to go into the question whether the facts on which the opinion of the Chief Justice of Delhi was based were correct or not and whether the opinion expressed by him was or was not justified, But all the same we may point out that, even on the record as it stands, the statement of S. N. Kumar in his affidavit In regard to the practice of the Delhi Court, does not seem to accord with what the Chief Justice of India, according to his (SIC)tatter dated 22nd May, 1081 appear have learnt as a result of the inquiry made by him, namely, that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases provided that a substantial amount of time has been already spent on them. It is not every part-heard case which travels with the Judge from the original to the appellate side and vice versa but only those part-heard cases on which a substantial amount of time has already been spent. It may be pointed out that there is nothing to show that the part-heard suits which continued to remain with S.N. Kumar were suits on which a considerable amount of time had already been spent In fact, suits Nos. 1408, 1409 and 1417 of 1979 were not at all part-heard suits and much less could it be said that a considerable time had already been spent by S.N. Kumar on them and yet, according to the Chief Justice of Delhi, they continued to be dealt by S.N. Kumar. But, as we observed a little while ago, this is not a matter which can be investigated by the court and it must be left to the President, that is, the Central Government to decide what credibility or weight to attach to the opinion of the Chief Justice of Delhi The Court is concerned merely to enquire whether there was, in fact, full and effective consultation with the Chief Justice of Delhi and the Chief Justice of India and not whether the opinion given by the Chief Justice of Delhi or the Chief Justice of India was correct or not. It is possible that the opinion expressed by the Chief Justice of Delhi in the present case was mistaken or erroneous, but that is not an issue which can be examined by the court. The Chief Justice of Delhi bona fide came to the view that S.N. Kumar did not enjoy good reputation for integrity and he frankly expressed this view to the Law Minister as he was bound to do, but from this it does not necessarily follow that S.N. Kumar was lacking in integrity. The possibility of a bona fide error on the part of the Chief Justice of Delhi can never be excluded.

95. There is also inherent evidence in the letter dated 7th May, 1981, to show that the Chief Justice of Delhi acted bona fide in giving his opinion to the Law Minister in regard to the integrity of S.N. Kumar. The Law Minister had by his letter dated 15th April, 1981 reuested the Chief Justice of Delhi to send his comments on the complaint made by one Sabir Hussain, an advocate. The Chief Justice of Delhi after examining the relevant files in regard to this complaint intimated to the Law Minister by his letter dated 7th May, 1981 that the complaint related to a suit which was disposed of by S.N. Kumar and it was therefore a matter which could be commented upon only judicially, The Chief Justice of Delhi adopted a correct approach in regard to this complaint and did not betray any undue enthusiasm to condemn S.N. Kumar, If the Chief Justice of Delhi were actuated by any mala fides against S.N. Kumar, he would have immediately seized upon this complaint and tried to utilise it for the purpose of supporting his opinion against the integrity of S.N. Kumar, We may point out that the Chief Justice of Delhi was perfectly right in not sitting in judgment over the decision given by S.N. Kumar in Sabir Hussein's suit, for it is not open to the Chief Justice of a High Court to examine the judgments given by an additional Judge and pass upon the quality of those judgments for the purpose of deciding whether the additional Judge should be reappointed or not. This exercise is not open to the Chief Justice of the High Court or to the Chief Justice of India because the additional Judge is not on probation and that is why we are constrained to observe though the case of O.N. Vohra not being before us, it is not necessary for us to do so, that the Chief Justice of Delhi was not justified in wadding through the papers of Kissa Kursi Ka Case for the purpose of deciding whether O.N. Vohra should be reappointed as an additional Judge. If O.N. Vohra was in error in not disposing of any application in the case or in making a wrong order on such application, it was for this Court in appeal, in the exercise of its judicial power, to comment on the judicial performance of O.N. Vohra and it was not for the Chief Justice of Delhi to sit in judgment over it for the purpose of condemning O.N. Vohra.

96. We may point out that the Chief Justice of Delhi also referred in his letter dated 7th May, 1981 to the low disposals of S.N. Kumar as also to his unsatisfactory behaviour with the members of the Bar. But these allegations need not detain us because the discontinuance of S.N. Kumar as an Additional Judge be President was not based on these

allegations but it was founded only on the opinion expressed by the Chief Justice of Delhi in regard to the integrity of S.N. Kumar.

97. Now we come to a most important part of the controversy between the parties. The letter dated 7th May, 1981 addressed by the Chief Justice of Delhi to the Law Minister carried at the top the remark, "Secret (for personal attention only)". Now before this letter was sent by the Chief Justice of Delhi to the Law Minister, he had informed the Law Minister to treat it as secret but at that time the Law Minister did not try to probe into the implications of this request. Later, however, when the Chief Justice of Delhi, with reference to the letter proposed to be written by him in regard to the continuance of O.N. Vohra, requested that that letter also should be kept secret for personal attention only, the Law Minister asked him as to what exactly he meant by the remark "Secret (for personal attention only)" in the letter dated 7th May, 1981. The Chief Justice of Delhi in reply intimated to the Law Minister that what he meant was that that letter should not be brought to the notice of the "Chief Justice of India and for three very good reasons, namely:

1. For reasons stated in the opening portion of his letter dated 7th May, 1981.

2. He felt highly embarrassed and perplexed after he addressed the original letter dated 19-2-1981 about Shri S.N. Kumar as the contents of that letter came clearly to be known to Shri S.N. Kumar and certain of his colleagues on the bench as a result of which' it embarrassed him in discharge of his duties and functions. He felt that the contents of his letter dated 7th May, 1981 would also get into the hands of Shri S.N. Kumar and certain of his other colleagues and he would thereby be put to greater embarrassment which might create problems for him in future in the discharge of Ms duties as chief justice.

3. He felt that the Chief Justice of India had already started wrongfully denigrating him for his letter of February 81 as some of his friends convey ed to him the feelings of the CJI. The Chief Justice of Delhi also informed the Law Minister that "ha could noford to spoil his relations with the Chief Justice of India on the one hand and on the other could not desist from expressing without fear or favour what he felt of certain matters" and if he was "going to be suspect for discharging his functions fairly and conscientiously, then his functioning as the Chief Justice would never be smooth vis-a-vis Chief Justice of India." The Law Minister placed this conversation on record in a note made by him on 19th May, 1981 as also in a letter dated 29th May, 1981 addressed by him to the Chief Justice of Delhi. Pursuant to this request made by the Chief Justice of Delhi, the Law Minister did not place the letter dated 7th May 1981 before the Chief Justice of India.

98. Though the Chief Justice of India had stated in his note dated 3rd March, 1981 that he would like to go carefully into the charges against S.N. Kumar and he had a meeting with the Chief Justice of Delhi on 26th March, 1981 in that connection, he did not write to the Law Minister until the 3rd week of May 1981 giving his opinion in regard to the question whether S.N. Kumar should be continued or not, Meanwhile, the time fixed by this Court for the Union of India to decide whether S.N. Kumar should be reappointed for a further term as an additional Judge or should be appointed as a permanent Judge or other-wise, was expiring on 27th May 1981 and the Law Minister was therefore constrained to address a letter dated 21st May 1081 reminding the Chief Justice of India that he had stated In his note dated 3rd March, 1981 that ha desired to look carefully into the charges against S.N. Kumar and requesting him that (SIC) he had made any inquiries, the Law Minister "would be grateful to have the details" and also pressing him to give his "urgent advice in regard to the continuance or otherwise" of the term of S.N. Kumar. It appears that this letter was received by the Chief Justice of India when he was camping at Simla during the summer vacation and on receipt of this letter, the Chief Justice of India addressed a communication dated 22nd May 1981 to the Law Minister stating that he had made the most careful and extensive inquiries in regard to the allegations against the integrity of S.N. Kumar as also hate of disposals and he was satisfied that there was no substance in any of these allegations. The Chief Justice of India pointed out that it was a common practice in the Delhi High Court that even after the allocation of a Judge was changed from the original side to the appellate side and vice versa, he continued to take up the part-heard cases on which sufficient amount of time had already been spent and S.N. Kumar therefore did nothing out of the way or unusual in taking up part-heard cases after the allocation of his work was changed. The Chief Justice of India observed that, on inquiries made by him, he disagreed with the view taken by the Chief Justice of Delhi that S.N. Kumar was either slow in his disposals or his integrity was doubtful and stated that it was not possible for him to agree that the term of S.N. Kumar should not be extended for the reasons mentioned by the Chief Justice of Delhi Not one member of the Bar or Bench, said the Chief Justice of India, doubted the integrity of S.N. Kumar and on the contrary, some of them stated that he was a man of unquestioned integrity. It seems that some Intelligence Bureau report regarding S.N. Kumar was also sent by the Law Minister to the Chief Justice of India for his opinion along with his letter dated 22nd May, 1981, but the Chief Justice of India could not give his opinion with reference to the report since he had no time to examine it and he therefore stated that he would give his opinion after his return to New Delhi on 26th May 1981 and in the circumstances he recommended extension of the term of S.N. Kumar for another short term of three months. But, since one short term extension had already been granted, the Law Minister presumably thought that it would not be

right to go on giving short, term extensions but that a decision should now be taken whether S.N. Kumar should be continued or not and he therefore, proceeded to make his recommendation ignoring the Intelligence Bureau Report against S.N. Kumar, the rate of his disposals and even his alleged behaviour in Court and confining himself only to the question of his reputation for Integrity. The Law Minister put up a note before the Prime Minister on 27th, May, 1981 summarising the effect of the correspondence which had taken place between him, The Chief Justice of Delhi and the Chief Justice of India and pointing out that notwithstanding his specific request as to details of the inquiries made by him, the Chief Justice of India had not furnished the same to him and on the contrary the letter dated 22nd May 1981 addressed by the Chief Justice of India revealed "that he became a victim of his own charge of vagueness made by him against the Chief Justice of Delhi." The Law Minister stated in the note that he presumed that when the Chief Justice of Delhi and the Chief Justice of India met, "the former must have informed the latter bout the details that he had mentioned... in his letter dated 7th May 1981" and this inference was obvious from the letters addressed by the Chief Justice of Delhi to the Law Minister and the Chief Justice of India. The Law Minister observed that even according to the Chief Justice of India, the prevailing practice in the Delhi High Court was that not every part heard case but only those part-heard cases on which substantial amount of time had already been spent would go with the Judge when there was change of allocating of work but the Chief Justice of India had" "surprisingly left the matter there" without probing further "as to whether the part-heard, matters which Justice Kumar chose to handle as a single Judge notwithstanding his having been allocated to the Division Bench were such on which substantial amount of time had already been spent by him.' It was also pointed out by the Law Minister in his note that It was not merely a case of drawing inference against the integrity of S.N. Kumar from his taking up part-heard cases after being transferred to the appellate side but the details given by the Chief Justice of Delhi in his letter dated 7th May 1981 went further and in contrast, the letter of the Chief Justice of India dated 22nd May, 1981 was not only lacking in details but was too vague. The Law Minute after making this analysis concluded that in the natter of assessment of integrity he preferred to accept the opinion of the Chief Justice of Delhi since "it is in his association that the Judge concerned discharges his duties and he has a better occasion and opportunity to watch his (SIC) and conduct" and on this view hiecommended that S.N. Kumar may not be continued any further as an additional Judge, The result was that S.N. Kumar was not continued as an additional Judge on the expiration of he term on 6th June, 1981,

99. Now the argument urged on be-hall of the petitioners and S.N. Kumar was that the facts set out in the letter of the Chief Justice of Delhi dated 7th May, 1981 on which the decision of the Central Government not to continue S.N. Kumar us an additional Judge was based, were not disclosed to the Chief Justice of India and he had therefore no opportunity to consider those facts and give his opinion upon them and hence there was no full and effective consultation between the Central Government and the Chief Justice of India and the decision of the Central Government not to continue S.N. Kumar as an additional Judge was vitiated by reason of non-compliance with the requirement of consultation laid down in Article 217. This argument was pressed with great vehemence by the learned Counsel appearing on behalf of S.N. Kumar and he injected considerable amount of passion in it, but we do not think it can be sustained. It is undoubtedly true that it was constitutionally impossible to the Central Government to arrive at the decision not to continue S.N. Kumar as an additional Judge without consultation with the Chief Justice of Delhi and the Chief Justice of India as mandatorily required by Article 217. But as pointed out by us in an earlier portion of the Judgment, it was not necessary that the full and identical facts which at once constituted "both the source and foundation of the Anal decision" of the Central Government should be placed before the Chief Justice of Delhi and the Chief Justice of India by the Central GOV eminent itself or that they should be brought to the notice of the Chief Justice of Delhi and the Chief Justice of India in any particular order or by following any particular procedure. What was necessary to constitute toll and (SIC)e fective consultation within the meaning of Article 217 was that the Chief Justice of Delhi and the Chief Justice of India should have for their consideratien "full and identical facts" which ultimately formed the basis of the (SIC) of the Central Government, Now there can be no doubt that the decision of the Central Government not to appoint S.N. Kumar for a further term was based on the facts provided by the Chief Justice of Delhi in his letter dated 7th May, 1981 and if these facts were not placed before the Chief Justice of India before he gave his opinion in regard to the continuance of S.N. Kumar in his letter dated 22nd May, 1981, the decision of the Central Government would be clearly vitiated for want of full and effective consultation with the Chief Justice of India. It therefore, becomes material to enquire whether the facts set out in the letter of the Chief Justice of Delhi dated 7th May, 1981 were placed before the Chief Justice of India before he gave his opinion in the letter dated 22nd May, 1981. We have already discussed this question at some length while dealing with the meeting held by the Chief Justice of Delhi with the Chief Justice of India on 26th Mar., 1981. and the letters dated 28th March, 1981 addressed by the Chief Justice of Delhi to the Law Minister and the Chief Justice of India subsequent to that meeting. We have pointed out various circumstances which, establish beyond any doubt that all the facts relating to the complaints and doubts expressed against the integrity of S.N. Kumar which were in the possession of the Chief Justice of Delhi must have been disclosed by him to the Chief Justice of India at the meeting held on 26th. March, 1981. We need not repeat what we have already discussed in great detail but we may add that, judging as practical men conversant with the ordinary course of human affiairs, we do not see any reason why the Chief Justice of Delhi should not have disclosed these facts to the Chief Justice of India, particularly when the Chief Justice of India had asked him to furnish "details and concrete facts in regard to the allegations against Justice Kumar", But, the question may then be asked as to why, if the Chief Justice of Delhi had disclosed all the facts set out in the letter dated 7th May, 1981, to the Chief Justice of India at the

meeting held on 26th March, 1981, the Chief Justice of Delhi should have requested the Law Minister not to bring the letter dated 7th May, 1981 to the attention of the Chief Justice of India, The Law Minister was also intrigued by this request and he therefore, asked the Chief Justice of Delhi as to why he did not want the tatter dated 7th May 1981 to be placed before the Chief Justice of India and the Chief Justice of Delhi gave three reasons which we have reproduced verbatim a little earlier. The first reason given by the Chief Justice of Delhi is extremely significant because it show clearly and indisputably that the facts set out in the letter dated 7th May, 1981 were discussed by the Chief Justice of Delhi with the Chief Justice of India at the meeting held on 26th March, 1981. The Chief Justice of Delhi pointed out that he did not want the letter dated 7th May, 1981 to be brought to the attention of the Chief Justice of India because, as observed by him in the opening portion of the letter, he had discussed the "details and concrete facts in regard to the allegations against Justice Kumar" with the Chief Justice of India but the letter dated 28th March, 1981 was write ten by him in the terms in which it was couched as per the desire of the Chief Justice of India and therefore it was embarrassing and painful for him to write the letter dated 7th May, 1981. This reason given by the Chief Justice of Delhi carries a veiled suggestion though not expressly articulated but implicit in what he has stated, that the Chief Justice of India did not want his. to place on record the "details and concrete facts in regard to the allegations" against S.N. Kumar and that is why he wrote the letter dated 28th Mar., 1981 in the terms he did according to the desire of the Chief Justice of India. This was perhaps the reason why the Chief Justice of Delhi found it embarrassing as well as painful to write the letter dated 7th May, 1981 setting out the "details and concrete facts in regard to the allegations" against S.N. Kumar, such a course being presumably contrary to the suggestion of the Chief Justice of India. We have, of course, no definite material before us on the basis of which we can conclude that the Chief Justice of India must have asked the Chief Justice of Delhi not to place the detailed facts relating to the complaints and doubts against S.N. Kumar in writing, but it does appear that some discussion must have taken place between the Chief Justice of Delhi and the Chief Justices of India as a result which the Chief Justice of Delhi bona fide carried a feeling that the Chief Justice of India might feel offended if the Chief Justice of Delhi were to put the detailed facts in regard to the allegations against S.N. Kumar on record, contrary to the view held by the Chief Justice of India. That is why the Chief Justice of Delhi was anxious that his letter dated 7th May, 1981 should not be brought to the attention of the Chief Justice of India. It was not because the Chief Justice of Delhi did not want the facts set out in the letter dated 7th May, 1981 to be disclosed to the Chief Justice of India that he requested the Law Minister not to place that letter before the Chief Justice of India, but because in view of the impression given or perhaps a suggestion made at the meeting by the Chief Justice of India, he apprehended that if he placed those facts on record contrary to the wish at the Chief Justice of India, the Chief Justice of India might feel offended and his relations with the Chief Justice of India might be spoilt. The second reason given by the Chief Justice of Delhi was that he had found that the contents of his previous letter dated 19th Feb., 1981 had coma to be known to S.N. Kumar and some of his colleagues on the Bench and he therefore felt that if the letter dated 7th May, 1981 was not kept by the Law Minister with himself along, but was sent by him to the Chief Justice of India, leakage might occur in the process and the contents of that letter also might get known to S.N. Kumar and others, causing him further embarrassment, The Chief Justice of Delhi might have been right or might have been wrong in entertaining the apprehension that if his letter dated 7th May 1981 was sent to the Chief Justice of India, its contents might in the process leak out and S.N. Kumar and others might come to know about them, but there is no reason to doubt that he bona fide felt this apprehension and that weighed with him by asking the Law Minister not to bring this letter dated 7th May 1981 to the attention of the Chief Justice of India particularly since he had already discussed the "details and concrete facts" set out in that letter with the Chief Justice of India, The third reason given by the Chief Justice of Delhi was that the Chief Justice of India had already started wrongfully denigrating him for his letter dated 19th Feb., 1981 as intimated to him by his friends and that if the Chief Justice of India came to know that he had placed the detailed facts in regard to the allegations against S.N. Kumar on record contrary to his wish, the Chief Justice of India might feel offended and in that event his functioning as Chief Justice of Delhi would become difficult vis-a-vis the Chief Justice of India, This feeling voiced by the Chief Justice of Delhi might or might not be justified and the information received by him from his friends in regard to the feelings of the Chief Justice of India might or might not be correct, but we have no reason to hold that the Chief Justice of Delhi acted otherwise than bona fide in carrying this feeling. It may be that the Chief Justice of Delhi was wrong in entertaining this feeling, but his bona fides and veracity cannot be doubted for a moment. Moreover, that is not a matter which falls within the scope of our inquiry. What we have to determine is only a very limited issue, namely whether the facts set out in the letter dated 7th May, 1981 were disclosed by the Chief Justice of Delhi to the Chief Justice of India and so far as that is concerned, there is no doubt in our minds that these facts were discussed by the Chief Justice of Delhi with the Chief Justice of India at the meeting held on 26th March 1981 and no contrary inference can be drawn merely because, for the three reasons given by him, the Chief Justice of Delhi asked the Law Minister not to bring his letter dated 7th May 1981 to the attention of the Chief Justice of India.

100. There is, in fact, another piece of evidence which clearly establishes that the detailed facts in regard to the allegations against S.N. Kumar were discussed between the Chief Justice of Delhi and the Chief Justice of India, The petitioners and S.N. Kumar of course did not dispute that the meeting of 26th March, 1981 did take place between the Chief Justice of Delhi and the Chief Justice of India but their contention was that the only circumstance pointed out by the Chief Justice of Delhi to the Chief Justice of India for drawing an adverse inference against the integrity of S.N. Kumar was thee had taken up part-heard cases of the original side even after he was transferred to the appellate side

and no other facts in regard to the integrity of S.N. Kumar were discussed by the Chief Justice of Delhi with the Chief Justice of India. This contention of the petitioners and S. N: Kumar is wholly without force and it stands completely answered by what we have already discussed in the preceding paragraphs of this judgment But, additionally, we may point out that this contention is also belied by the counter-affidavit dated 7th July 1981 filed by S.N. Kumar himself. If the only complaint in regard to integrity of S.N. Kumar mentioned by the Chief Justice of Delhi to the Chief Justice of India related to the taking up of part-heard cases by S.N. Kumar after transfer to the appellate side and that was a fortiori the only matter mentioned by the Chief Justice of India to S.N. Kumar when he called S.N. Kumar for discussion after his meeting with the Chief Justice of Delhi, it is difficult to understand how S.N. Kumar happened to refer to Suits Nos. 1408, 1409 and 1417 of 1979 in his counter-affidavit filed before the disclosure of the letter dated 7th May, 1981, These three suits were not part heard suits because the summonses for judgment in these three suits had been disposed of S.N. Kumar on 7th March, 1980 by granting unconditional leave to defend and yet they were specifically referred to by S.N. Kumar in his counter-affidavit and explanation was sought to be given in regard to them. These three suits were particularly mentioned in the letter dated 7th May, 1981 and according to that letter, it was in relation to these suits that allegation of lack of integrity was made against S.N. Kumar. Now if the complaint against the integrity of S.N. Kumar in relation to these three suits was not mentioned by the Chief Justice of Delhi to the Chief Justice of India at the meeting held on 26th Mar. 1981, how could S.N. Kumar think of dealing with them1 in his counter-affidavit. The reference to these three suits in the counter-affidavit of S.N. Kumar clearly shows that apart from the part-heard suits, these three suits and the allegations relating to them were also disclosed by the Chief Justice of Delhi to the Chief Justice of India and if thae so, there can be no doubt that all the facts in regard to the allegations against S.N. Kumar must have been discussed between the Chief Justice of Delhi and the Chief Justice of India.

101. It was suggested by the learned Counsel on behalf of S.N. Kumar in the course of arguments that the Chief Justice of Delhi was anxious to keep the facts set out in the letter dated 7th May, 1981 secret from the Chief Justice of India, lest he should make his com-ments on them and reject the recommendation not to continue S.N. Kumar as an additional Judge based on these facts. But this suggestion is meaningless because the Chief Justice of Delhi in any event knew as a result of the meeting held on 26th March 1981 that the Chief Justice 6f India was not agreeing with the view expressed by him and was against his recommendation to discontinue S.N. Kumar as an additional Judge, while he, on his part, was not prepared to change his view and retract the recommendation made by him, because even after the discussion with the Chief Justice of India, he felt that he could not honestly recommend continuance of S.N. Kumar as an additional Judge and if that be so, there is no reason why he should have wanted to keep back his letter dated 7th May, 1981 from the Chief Justice of India except for the three reasons given by him. We must, of course, observe that in our opinion, howsoever strong and cogent might be the three reasons given by him, the Chief Justice of Delhi should never have asked the Law Minister not to place his letter dated 7th May, 1981 before the Chief Justice of India, So long as the Chief Justice of Delhi was acting bona fide in the discharge of his constitutional duty -- and we have no doubt that in the matter of continuance of S.N. Kumar he was acting bona fide, he should not have bothered whether by his action in putting the facts on record in the letter dated 7th May, 1981 the Chief Justice of India would be offended and his relations with the Chief Justice of India would be spoilt. There are occasions when persons holding high constitutional offices are called upon to perform an unpleasent duty and this duty they have to perform, whatever by the consequences. If necessary, let the heavens fall but what is right and jushall be done without fear or favour, affection or goodwill. Long 'years ago that great common law Judge, Lord Mansfield spoke of the judicial office in majestic tones and said:

I will not do that which conscience tells me is wrong, upon his occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press; I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow.... Once for all, let it be understood, 'that no endeavours of this kind will influence any man who at present sits here.

What the learned Chief Justice said in regard to judicial function must apply with equal validity where a Judge is called upon to discharge any other function entrusted to him by the Constitution and he must boldly and fearlessly do that which Constitution commands. But merely because the Chief Justice of Delhi flinched and faltered out of a sense of apprehension that the Chief Justice of India might feel offended by his writing the letter dated 7th May, 1981, it does not follow that the facts set out in that letter were not personally discussed by him with the Chief Justice of India at the meeting held on 26 Mar, 1981. We are clearly of the view that the "full and identical facts" on which the decision of the Central Government was based were placed before the Chief Justice of India there was full and effective consultation with him before the Central Govt. reached the decision that S.N. Kumar should not be continued as an additional Judge. We may also point out that this decision of the Central Government was not based on any irrelevant considerations, since, as we have already pointed out earlier, lack of eputation for integrity is certainly a most relevant consideration in deciding whether a person should be appointed a Judge.

102. We may make it clear that in taking this view we do not for a moment wish to suggest that S.N. Kumar was lacking in integrity. That is not a matter Into which we are called upon to enquire and nothing that is stated by us should be regarded as expression of any opinion en this question. We may observe in (SIC)hrness to S.N. Kumar that the Chief Justice of India clearly stated it to be his opinion that the integrity of S.N. Kumar was unquestionable. What happened here was that there were two conflicting opinions given by the two constitutional authorities required to be consulted, namely, the Chief Justice of Delhi and the Chief Justice of India. Both were perfectly bona fide opinions and the Central Government had to choose, between them and come to its own decision. The Central Government preferred the Opinion of the Chief Justice of Delhi for the reasons mentioned in the note of the Law Minister dated 27th May, 1981 and decided not to appoint S.N. Kumar as an additional Judge for a further term. We do not think this decision suffers from any constitutional infirmity.

103. But before we part with this point, we must refer to one last contention urged on behalf of the petitioners and S.N. Kumar and that contention was that the non-appointment of S.N. Kumar as an additional Judge was tantamount to his removal and the Central Government was therefore bound to follow the principles of natural justice before taking the decision not to continue him an Additional Judge, This contention is without merit and the premise on which it is based is not sustainable. It is wholly incorrect to say that when an additional Judge whose term has expired and who would therefore have to return to the Bar or to the subordinate Judicial service, is not appointed a permanent Judge or an additional Judge for a further, term he is re moved by the Central Government. We have already discussed this aspect of the matter and pointed out that on the expiration of his term, an additional Judge has no right to be appointed a permanent Judge or an additional Judge for a further term and his only right is to be considered for such appointment and if as a result of such consideration, after going through the consultation process envisaged in Article 217, he is not considered suitable for further appointment and it is decided not to reappoint him, he cannot complain against the decision, unless he can show that there was no full and effective consultation as com templated in Article 217 or that the decision not to appoint him was based irrelevant considerations. If he is not appointed a permanent Judge or an additional Judge for a further term, he goes out, but that happens because the term for' which he was originally appointed has come to an end and not because he is removed, There is therefore no question of giving him an opportunity to be heard before the decision is taken not to appoint him as a permanent Judge or an additional Judge, We must in the circumstances reject the challenge leveled on behalf of the petitioners and S.N. Kumar against the decision of the Central Government not to appoint S.N. Kumar as an additional Judge for a further term.

104. We would therefore dismiss the first group of writ petitions in so far as they seek relief in respect of O.N. Vohra and S.N. Kumar. No relief can be granted in respect of O.N. Vohra because, though added as a party respondent, he has not appeared and claimed any relief against the decision of the Central Government to discontinue him as an additional Judge and has accepted such decision without protest or complaint, That is the reason why we have not examined the complaint of the petitioners in regard to discontinuance of O.N. Vohra as an additional Judge, So far as S.N. Kumar is concerned, we have rejected his claim for relief, because, in our opinion, and we have already given our reasons taking this view, the decision to discontinue him as an additional Judge was taken by the Central Government after full and effective consultation with the Chief Justice of Delhi and the Chief Justice of India and it was not based on any irrelevant considerations, We have taken the view that the circular letter issued by the Law Minister was not unconstitutional and void and hence the first group of writ petitions must also fail in so far as they challenge the constitutional validity of the circular letter. The other relief claimed in the first group of writ petitions have also been rejected by us and hence this group of writ petitions must wholly fail.

105. But, while dismissing this group of writ petitions, we may observe that though, in our opinion, there was full and effective consultation with the Chief Justice of Delhi and the Chief Justice of India before the decision was taken by the Central Government to discontinue S.N. Kumar as an additional Judge 'and neither the petitioners nor S.N. Kumar could therefore have any legitimate cause for grievance against such decision, it would be a good thing if, having regard to the high status and dignity of a High Court Judge, the Union of India could see its way to place the letter dated 7th May, 1981 addressed by the Chief Justice of Delhi to the Law Minister before the Chief Justice of India and elicit his opinion with reference to that letter and then consider whether S.N. Kumar should be re-appointed as an additional Judge in the Delhi High Court. This is only a suggestion which we are making ex cathedra for the acceptance of the Government; if thought fit. K.B.N. Singh's case.

106. The second group of writ petitions raises the question of constitutional validity of the orders transferring Chief Justice M.M. Ismail to the Kerala High' Court and Chief Justice K.B.N. Singh to the Madras High Court, However, so far as Chief Justice M.M. Ismail is concerned, the question has become academic because he has stated in the counteraffi davit filed by him in reply to the writ petition of Miss Lily Thomas that he does not want anyone to litigate for or against him nor does he want anything about him to be argued or debated and he has subsequently resigned his office as Chief Justice of the Madras High Court the only question which therefore survives for consideration is whether the transfer of Chief Justice K.B.N. Singh to the Madras High Court could be said to be constitutionally

invalid. The determination of this question obviously depends upon the true scope and ambit of the power of transfer conferred under Clause (1) of Article 222. That Article reads as follows:

Article 222(1). The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

This article came up for consideration before a Bench of five Judges of this Court in Sankalchand Sheth's case MANU/SC/0065/1977 (supra), Mr. Seervai arguing on behalf of Sankalchand Sheth in that case contended that a Judge cannot be transferred from one High Court to another without his consent, and there were two grounds on which he rested this contention, One was that on a proper construction of Article 222 Clause (1) in the context of the basic principle of independence of the Judiciary, consent must be read as a necessary requirement in that article and the other was that since transfer of a Judge involves a fresh appointment in the High Court to which he is transferred, such transfer cannot be made without the consent of the Judge. The majority Judges comprising Chandrachud, J., (as he then was) Krishna lyer, J. and Fazal Ali, J., rejected this contention of Mr. Seervai and held that there was no need or Justification, in order to uphold and protect the independence of the judiciary, to construe Article 222 Clause (1) as meaning that a Judge can be transferred from one High Court to another only with his consent, Justice Untwalia and myself, however, took a different view. We upheld the contention of Mr. Seervai and held that a Judge cannot be transferred from one High Court to another without his consent, Mr. Justice Untwalia based his conclusion on the second ground urged by Mr. Seervai, namely, that the transfer of a Judge involves fresh appointment in the High Court to which he is transferred and the Judge is also required to take a fresh oath in accordance with Article 219 and in the form prescribed in the Third Schedule and he cannot therefore be transferred without his consent. I accepted both the grounds urged by Mr. Seervai in support of his contention and held that it is no doubt true that the words "without his consent" are not to be found in Clause (1) of Article 222, but the word 'transfer' which is used there is a neutral word which can mean consensual as well as compulsory transfer and if the high and noble purpose of the Constitution to secure the independence of superior judiciary by insulating it from all forms of executive control or interference is to be achieved, the word 'transfer' must be read in the limited sense of consensual transfer. I pointed that when a Judge is transferred to another High Court, he has to make and subscribe a fresh oath or affirmation before the Governor of the State to which he is transferred before he can enter upon the office of a Judge of that High Court and such transfer would not become effective unless the Judge makes and subscribes an oath or affirmation before the Governor and that would plainly be a matter within the volition of the Judge and I therefore, concluded that since the volition of the Judge who is transferred is essential for making the transfer effective, there can be no transfer of a Judge of a High Court without his consent The view taken by Justice Untwalia and myself was thus a minority view, but since the present writ petitions were being heard by a larger Bench than that which decided Sankalchand Sheth's case, Mr. Seervai canvassed the minority view for acceptance by the Bench of seven Judges. The learned Attorney General, on the other hand, contended that the majority view taken in Sankalchand Sheth's case represented the correct law on the point and the Bench of seven Judges should affirm that view. I have carefully examined the arguments which have been advanced with great ability and learning on both sides, but I am afraid I find it impassible to change the view I took in Sankalchand Sheth's case. Nothing that has been said in the course of the arguments has persuaded me to take a different view. I remain unconvinced of the incorrectness of the view taken by me and I hold to that view despite the fact that I still happen to be in a minority, I have already, given elaborate reasons in my Judgment in Sankalchand Sheth's case for taking the view that a Judge cannot be transferred from one High Court to another without his consent and I think would be a futile exercise on my part to reiterate those reasons once again in this judgment, I hold for the reasons given by me in my judgment in Sankalchand Sheth's case that the power of transfer under Article 222 Clause (1) cannot be exercised against a Judge without his consent, It is, I may repeat, a highly dangerous power involving great hardship and, injury to the Judge transferred including a stigma on his reputation in cases where the transfer is not effected pursuant to any p olicy but the Judge is picked out for transfer on a selective basis and to my mind, it makes no difference whether the transfer is made by the Government on its own initiative or it is made at the instance of the Chief Justice of India as in the case of Chief Justice K.B.N. Singh.

107. Even if I am wrong in taking the view that no Judge can be transferred from one High Court to another without his consent, the transfer of Chief Justice K.B.N. Singh must still fail. It has been held in Sankalchand Sheth's case MANU/SC/0065/1977), and on this point there was no disagreement between the majority and the minority, that the power to transfer a Judge from one High Court to another can be exercised only in public interest and there must be full and effective consultation between the President, that is, the Central Government and the Chief Justice of India before the decision to transfer a Judge is taken. I wholly accept this construction of Clause (1) of Article 222 and since full and detailed reasons have been given in the various judgments in Sankalchand Sheth's case I need not indulge in the same exercise again,

108. Now it is obvious that when a Judge is transferred from one High Court to another by way of punishment, it can never be in public interest for no public interest would countenance punishment of a Judge except by way of

impeachment under proviso (b) to Clause (1) of Article 217 read with Clause (4) of Article 124. There is a clear antithesis between a transfer by way of punishment and a transfer In public interest and therefore, a transfer by way of punishment must be held to be outside the scope and ambit of Article 222 Clause (1), In fact, if was so held in Sankalchand Sheth's case by all the Judges, But the question then arises when can it be said that a Judge is transferred from one High Court to another by way of punishment, Undoubtedly, when a Judge is transferred by the Government because he does not toe the line of the executive or gives decisions against the Executive or has for some reason or the other fallen from its grace, it would be a transfer byway of punishment. That would be the plainest case of penal transfer. But these are not the only circumstance in which a Judge may be transferred from one High Court to another by way of punishment. The element of punishment is not confined merely to the wrath of the Government on account of a Judge being inconveniently independent. There may be cases where a Judge may be transferred because he is not behaving properly or is conducting himself in a manner not befitting the position of a High Court Judge and such a transfer grounded on the conduct or behaviour of the Judge would clearly be punishment, even if it be on the recommendation of the Cheif Justice of India. It is also possible that the Chief Justice of India may find in a given case that a Judge of a High Court is promoting the interest of his son or brother in practice or by passive inaction allowing his son or brother to exploit his relationship with the Judge for the purpose of advancing his professional interest and in such a case, the Chief Justice of India may recommend that the Judge should be transferred to another High Court and the Government may accept such recommendation, Would the transfer in such a case not clearly be by way of punishment? There may also be cases where the recommendation of the Chief Justice of India for transfer of a Judge may proceed from his disagreement with the social philosophy of the Judge or his unhappiness with the manner in which he is deciding cases and the Government may unquestioningly accept such recommendation, This would also, in my opinion, be nothing short of punishment, I take the view that whenever transfer of a Judge is effected for a reason bearing upon the conduct or behaviour of the Judge, it would be by way of punishment and therefore, not permissible under Clause (1) of Article 222. When I say this, I may make if clear that I do not regard transfer pet se as a punishment, It is the reason for which the transfer is made, which makes it penal and if that reason is related to the conduct of behaviour of the Judge the transfer would clearly be a penal transfer not in public interest and hence outside the scope and ambit of Article 222 Clause (1).

109. That takes me to a consideration if the question whether in the present case where there was full and effective consultation between the Central Government and the Chief Justice of India before the decision was taken to transfer Chief Justice K.B.N. Singh to the Madras High Court and whether such transfer was effected in public interest and not by way of punishment. While considering this question, I would like to emphasise at the outset, and the point I am making here is one of great importance, that when a transfer of a Judge of a High Court is challenged in a Court of Law, the burden must lie upon the Government to sustain the validity of the transfer. The power of transfer even according to the majority decision in Sankalchand Sheth's case MANU/SC/0065/1977, is a drastic power to be exercised only in rare cases as it has the effect of destroying the right o! the Judge who is transferred, to continue as a Judge in the High Court to which he was appointed until he reaches the age of 62 years and removing him to another High Court where possibly ha would not have agreed to go if he had been asked at the tome of his original appointment. When an order of transfer is made, the Judge has a difficult choice, either to go to the High Court where he is transferred or to resign and having burnt his boats and given up his profession long back, he would be in great difficulty if he chose to resign and therefore, from a practical point of view, he would have no option but to go to the other High Court, howsoever inconvenient it may be to him. Moreover, it would be almost impossible for the Judge to successfully challenge the order of transfer if the burden of showing its invalidity were cast upon him. Even as it is, the Judge would have to wage a lone and unequal battle against the Government when he challenges the Order of transfer and if the onus of establishing facts invalidating the order of transfer were thrown upon him, the battle would be rendered still more unequal and the scales would be weighted heavily against him. The result would be that even an invalid order of transfer would pass muster on account of the inability of the Judge to discharge the burden of showing the invalidity of the order of transfer and the virtual immunity thus granted to the order of transfer would seriously impair the independence of the judiciary. Furthermore, having regard to the high status and dignity of a Judge of a High Court, it is but fair that when the Government is displacing the right of the Judge to continue in his High Court, up to the age of 62 years, he should be told what are the reasons which have weighed with the Government in transferring him. He must, be assured that all the constitutional equipments have been compiled with, Besides, the facts showing that there was full and effective consultation between the Government and the Chief Justice of India and the reasons for making the transfer would toe within the special knowledge of the Government and the onus must therefore be upon the Government to prove them. Thus the burden of sustaining the validity of the order of transfer must rest on the Government and this burden, it may be pointed out, is a heavy burden, which must be satisfactorily discharged by the Government. This is the same principle which has been applied by this Court when the legality of detention of a person is challenged by filing an application for a writ of habeas corpus, This Court has consistently taken the view in such cases, unlike the House of Lords in Zamihr's case, that the burden if sustaining the validity of the detention must lie on the detaining authority.

110. I may observe that this is a remarkably unusual case in which there is substantially a contest between the Chief Justice of a High Court on one hand and the Chief Justice of India on the other. The Government is, of course, a party to this contest since it is ultimately the order of transfer made by the Government which is called in question by Chief Justice K.B.N. Singh, but since the order of transfer was made by the Government on the recommendation of the Chief Justice of India, it is the Chief Justice of India who has accepted the gauntlet and joined the contest against Chief Justice K.B.N, Singh. The Chief Justice of India has filed a counter-affidavit in reply to the writ petition of Chief Justice K.B.N. Singh and others, but having filed such counter-affidavit, he has chosen not to appear before us through counsel, The result is that we have been deprived of the opportunity of asking for clarification of some of the averments made in the counter-affidavit, which appeared at least to some of us to be vague and indefinite. When we asked the learned Solicitor General in the course of the hearing to give us particulars of one statement made in the counter-affidavit of the Chief Justice of India, namely, "Every relevant "aspect of that question was discussed by me fully with the President both before and after I proposed the transfer," the learned Solicitor General rightly rejoined by saying that he was not appearing for the Chief Justice of India and he could not therefore give the particulars asked for by the Court. We have therefore to proceed on the basis of the counter-affidavit of the Chief Justice of India as it stands without any further clarification or elucidation, We must also remind ourselves when we are deciding this contest between Chief Justice K.B.N. Singh on the one hand and the Chief Justice of India and the Government on the other, that we are sitting as Judges, who have taken an oath to perform the duties of our office without fear or favour, affection or ill-will and it is our solemn and sacred duty to do justice, irrespective of who is the litigant before us. We have the highest regard for the Chief Justice of India as we have for Chief Justice K.B.N. Singh, but they are both litigants before us and while deciding the contest between them, we must be blind to their status or position and we must adjudicate the controversy between them as we might do in the case of any other litigants before us. We roust apply the same standards in assessment of the affidavits and Counter-affidavits filed by Chief Justice K.B.N. Singh and Chief Justice of India as we would do in any other case, The scales of justice cannot tilt one way or another merely because a litigant before us happens to be the Chief Justice of a High Court or the highest amongst the Indian Judiciary. They are all equal before us when we sit on the seat of Justice and we shall do justice, without fear or favour, affection or ill" will and decide the issues arising in the case objectively and dispassionately, forgetful of the high status and dignity enjoyed by the two litigants before us.

111. With these preliminary observations I may now proceed to consider the facts. But on facts, I do not wish to say much because I agree with the Judgment prepared by my learned brother D.A. Desai on this point. He has Carefully analysed the correspondence as well as the affidavits and reached the conclusion that there was no full and effective consultation between the Central Government and the Chief Justice of India before the decision was taken to transfer Chief Justice K.B.N. Singh to the Madras High Court and the transfer was made by way of punishment and not in public interest I wholly endorse this view taken by him as also the reasons given by him in support of that view, but having regard to the importance of the matter Effecting as it does the fate of the Chief Justice of a High Court, I would add a few words in support of what my learned brother D.A. Desai, has stated in his judgment.

112. So far as the first question is concerned whether there was full and effective consultation between the Central Government and the Chief Justice of India, I have already pointed out, while discussing the scope and effect of Clause (1) of Article 217 as to what is the meaning and content of 'consultation', It requires that the Central Government must make available to the Chief Justice of India relevant data in regard to the Judge proposed to be transferred and the Chief Justice of India must also elicit and ascertain all relevant material relating to the Judge either directly from him or from other reliable resources and place such material before the Central Govt. Each of the two constitutional authorities, the Central Govt. and the Chief Justice of India, must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision. There must be careful and intelligent deliberation on the part of each of them on full and identical facts. Each must make known to the other its point of view and they must discuss and examine the relevant merits of the views. It is only after this process is gone through that a decision can be taken by the Central Government to transfer a Judge from one High Court to another. Now here, in the present case, the initiative for transferring Chief Justice K.B.N. Singh was taken by the Chief Justice of India, He proposed by his letter dated 7th Dec., 1980, that Chief Justice K.B.N. Singh may be transferred to the High Court of Rajasthan. This means that on his part he had made up his mind prior to 7th December, 1980 that Chief Justice K.B.N. Singh should be moved but of Patna. Now admittedly, the Chief Justice of India had not mentioned anything about the proposed transfer to Chief Justice K.B.N. Singh prior to making his proposal of 7th Dec., 1960. This was rather strange -- I might say almost inexplicable -- because the judgments of the Chief Justice of India and Krishna lyer, J. in Sankalchand Sheth's case MANU/SC/0065/1977 have clearly laid down that it is the duty of the Chief Justice of India to elicit and ascertain, if necessary by asking directly the Judge concerned all relevant material relating to the Judge and such material would include, for example, the health of the Judge, the availability of medical facilities in and the climate of the place to which he is to be transferred, the business or occupation of his wife or daughter, the position of his parents and the education of his children etc. as a part of the process of consultation, The Chief Justice of India should have therefore, before making his proposal for transfer by his letter dated 7th Dec. 1980, informed Chief Justice K.B.N. Singh about his proposed transfer to Rajasthan High Court and enquired from him whether he would have any

particular problems or difficulties, if he was transferred to the Rajasthan High Court. But unfortunately, no such enquiry was made by the Chief Justice of India before he made his proposal for transfer of Chief Justice K.B.N. Singh to the Rajashthan High Court, which proposal might well have been accepted by the Central Government immediately, but for the fact that there was some difficulty in regard to another proposal simultaneously put forward by the Chief Justice of India for transfer of Chief Justice K.D. Sharma from the Rajasthan High Court to the Kerala High Court. The Chief Justice of India however, changed his proposal in regard to the transfer of Chief Justice K.B.N. Singh and asked the Central Government by his letter dated 20th Dec., 1980, addressed to the Law Minister to transfer Chief Justice K.B.N. Singh to the Madras High Court. There was thus a change in the proposal for transfer of Chief Justice K.B.N. Singh within a period of less than 14 days. But even then, the Chief Justice of India did not inform Chief Justice K.B.N. Singh that he was being transferred to the Madras High Court nor did he enquire to gather from him any relevant material bearing upon the proposal for" transfer. Now it is significant to note that neither of the two letters dated 7th Dec., 1980 and 20th Dec., 1980 sets out any facts showing why the Chief Justice of India desired that Chief Justice K.B.N. Singh should be transferred from the Patna High Court. Neither of these two letters throws any light as to what were the facts on the basis of which the Chief Justice of India recommended transfer Chief Justice K.B.N. Singh from the Patna High Court and there is also nothing in these two letters to show that these facts were communicated by the Chief Justice of India to the Law Minister or to any other high level functionary of the Central Government. The letter dated 7th Dec, 1980 merely states that he was recommending the transfer of Chief Justice K.B.N. Singh on the basis of the data which he had collected as a result of personal inquiries made from several lawyers and many other Judges of the High Court and which he had considered with the greatest objectivity, What were the data collected by him on the basis of which he was recommending the transfer of Chief Justice K.B.N. Singh was not disclosed by the Chief Justice of India in his letter dated 7th Dec., 1980 and from the tenor of this letter it appears though it cannot be said with certainty that no such data must have been communicated to the Law Minister prior to 7th December, 1980, for otherwise the Chief Justice of India would have stated in this letter that he was recommending the transfer on the basis of the data which he had already pointed out to the Law Minister, It is a little surprising that if any facts bearing upon the transfer of Chief Justice K, B, N, Singh were to be communicated by the Chief Justice of India to the Law Minister, it should not have been done in writing particularly when the letter dated 7th Dec,, 1980, recommending the transfer was addressed by the Chief Justice of India to the Law Minister, and this was followed , by another letter dated 20th Dec., 1980, addressed to the Law Minister. It was quite some time after the revised proposal for transfer of Chief Justice K.B.N. Singh was made in the letter dated 20th Dec., 1980 that on 5th Jan., 1981, the Chief Justice of India telephoned to Chief Justice K.B.N. Singh and informed him that Chief Justice M.M. Ismail was proposed to be transferred to the Kerala High Court and that he may therefore have to go to the Madras High Court and enquired him "if he had anything to say on the question of his proposed transfer". Chief Justice K.B.N. Singh thereupon enquired from the Chief Justice of India as to why "he may be transferred to Madras" on which, according to the counter-affidavit of the Chief Justice of India, he gave two reasons, one that it was Government policy and the other that it was proposed to transfer Chief Justice M.M. Ismail from Madras and "it was necessary to appoint an experience and senior Chief Justice in his place." Chief Justice K.B.N. Singh, however, informed the Chief Justice of India that his mother was bedridden and was not in a position to go with him to Madras and that if his transfer was insisted upon, he would prefer to resign, The Chief Justice of India requested him not to act in haste and to give the matter a close thought, Chief Justice K.B.N. Singh thereafter met the Chief Justice of India in New Delhi in the evening of 8th Jan., 1981 and discussed the question of his proposed transfer with him for some time. When Chief Justice K.B.N. Singh mentioned his difficulty in regard to his mother's advanced age and illness, the Chief Justice of India told him that he was unable to agree with him "since there were available persons in his family who could look after his mother and in any case, his brother S.B.N. Singh who was practising in the High Court was quite capable of looking after the mother. "Chief Justice K.B.N. Singh, however, informed the Chief Justice of India that his mother has a special attachment to him and he could not leave her to the care of his brother or other members of his family. Chief Justice K.B.N. Singh then told the Chief Justice of India that certain persons connected with the High Court who were influenced by communal considerations, had made some baseless complaints against him and that he on his part did not permit communal or any other extraneous considerations to influence him administratively or judicially. The Chief Justice of India, however, assured Chief Justice K.B.N. Singh that he did not hold that Chief Justice K.B.N. Singh himself was to blaim, but certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. Chief Justice K.B.N. Singh thereafter left and on the next day that is, 9th Jan., 1981, the Prime Minister endorsed her decision on the file in regard to transfer of Chief Justice K.B.N. Singh to the Madras High Court and the formal order effecting such transfer was made on 19th Jan., 1981.

113. It is extremely difficult on these facts to hold that there was full and effective consultation between the Central Government and the Chief Justice of India. The burden of showing that there was full and effective consultation rests heavily on the Government and it is not possible to say that this burden has been discharged by the Government. I have already referred to the correspondence exchanged between the Chief Justice of India and the Law Minister and there is nothing in it which shows that any facts bearing upon the transfer of Chief Justice K.B.N. Singh were communicated by the Chief Justice of India to the Law Minister, We were informed by the learned Solicitor General on an enquiry made by us that there is also nothing in the notings which' might indicate even remotely that any such facts were communicated by the Chief Justice of India to the Law Minister or to the Prime Minister or to any other high level

constitutional functionary of the Central Government. The only statement which we have on this point is the one made by the Chief Justice of India in his counter-affidavit, namely, that "every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer." This statement, even B it be accepted as wholly correct, is, in my opinion, not sufficient to discharge the burden which lies upon the Government to show that there was full and effective consultation, In the first place, it does not say who was the constitutional functionary on behalf of the President with whom "every relevant aspect of that question was discussed." Did the Chief Justice of India discuss the matter with the President personally, though, of course, a statement was made to us on behalf of the President that he had no discussion with the Chief Justice of India in this respect or did he discuss with the Prime Minister or did he discuss with the Law Minister? We are not informed as to who was the person with whom the discussion took place and unless the name of the person is mentioned, I do not see how the correctness of the statement can be verified or challenged by the other side. It is not enough merely to repeat the constitutional formula that every aspect of the question was discussed with the President, It is an affidavit which is made by the Chief Justice and the affidavit must contain not merely the constitutional incantation but facts giving particulars stating with whom the Chief Justice of India had discussion. The affidavit also does not give the date or dates when the discussion took place between the Chief Justice of India and the President, ' The statement made in the affidavit is delightfully vague, ACCording to this statement, the discussion look place "both before and after I proposed the transfer". This would mean that the discussion could have taken place at any time before 20th Dec., 1980 or at any time alter 20th Dec. 1980 up to 9th Jan., 1981. How can Chief Justice K.B.N. Singh possibly meet such a vague allegation? I personally fail to see why if the Chief Justice of India had discussion with the Law Minister or the Prime Minister in regard to the proposed transfer of Chief Justice K.B.N. Singh, the Chief Justice of India could not give us the data or dates when such discussion took place, because surely he must be having some record in regard to his meetings with the Law Minister or the Prime Minister. Then again, the statement in the affidavit merely says that every relevant aspect of the question was discussed, but does not indicate what aspects were discussed. It is for the Court to decide whether all relevant facts were discussed between the Chief Justice of India and the Central Government so as to constitute full and effective consultation and this enquiry cannot be pre-empted by the Chief Justice of India by asserting in his affidavit that every relevant aspect of the question was discussed by him with the Central Government. It is not for the Chief Justice of India to decide, but it is for the Court to be satisfied, that all relevant aspects of the question were discussed by him with the Central Government. It is possible that the Chief Justice of India might have considered some facts as irrelevant and not discussed them with the Central Government, but the Court may find that such facts were relevant and should have formed the subject matter of discussion and it is equally possible that some facts might have been discussed which the Chief Justice of India considered relevant but the Court might find them to be irrelevant. We are not told by the Chief Justice of India as to what were the facts discussed by him with the Central Government and in the absence of this information, it is not possible for us to conclude that there was full and effective consultation between the Chief Justice of India and the Central Government.

114. There is also another infirmity from which the process of consultation suffers. It was on 8th Jan., 1981 that Chief Justice K.B.N. Singh discussed with the Chief Justice of India the difficulty arising from his mother's advanced age and illness and when the Chief Justice of India pointed out to him that his brother and other family members were there to look after his mother, he explained to the Chief Justice of India that his mother had a sentimental attachment to him and he could not leave her to the care of his brother or other members of the family. There is nothing to show that this particular difficulty of Chief Justice K.B.N. Singh was brought to the notice of the Central Government by the Chief Justice of India before the decision was taken by the Prime Minister on 9th January, 1981, to transfer Chief Justice K.B.N. Singh. The meeting between Chief Justice K.B.N. Singh and the Chief Justice of India took place at 7.00 p.m. on 8th January, 1981 and on the next day, the Prime Minister made her endorsement on the file and there is absolutely nothing to show, nothing even in the counter-affidavit of the Chief Justice of India, that after his talk with Chief Justice K.B.N. Singh, he telephoned either to the Law Minister or to the Prime Minister pointing out this particular difficulty of Chief Justice K.B.N. Singh to the Central Government. There is nothing even in any nothings on the file showing that any such information was conveyed by the Chief Justice of India to the Law Minister or to the Prime Minister in the evening of 8th Jan., 1981 or on 9th Jan., 1981. This omission to communicate the difficulty which would be experienced by Chief Justice K.B.N. Singh as a result of transfer is sufficient to vitiate the process of consultation and it must be held that there was no full and effective consultation as required under Article 222 Clause (1).

115. We may now examine the reasons for which Chief Justice K.B.N. Singh was transferred to the Madras High Court. Two reasons were given by the Chief Justice of India to Chief Justice K.B.N. Singh in the course of the telephonic talk which took place on 5th Jan., 1981. One was that the transfer was being made on account of Government policy and the other was that since Chief Justice M.M. Ismail was being transferred from Madras, it was necessary to appoint an experienced and senior Chief Justice in his place. So far as the first reason is concerned, I find it rather difficult to appreciate it. The Government policy which the Law Minister put forward was that there should be Chief Justice from outside in every High Court, but the Chief Justice of India in his letter dated 7th Dec., 1980 expressed his firm opposition to this Government policy and stated that transfers of Chief Justices "may be made in appropriate cases for strictly objective reasons," and it was in pursuance of this view taken by him that he

recommended the transfer of Chief Justice K.B.N. Singh. The Chief Justice of India did not recommend the transfer of Chief Justice K.B.N. Singh pursuant to the Government policy because he was firmly opposed to that policy, but he recommended the transfer because he thought that for strictly objective reasons, it was necessary to transfer Chief Justice K.B.N. Singh. Then, how could the Chief Justice of India tell Chief Justice K, B, N. Singh that he was being transferred on account of Government Policy. The second reason given by the Chief Justice of India is also a little intriguing. If Chief Justice K.B.N. Singh was proposed to be transferred to Madras Because it was necessary to appoint an experienced and senior Chief Justice in place of Chief Justice M.M. Ismail, why, may I ask was he proposed for transfer to the Rajasthan High Court? This reason could not possibly apply to the proposed transfer to the Rajasthan High Court. There is no doubt that Chief Justice K.B.N. Singh was proposed to be transferred not because he was a senior and experienced Chief Justice who was required to man the High Court of Madras in place of Chief Justice M.M. Ismail but because the Chief Justice of India was of the view that he should be moved out of the Patna High Court.

116. Then, in the course of the discussion at the meeting which took place on 8th Jan., 1981, the Chief Justice of India stated to Chief Justice K.B.N. Singh that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. I do not know whether this statement was made by the Chief Justice of India by way of furnishing to Chief Justice K.B.N. Singh the reason why he was being transferred because I do not find it so stated in the counter affidavit of the Chief Justice of India. But even if it be assumed that this was the real reason why Chief Justice K.B.N. Singh was sought to be transferred from the Patna High Court, I cannot say whether this reason was communicated by the Chief Justice of India to the Central Government because there is nothing in the correspondence or in the nothings showing that any such communication was made by the Chief Justice of India to the Central Government, nor does the counter affidavit of the Chief Justice of India throw any light on this point beyond making a vague and indefinite statement which I have already discussed. This circumstance would also show that there was no full and effective consultation. But assuming that this reason was communicated by the Chief Justice of India to the Central Government and it weighed with the Central Government in making the order of transfer; it would, I am afraid, have the effect of converting the transfer into a penal transfer. It is undoubtedly true that the Chief Justice of India told Chief Justice K.B.N. Singh that he was not personally to blame, but if he was by his passive inaction allowing certain persons -- and certain persons in this context must mean his close relatives -- to take advantage of their proximity to him and he was being transferred on that account, it would certainly be a transfer for a reason related to his conduct or behaviour. But quite apart from that, I find that this is not the reason which weighed with the Central Government in making the order of transfer against Chief Justice K.B.N. Singh. The Central Government stated in a note handed over by the learned Solicitor General to the Court that the reason why the Central Government made the order of transfer was; "(1) it was felt that not agreeing to these transfers may be construed as though the Government is departing from the view of having Chief Justices from outside; (2) the policy aspect could still be pressed into service later." This reason which prevailed with the Central Government was totally different from the reason which induced the Chief Justice of India to make his proposal for transfer and there is nothing to show that this reason which weighed with the Government of India was communicated to the Chief Justice of India for his opinion. There was therefore clearly no full and effective consultation even in regard to this aspect. Moreover this reason given by the Central Government for making the order of transfer clearly shows that the Central Government did not apply its mind to the question whether on the facts, it was necessary or expedient to transfer Chief Justice K.B.N. Singh, but accepted the recommendation of the Chief Justice of India, because it thought that if the recommendation of the Chief Justice of India was accepted and the transfers of Chief Justice M.M. Ismail, and Chief Justice K.B.N. Singh were made, it would be easier for the Central Government thereafter to press for acceptance of the government policy by the Chief Justice of India. There was in my opinion, clearly abdication of its constitutional function by the Central Government. The order of transfer of Chief Justice K.B.N. Singh to the Madras High Court must therefore be held to be unconstitutional and void.

117. I would, therefore, allow the second group of writ petitions in so far as they challenge the constitutional validity of the order transferring Chief Justice K.B.N. Singh and issue a writ declaring the order of transfer of Chief Justice K.B.N. Singh as unconstitutional and void.

118. There will be no order as to costs in both the groups of writ petitions. There will also be no order on the special leave petition,

A.C. Gupta, J.

119. This batch of writ petitions raises broadly two issues:

(i) whether on the expiry of the term of office of an additional Judge of a High Court it is permissible to drop him by not giving him another term though the volume of work pending in the High Court requires the services of another Judge; and

(ii) in what circumstances a Judge of a High Court can be transferred to another High Court.

A number of other matters connected with these questions, directly or remotely, were discussed at length at the hearing of the petitions, As I happen to agree with the conclusions reached by one or another of my learned .brethren on the different questions that arise for decision, I shall deal with only some aspects of the controversy. It is necessary at the outset to state two propositions on which there is no controversy; one is that the independence of the judiciary is a cardinal principle of our Constitution, and the other is that an additional Judge of a High Court is not appointed on probation. The first proposition needs a little elaboration. Independence of the judiciary does not mean freedom of the Judges to act arbitrarily, it means that the Judges must have freedom in discharging their judicial functions. In order to maintain the independence of the judiciary it has to be protected against interference, direct or indirect; it also follows that the constitutional provisions should not be construed in a manner that would tend to undermine this independence.

120. The first of the two questions set out above arises on the decision of the Union of India not to extend the tenure of Shri S.N. Kumar, an Additional Judge of the Delhi High Court, on the expiry of his initial term of office. Shri Kumar was appointed an Additional Judge of the Delhi High Court for a period of two years He assumed the charge of his office on March 7, 1979. On Feb. 19, 1981, a few days before Shri Kumar's term of office was to expire, the Chief Justice of the Delhi High Court wrote to the Union Law Minister saying that it was his "very painful duty not to recommend an extension for Justice Kumar" as he had been receiving "persistent" and "serious complaints" against Shri Kumar. The Chief Justice of India to whom a copy of this letter was sent wanted to look carefully into the charges against Shri Kumar and accordingly advised extension of his term by a period of six months, Ultimately on the recommendation of the Law Minister Shri Kumar's tenure as Additional Judge of the Delhi High Court was extended by three months commencing from March 7, 1981; at the end of this period the Chief Justice of India took a different view from the Chief Justice of the High Court and in a letter to the Law Minister written on May 22, 1981 he said that he had "made independent enquiries in regard to Justice Kumar's integrity" and that "Not one member of the Bar or of the Bench doubted the integrity of justice Kumar" and that "on the other hand, several of them stated that he is a man of unquestioned integrity", However, in a note recorded on the relevant file on May 27, 1981 the Law Minister said "In the matter of assessment of integrity, I prefer that the views of C.J. Delhi be given credence" and recommended that "Shri Justice S.N. Kumar may not be continued any further as Additional Judge of the Delhi High Court after the expiry of the present tenure on 7-6-1981". Shri Kumar's tenure of office as an Additional Judge thus ended, In the aforesaid letter dated Feb. 19, 1961 written by the Chief Justice of the High Court to the Law Minister, the Chief Justice had also said: "Normally, extension of the tenure of an Additional Judge is recommended keeping in view the pendency In Court. The pendency in this Court still justifies the appointment of Additional Judges".

121. In my opinion the decision not to Extend Shri Kumar's term of office as an Additional Judge was invalid and unconstitutional on several grounds. The first ground is that when the question before the concerned authorities was whether the term of an Additional Judge should be extended and the volume of work pending in the High Court admittedly required the services of another Judge, it was not permissible to refuse extension on the basis of unconfirmed reports. The scheme of the constitutional provisions does not warrant such a course of action. Under Article 217(1) of the Constitution the President, before he appoints a person as a Judge of a High Court, whether permanent or additional, has to consult these functionaries: the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. A permanent Judge holds office until he attains the age of 62 years. The tenure of an Additional Judge, Article 217(1) says, is as provided in Article 224(1). Article 224 provides that the President may appoint duly qualified persons to be Additional Judges if it appears to him that "by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein" the number of the Judges of the court "should be for the time being increased" and that the appointment of Additional Judges shall be for a period not exceeding two years, It is thus clear that the appointment of an Additional Judge depends on the volume of work pending in the court. The maximum period of two years was fixed presumably to introduce a measure of uniformity and to serve as a check on the number of such appointments because the appointment of Additional Judges was apparently considered as an exceptional measure to meet a particular situation when Article 224 in its present form was introduced in the Constitution in 1956, As things stand at present, however, this seems to have become a regular feature as would appear from the chart supplied during the hearing of these petitions showing the number of permanent and Additional Judges in the different High Courts. There can be no dispute however that the continuance of an Additional Judge in office is conditional upon the continued existence of arrears in a High Court. Except that the tenure of an Additional Judge is limited depending on the arrears of work or the temporary increase in the business of a High Court, the position and powers of an Additional Judge and a permanent Judge are the same. Qualifications required of a person for appointment as a Judge of a High Court as stated in Article

217(2) are the same for both. Article 221(1) read with the Second Schedule which provides for the salaries payable to the Judges of the High Court makes no distinction between an Additional and a permanent Judge. Clause (4) and (5) of Article 124 provide the procedure for the removal of a Judge of the Supreme Court from his office and Article 218 makes these provisions applicable in relation to the Judges of a High Court. Here also there is no special provision for Additional Judges; it cannot be suggested that an Additional Judge of a High Court cannot be removed from office. The oath of office which a Judge has to take before assuming office is also the same for both.

122. I have already referred to the provisions of Article 217(1) which provides that the President must consult the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court concerned before appointing a person as a Judge of a High Court, whether permanent or additional. Naturally, the fitness of a person to be appointed a Judge has to be considered by the three functionaries and this fitness test is applicable to both permanent and additional Judges. Fitness must include both capacity and integrity. It is admitted in the affidavit sworn on July 22, 1981 by Shri K.C. Kankan, Deputy Secretary in the Department of Justice, Ministry of Law, Justice and Company Affairs, and filed on behalf of the Union of India that an Additional Judge is not a Judge on probation. To say that an Additional Judge is not on probation means that his appointment is not a tentative appointment, it is not for trying out if he is fit to be a permanent Judge. An Additional Judge is appointed for a certain period to cope with the temporary increase and the pending arrears of work in a High Court. Therefore, if the volume of work still pending in the High Court justifies the appointment of an Additional Judge, when the term of an Additional Judge is about to expire, there seems to be no reason why the Judge should not be appointed for another term. Shri Kankan's affidavit however adds. "It is denied that the appointments of Additional Judges should always be for a period of 2 years unless the amount of business or arrears of work do not warrant the appointment for that period. It, is submitted that the 2-year period is the ceiling mentioned in Article 224 and that the President is competent to appoint all or any Additional Judges for any shorter period as he may consider Justified." This claim of absolute power for the Government is not acceptable. The argument is that Article 224 only fixes an outer limit of time, and the President is therefore free to appoint Additional Judges for varying periods of time not exceeding 2 years -- for three months or six months -- as he 'pleases without reference to the volume of work pending in the High Court. Such a claim is untenable on the language of Article 224 and militates against the conception of independence of the judiciary. The independence of the judiciary depends to a great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour. On a proper reading of Article 224(1) it must be held that the tenure of an Additional Judge is not uncertain or precarious but it is conditional on the existence of arrears in the High Court which is an objective condition of fact. It was pointed out on behalf of the petitioners that the practice has always been to appoint an Additional Judge for a further period on the expiry of his previous term if the pending work in the High Court required the services of an Additional Judge and to appoint the seniormost among the Additional Judges as a permanent Judge when a vacancy was available. The existence of such practice could not be denied However, as an Additional Judge has to be appointed again on the expiry of his initial term, Article 217(1) is attracted. The fitness of the Judge had been considered at the time of his initial appointment what then should be the scop e of consultation when the appointment of an Additional Judge for another term is contemplated? In my opinion it reasonably follows that in such a case the scope is limited to an enquiry as to the volume of work pending in the High Court and the time likely to be required to dispose of the arrears. If his initial appointment was not on probation, the Judge's capacity and integrity cannot come within the scope of the consultation necessary under Article 217(1) for giving him another term on the expiry of his previous term of office.

123. A question then arises, whether the Judge should be appointed for another term if there are complaints against him regarding his integrity. If the complaints are serious and are from a responsible source, they cannot certainly be Ignored. But, as pointed out by Mr. Seervai appearing for the petitioners in Transfer Case No. 22 of 19R1 which is Writ Petn. No. 527 of 1981 filed in the Bombay High Court that the allegations cannot be presumed or assumed to be true and have to be proved. In his letter written to the Law Minister on Feb. 19, 1981 the Chief Justice of the Delhi High Court while stating that it was his "very painful duty not to recommend an extension for Justice Kumar", added that he had "no investigating agency to conclusively find out whether the complaints are genuine or not". That being so, the only reasonable course open, which doss not undermine the independence of the judiciary was to appoint the Judge for another term having a rational nexus with the volume of arrears pending in the High Court and then proceed with an enquiry into the allegations and remove the Judge if the allegations were found true, in accordance with the procedure laid down in Clause (4) and (5) of Article 124 read with Article 218. I do not think the language of Article 224(1) permits short term extensions of the tenure of an Additional Judge to enable the authorities to complete investigation into the allegations against him. That being so there seems to be no possible alternative to what has been suggested above as the proper course to follow. In the case of Shri Kumar, admittedly there has been no real investigation into the complaints against him, Possibly conscience of this position the Chief Justice of the Delhi High Court in a letter to the Law Minister written on May 7, 1981 said " To my mind, the reputation of integrity is just as important as a person actually being above-board". This statement should then apply to both additional and permanent Judges, but a permanent Judge cannot be removed from office on the ground that his reputation is bad. From long practice, mentioned earlier, an additional Judge has a legitimate expectancy, if not a right, to be appointed for another term if the

pending business in the High Court requires the services of an Additional Judge, or as a permanent Judge, when a vacancy is available, if he is the senior-most of the Additional Judges. Refusing to appoint him again when the conditions required an appointment to be made means in substance his removal, To remove a permanent Judge the prescribed procedure must be followed and the allerations against him proved; dropping an Additional Judge at the end of his initial term of office on the ground that there are allegations against him without properly ascertaining the truth of the allegations may be expedient but it is destructive of the independence of the judiciary. This would be an easy way for the executive to get rid of an inconvenient Judge. Taking into consideration all these aspects. I am of the view that the scope of consultation contemplated in Article 217(1), when the question is whether an Additional Judge should be given another term, is limited to the enquiry whether the volume of work pending in the High Court requires his re-appointment.

124. Assuming that the scope of consultation under Article 217(1) is the same for the initial appointment of an Additional Judge and also for his appointment for another term, it seems to me that there has been no proper consultation in the case of Shri Kumar, In Union of India v. Sankalchand Himatlal Sheth MANU/SC/0065/1977, Chandrachud J., explained what consultation means within the meaning of Article 222(1) which provides that the President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to another High Court, What is said in that case should apply also to 'consultation' for the purpose of Article 217(1). It is observed in Sheth's case: "...there can be no purposeful consideration of a matter, in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken, It must, therefore, follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted, The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Article 222(1), therefore, means full and effective, not formal or unproductive, consultation."

125. From the facts appearing from the correspondence that passed between the Chief Justice of India and the Chief Justice of the High Court, the Chief Justice of the High Court and the Law Minister, and between the Chief Justice and the Law Minister, it would appear clearly that there has been no complete and effective consultation on the question whether Shri Kumar's term as an additional Judge of the Delhi High Court should be extended. It will be convenient for a proper appreciation of the matter to set out chronologically the gist of the letters that passed between the constitutional functionaries in Shri Kumar's case and certain other facts:

19-2-1081. The Chief Justice of the Delhi High Court wrote to the Union Law Minister that it was his "very painful duty not to recommend an extension for justice Kumar" because there had been "serious complaints against Mr. Justice S.N. Kumar, both oral and in writing. These complaints have been received by me direct as well as through you. I have examined these complaints and find that some of the complaints are not without basis. Responsible persons of the Bar and some of my colleagues, whom I would rather not name, have also complained about Mr. Justice Kumar. I have no investigating agency to conclusively find out whether the complaints are genuine or not. All the same the complaints have been persistent," It was added that "Mr. Justice Kumar has also not been very helpful in disposing of cases. Some responsible members of the Bar and some of my colleagues have also expressed doubts about Justice Kumar's integrity." The Chief Justice prefaced his statement about the complaints against Justice Kumar by saying: "Normally, extension of the tenure of an Additional Judge is recommended keeping in view the pendency in Court. The pendency in this Court still Justifies the appointment of Additional Judges." The point to note in this letter is that it does not mention the facts constituting the basis of the complaints against Shri Kumar.

3-3-1981. 126. A copy of this letter was sent to the Chief Justice of India and on March 3, 1981 the Chief Justice of India recorded this note on the relevant file: "I would like to look carefully into the charges against Shri S.N. Kumar. The letter of the Delhi Chief Justice dated February 19, 1981 seems to me too vague to accept that Shri Kumar lacks integrity". The Chief Justice of India recommended extension of Shri Kumar's term of office by six months. The term of office of Shri Kumar was to expire on March 7, 1981.

19-3-1981: The Law Minister in his letter to the Chief Justice of the High Court referred to the observations of the Chief Justice of India that the charges against Shri Kumar appeared to be "too vague" and asked for "further comments" from the Chief Justice of the High Court "on the question of continuance or otherwise of Shri Justice S.N. Kumar". 26-3-1981: The Chief Justice of the High Court and the Chief Justice of India had a discussion over Shri Kumar's case. 28-

3-1981: The Chief Justice of the High Court wrote to the Law Minister saying that he had had "an opportunity to discuss the entire matter in detail with the Chief Justice of India" and that after the discussion he had also addressed a letter to the Chief Justice of India. The Chief Justice ended the letter by saying: "Perhaps you will consider this to be sufficient 'comments' on my part as desired by you in your letter under reply (letter dated 19-3-1981) about the observations of the Chief Justice of India which you have quoted in your letter,"

127. The letter that the Chief Justice wrote to the Chief Justice of India on the same day refers to the three points mentioned in his letter dated 19-2-1981 addressed to the Law Minister repeating that he had "no investigating agency to conclusively find out whether the complaints are genuine or not". The letter ends as follows: "With regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us, About Justice Kumar not being very helpful in disposing of cases, I enclose a statement of disposal by Justice Kumar in 1980."

15-4-1981: The Law Minister wrote to the Chief Justice of the High Court in reply to the letter dated March 28, 1981. Among other things, the Law Minister in this letter said: "It is true that you have no investigating agency to conclusively establish the truth of complaints. Nevertheless, you must have had some material which provided the basis on which you concluded that Justice Kumar's reputation for integrity was not above board....In view of the observations of the Chief Justice of India asking for concrete material, it would be necessary for us to have it with your comments."

7-5-1981: In answer to the Law Minister's letter of 15-4-1881 the Chief Justice of the High Court wrote back saying that in regard to the allegations against Shri Kumar, he had discussed the matter with the Chief Justice of India and had also written to him. "Accordingly", the Chief Justice wrote, "it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's Integrity was not above board, I give below some facts". The facts which the Chief Justice mentioned in the letter are:

(i) In the first half of 1980 when he was not the Chief Justice "chance remarks" came to his knowledge about Shri Kumar's "conduct in Court as well as about his integrity" when Justice Kumar was doing mostly original side work sitting singly and that in early May of the same year one of his colleagues had told me that he had "information with him to the effect that if a substantial amount was paid to Justice Kumar, suits brought by a particular party against an insurance company would be decided in favour of that party."

(ii) As Acting Chief Justice he constituted the Benches for the second half of 1980 putting Justice Kumar in a Division Bench on the Appellate Side which he thought "was a safe way to finish the numours if the same were incorrect and thus safeguard the reputation of a Judge". However "Justice Kumar did not release the original suits, regarding which allegations had been made, from his board". The particulars of the suits and the names of the parties were mentioned in the letter.

(iii) In August 1980 the same "colleague Of his who had talked to him earlier regarding Shri Kumar's integrity and another colleague mentioned that "doubts were being expressed about the integrity of Justice Kumar vis-a-vis the aforesaid cases and some others." He made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations. Looking into the matter more carefully he found that "it was not only the three suits mentioned above but that there were other Single Bench matters also which had been retained by Justice Kumar on his board despite being put in the Division Bench....In some of these the parties involved were rich and influential including former princes."

128. The Chief Justice added that these "unconfirmed reports" made him "conclude that the reputation for integrity of Justice Kumar was not what should be for a Judge of the High Court. To my mind, reputation of integrity is just as important as a person actually being above board." The Chief Justice also mentioned certain figures to show the rate of disposal of cases by the Division Bench of which Justice Kumar was a member.

129. It seems from what the Chief Justice of the High Court said in his letter of May 7, 1981 that he had not recommended extension of Justice Kumar's term not really because he found the reports against Shri Kumar were true -- he had admittedly no "investigating machinery" -- but because he thought that reputation of integrity is as important as a man being actually above board. I have already said that this is a view which will undermine the independence of the judiciary.

130. The letter of May 7, 1981 written by the Chief Justice of the Delhi High Court to the Law Minister was marked "SECRET (For Personal Attention Only)". It appears from a subsequent letter addressed by the Law Minister to the Chief Justice of the High Court on May 29, 1981 that a few days after the letter of May 7 was written, the Chief Justice

of the High Court had requested the Law Minister to keep that letter a secret from the Chief Justice of India. The letter of May 29 discloses that the Chief Justice of the High Court mentioned three reasons for not disclosing the letter to the Chief Justice of India. The reasons as appearing from the Law Minister's letter are as follows:

1. ...the reasons stated in the opening portion of your letter dated 7th May, 1981,

Probably the reference is to the following lines of the 7th May letter written .by the Chief Justice of the High Court:

Hon'ble the Chief Justice of India had made certain observations with regard to my recommendation about Mr. Justice S.N. Kumar and the same were communicated to me by you for my comments in your D.O. No. 50/2/81-Jus., dated 19th March, 1981. The Chief Justice had also written to me a letter dated 14th March, 1981 asking for "details and concrete facts in regard to the allegations against Justice Kumar." As I wrote to you in my D.O. No. 293-HCJ/PPS, dated 28th March, 1981, I discussed the matter with Hon'ble the Chief Justice and as desired by him, in reply to his letter, wrote my D.O. No. 292-HCJ/PPS, dated March 28, 1981, a copy of which was forwarded to you. Accordingly, it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's integrity was not above board, I give below some facts.

2. You felt highly embarrassed as the contents of your letter dated 19th February, 1981 about Shri Kumar came clearly to be known to Shri S.N. Kumar and some of his colleagues on the Bench. You felt that the contents of your letter dated 7th May, 1981 might also get known to them and cause you further embarrassment.

3. You felt that the Chief Justice of India had already started wrongfully denigrating you for your letter of February 19, 1981,

The letter of May 29 concludes by saying that in view of the fact that the Chief Justice of the High Court was keen on keeping the letter "confidential from the Chief Justice of India", the letter was not shown to him, Whether the reasons for not disclosing the letter of May 7 to the Chief Justice of India were valid or not, it is clear that the Chief Justice of India was not apprised of the particulars contained in the letter of May 7 concerning Justice Kumar's integrity. It was argued on behalf of the Union of India and the Law Minister that it must be presumed that all the details were placed before the Chief Justice of India because the Chief Justice of the High Court in his letter dated March 28, 1981 addressed to the Law Minister had stated that he "had an opportunity to discuss the entire matter in detail with the Chief Justice of India" and that in another letter written on the same day to the Chief Justice of India he had said:

With regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us.

That this presumption is wrong would appear from the following facts. On May 21, 1981 the Law Minister had written a letter to the Chief Justice of India when he was in Simla Paragraphs 3, 5 and 6 of this letter read as follows:

3. In regard to complaints regarding Justice Kumar's integrity and general conduct, the Chief Justice of the High Court discussed the matter with you as mentioned in his D.O. letter No. 292-HCJ, dated 28th March, 1981, to you, a copy of which he had sent to me. In that letter he had also mentioned the disposals of Justice Kumar.

4. x x x

5. You will please see that in your advice doted 3rd March, 1981 you desired to look carefully into the charges against Shri S.N. Kumar. In terms thereof if you were pleased to make any inquiries, I shall be grateful to have the details.

6. I would be grateful for your urgent advice in regard to the continuance or otherwise of the terms of Justice S.N. Kumar....

There is no reference here to the letter of May 7 from the Chief Justice of the High Court. The Chief Justice of India replied to this letter next day, May 22, 1981 from Simla, The relevant portions of the letter are as follows:

Shri Prakash Narain, Chief Justice of the Delhi High Court, had written a letter dated February 19, 1981 to you, a copy of which was sent to me, The Chief Justice had recommended in that letter that Justice Kumar's appointment should not be extended further for three reasons: (1) that serious complaints were received against Justice Kumar orally as well as

in writing; (2) that Justice Kumar was not very helpful in disposing of cases) and (3) that some responsible members of the Bar and Bench had expressed doubts about Justice Kumar's integrity, By my letter dated March 14, 1981 to the Delhi Chief Justice I requested him to furnish further details and concrete facts in regard to the allegations against Justice Kumar since the result of the enquiries made by me was quite at variance with what the Chief Justice had stated in his letter of March 19.

The Chief Justice met me on March 26, 1981 when he told me that Justice Kumar was very slow in his disposals and that he doubted his integrity because even after Justice Kumar's allocation was changed from the original side to the appellate side," he still continued to hear the part-heard cases on the original side. The Chief Justice did not mention anything adverse in regard to Justice Kumar's political leanings or affiliations By my request the Chief Justice promised to send a statement showing the disposals of Justice Kumar.

I have made the most careful and extensive enquiries in regard to both of these matters and I am satisfied that there is no substance in any one of them. I have with me a detailed statement of the disposals of Justice Kumar from which it would appear that no charge can be made against him that he is slow in his disposals.

As regards the complaint of the Chief Justice that Justice Kumar's integrity was doubtful since he continued to take old part-heard matters even after the allocation of his work was changed. I have made enquiries not only from members of the Bar but from the sitting Judges of the Delhi High Court which show that it is a common practice in the Delhi High Court that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up partheard cases on which a substantial amount of time has been already spent. Justice Kumar, therefore, did nothing But of the way or unusual in taking up part-heard cases after the allocation of his work was changed.

I find it, therefore, difficult to agree that Justice Kumar's term should not be extended for the reasons mentioned by the Chief Justice of the Delhi High Court. I disagree with the learned Chief Justice, on enquiries made by me, that Justice Kumar is either slow in his disposals or that his integrity is doubtful.

I must mention that I also made independent enquiries in regard to Justice Kumar's integrity generally and apart from the reason for which the learned Chief Justice thought that Justice Kumar lacked integrity. Not one member of the Bar or of the Bench doubted the integrity of Justice Kumar. On the other hand, several of them stated that he is a man of unquestioned integrity." However, on May 27, 1981 the Law Minister recorded a note in the relevant file recommending that "Shri Justice S.N. Kumar may not be continued any further as Additional Judge of the Delhi High Court after the expiry of the present tenure on 7-6-1981". It appears from this note that in making this recommendation, the Law Minister confined himself only to Shri Kumar's reputation. The portion of the note relevant for the present purpose reads:

C.J.I. does mention that C.J. Delhi met him on 26-3-198l. He also refers about the common practice in the Delhi High Court that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. I presume that when C.J. Delhi and the C.J. of the Supreme Court met, the former must have informed the latter about the details that he had mentioned to me in his letter dated 7-5-1981. This presumption is raised on the basis of the letters from the Chief Justice, Delhi....The C.J.I, in his advice proceeds from the premises that taking up part-heard cases after the allocation of work is changed does not amount to lacking in integrity. If it were that simple I would not have joined issue, but the details furnished by the C.J. Delhi in his letter dated 7-5-1981 go farther.

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In the matter of assessment of integrity, I prefer that the views of C.J. Delhi be given credence as it is in his association that the Judge concerned discharges his duties and that he has a better occasion and opportunity to watch his working and conduct. The correspondence from the C.J. of Delhi addressed to me furnishes clear details which cannot easily be brushed aside.

131. Taking the last paragraph of the note first, I find it difficult to see how, because the Chief Justice of the High Court had a "better occasion and opportunity" to watch "his (Justice Kumar*s) working and conduct", he was in a better position to come to a correct conclusion as to the Judge's integrity, if all the facts concerning the matter were also placed before the Chief Justice of India; it is not like watching the demeanour of a witness to test his credibility. As regards the statement that the letter from the Chief justice of the High Court furnished "clear details which cannot easily be brushed aside", the details are only particulars of certain suits that Justice Kumar had dealt with, but it is

difficult to follow what is sought to be conveyed by saying that these cannot "easily be brushed aside". Mere details of the suits can indicate nothing regarding Justice Kumar's integrity. If however 'by details' the unconfirmed reports against Justice Kumar-were also sought to be included, no reasonable person could accept them 16 true without proof. As regards the earlier portion of the note quoted above, the presumption that the Chief Justice of the High Court must have informed the Chief Justice of India about the details that the former had mentioned in his letter dated May 7, 1981 addressed to the Law Minister does not appear to have any basis. It is true the Chief Justice of the High Court in his two letters dated March 28, 1981 written respectively to the Law Minister and the Chief Justice of India had said that the "entire matter" concerning Justice Kumar's integrity had been discussed between him and the Chief Justice of India but it would be wrong to assume, though the Chief Justice of the High Court spoke of the "entire matter", the particulars of the suits and the allegations against Justice Kumar concerning them were placed before the Chief Justice of India. What was discussed between the two would appear very clearly from the letter addressed by the Chief Justice of India to the Law Minister on May 22, 1981. I have quoted above relevant extracts from this letter. It is plain from this letter that when the Chief Justice of the High Court met the Chief Justice of India on March 26, 1981 the only thing that he disclosed was the alleged impropriety of Justice Kumar's conduct that "even after Justice Kumar's allocation was changed from the original side to the appellate side, he still continued to hear the part-heard cases on the original side" and that "he continued to take old part-heard matters even after the allocation of his work was changed". There is no mention of the other allegations against Justice Kumar concerning these part-heard matters. It is impossible to think that if the details that the Chief Justice of the Delhi High Court mentioned in his letter of May 7, 1981 addressed to the Law Minister for his "personal attention only" were disclosed to the Chief Justice of India he would not have referred to them in his letter on May 22. It further appears from the affidavit of Shri Kumar, sworn on July 17, 1981, that the Chief Justice of the Delhi High Court had not asked him any question or called for any explanation or clarification from him regarding the allegations against him, but the Chief Justice of India had a discussion with him only with regard to the allegations that he was slow in his disposal and that it was improper for him to continue to deal with the original side matters heard in part by him while sitting on the appellate side. It is also impossible to think that the Chief Justice of India though apprised of the allegation of corruption against Shri Kumar would not ask for his explanation on this serious charge and discussed only the minor allegations against him.

132. As part of the relevant material was withheld from the Chief Justice of India it must be held that there was no full and effective consultation as contemplated in Article 217(1) and this vitiates the decision not to extend Shri Kumar's term of office as an Additional Judge of the Delhi High Court though the volume of pending work in that High Court required the services of another Judge.

133. In any event, even assuming that the Chief Justice of the Delhi High Court had informed the Chief Justice of India of the allegation of corruption against Shri Kumar, it is clear that it was not disclosed to Shri Kumar and he was not given an opportunity to explain the charge against him. Assuming again that Shri Kumar had no legal right to have his term extended, he had at least a legitimate expectation that his tenure as an Additional Judge would continue following the usual practice, and it appears from the letter of the Chief Justice of the Delhi High Court written to the Law Minister on February 19, 1981 that but for the allegations against him, Shri Kumar would have got an extension of his tenure as an Additional Judge in view of the arrears of work in the Delhi High Court. Consistent with the principles of natural Justice Shri Kumar who had undoubtedly suffered an injury by his term of office not being extended should have been given an opportunity to explain the charge of corruption against him. The principles of natural justice apply even to a person who has no legal right. (See In re H.K. (An Infant); (1967) 2 QB 617). The decision against Shri Kumar cannot be sustained on this ground as well.

134. As stated above, in reaching the decision not to extend Shri Kumar's tenure of office, the Law Minister preferred the opinion of the Chief Justice of the Delhi High Court to that of the Chief Justice of India on the view that the Chief Justice of the High Court had "better occasion and opportunity" to watch his working and conduct. As I have already said, this is a view which has no valid basis. Under Article 217(1) the President, before appointing a person as a Judge of a High Court has to consult three functionaries, the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court; for the appointment of the Chief Justice of the High Court, the President has to consult the Chief Justice of India and the Governor of the State. The controversy is over the question whether the opinion of the Chief Justice of India should have primacy Or the three functionaries must be regarded as coordinate authorities for the purpose of Article 217(1) and the President was free to accept the opinion of any of them. Assuming however they are coordinate authorities in the sense that each of them must be consulted, the scope of consultation is not the same so far as the Governor is concerned. He is certainly not in a position to give any opinion on the legal acumen of the persons proposed to be appointed. His opinion is relevant on matters on which the Chief Justice of the High Court or the Chief Justice of India are not expected to have any information. The question however remains, whose opinion should the President accept if the Chief Justice of the High Court and the Chief Justice of India differ? Normally, the Chief Justice of the High Court is likely to know more about a lawyer practising in that court whose name is proposed for appointment but where the question is whether or not the tenure of an Additional Judge should be extended, if all the relevant materials are before both, the Chief Justice of the High Court and the Chief Justice of India, it is difficult to see

how the Chief Justice of the High Court is in a better position than the Chief Justice of India to give a correct opinion. However, as Krishna Iyer J., has said in Shamsher Singh's case MANU/SC/0073/1974, the Chief Justice of India is the "highest dignitary of Indian Justice". The president has to consult him for the appointment of the Chief Justice of a High Court. He is, as Mr. R.K. Garg appearing for Shri S.N. Kumar in Transferred Case No. 20 of 1981 (which is Writ petition No. 882 of 1981 filed in the Delhi High Court) described as the pater familias of the Indian judiciary. In my view the President should accept the opinion given by the Chief Justice of India in such a case unless the opinion suffers from any obvious Infirmity; he cannot act as an umpire and choose between the two opinions.

135. For the reasons indicated above, the decision in Shri S.N. Kumar's case must be held invalid and the case should go back to the President for a fresh decision after a full and effective consultation as contemplated in Article 217(1) of the Constitution.

136. The other main issue arising on these writ petitions relates to the transfer of Judges from one High Court to another High Court. The question of transfer arises upon a letter addressed by the Law Minister on March 18, 1981 to the Governor of Punjab and the Chief Ministers of different States, except the North-eastern States, stating that the Law Commission, States Reorganisation Commission and various Bar Associations had expressed the view that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should be from outside the State in which that High Court is situated, the Law Minister in this letter requested those to whom the letter was addressed to (a) obtain from all the Additional Judges of the High Court in a State their consent to be appointed as permanent Judges in any other High Court in the country and (b) also to obtain similar consent from those persons who have been or in the future likely to be proposed for appointment as Judges. The letter also carried a request to obtain from the Additional Judges and the proposed appointees names of three High Courts in order of preference to which they would like to be appointed as Judges or permanent Judges as the case may be. It was however added that it should be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of the Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given. The letter says that the written consent and preferences of the Additional Judges and the persons recommended for initial appointment should be sent to the Law Minister within a fortnight of the receipt of the letter.

137. The question of transfer also arises in Transferred Case No. 2/81 which is Writ Petition No. 390 of 1981 filed in the Madras High Court and in Transferred Case No. 24 of 1981 which is Writ Petition No. 2224 of 1981 in the Patna High Court. These petitions relate to the transfer of the Chief Justice of the Patna High Court, Shri K.B.N. Singh, to the Madras High Court. Article 222(1) says that the President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court. It was argued that the letter seeking to obtain general consent of the Additional Judges to their transfer to other High Courts was only a device to circumvent Article 222(1) reducing the requirement of consultation with the Chief Justice of India to a formality. Clearly, the Constitution does not contemplate taking of such general consent to transfer which might take place at some future dates in respect of only some of the Judges. The letter has thus no authority of law. This aspect has been dealt with in detail in the judgments of Tulzapurkar J., and Pathak J., which I have had the advantage of reading. I agree with them that the said letter dated March 18, 1981 is of no consequence legally and cannot bind or affect in any way those for whom it was intended.

138. This letter of March 18, 1981 suggests in defence of the proposed transfer of Judges that for furthering national integration and combating narrow parochial tendencies one-third of the Judges of a High Court should be from outside the State in which that High Court is situated. It has been held by a majority in Sankal Chand's case MANU/SC/0065/1977 that transfer of a Judge of a High Court to another High Court is permissible only in public interest and not by way of punishment. One reason stated in support of the policy of transfer in the letter of March 18, 1981 is that it would combat narrow parochial tendencies. However, the transfer of an individual Judge on the ground that he is guilty of parochial tendencies would be a transfer by way of punishment and as such not permissible. If the proposed transfer is with a view not to allow parochial tendencies to grow, then again the question will remain who among the Judges should be transferred and to which High Courts, Also, whether the transfer of Judges' from one High Court to another would really further national integration may be open to debate. However, the validity of the policy does not arise for decision on these writ petitions. Apart from its validity, to what extent the policy is relevant in the context of Article 222(1) is a question, As held in Sankal Chand's case mass transfers are not contemplated under Article 222(1). The President may transfer a Judge from one High Court to another only after consultation with the Chief Justice of India. The policy may provide the President with a ground to suggest the transfer of a Judge, but the Chief Justice of India must consider in each case whether the proposed transfer is in public interest because, even granting the validity of the policy, the question would remain who among the Judges should be transferred and to which High Courts.

139. In Transferred Case No. 24 of 1981 which was Writ Petition No. 2224 of 1981 in the Patna High Court in which Shri K.B.N. Singh, Chief Justice of the Patna High Court has been transposed as a petitioner, and Transferred Case No. 2 of 1981 which was Writ Petition No. 390 of 1981 in the Madras High Court, the validity of the Notification transferring Shri K.B.N. Singh as Chief Justice of the Madras High Court is challenged. The notification is challenged mainly on the ground that the order of transfer was bad as Shri K.B.N. Singh had not consented to it, that there was no full and effective consultation between the Central Government and the Chief Justice of India before the order was made, and that the transfer was not in public interest but was really by way of punishment. Tulzapurkar J. has dealt with this aspect of the case in detail in his judgment and I do not propose to go over the same ground as I agree with him for the reasons given by him that the impugned order of transfer is valid under Article 222(1) of the Constitution.

140. I would however like to add that an order of transfer even if made for administrative reasons and in public interest is likely to cause some injury to the Judge transferred, though that could not be valid ground for holding that the transfer is by way of punishment; it is the reason behind the order of transfer that should determine its nature. It would be only fair not to let the Judge who is being transferred face more difficulties than are absolutely necessary. If the Judge is wholly unfamiliar with the language of the State to which he is transferred, it is possible in some cases that it will affect his efficiency. I would ask the Government to consider if it is possible to transfer Shri K.B.N. Singh to some High Court, consistent with his position as a senior Chief Justice, where the language difficulty will not be so acute.

141. Counsel for the Law Minister questioned the locus stand of the petitioners in these cases who are members of the legal profession. The question however seems to be academic because Shri S.N. Kumar and Chief Justice K.B.N. Singh are parties respectively in Transferred Case No. 20 of 1981 and Transferred Case No. 24 of 1981; Shri S.N. Kumar, impleaded as respondent No. 5 in Transferred Case No. 20 of 1981 has supported the petitioners in challeging the validity of the decision not to extend his term of office as an Additional Judge of the Delhi High Court and Shri K.B.N. Singh transposed as petitioner in Transferred Case No. 24 of 1981 has challenged the notification transferring him to the Madras High Court. Apart from the fact that they are both parties, for the reasons given by Bhagwati, J. and Tulzapmkar J. in their respective judgments I agree with them that the petitioners who are practising advocates of different High Courts are competent to maintain the petitions.

142. In the course of the hearing of these petitions we had made two orders for the disclosure of certain documents. The reasons in support of these orders will appear from the judgment of Bhagwati J. with which I agree.

143. The petitions shall be disposed of in accordance with the conclusions reached on the various points arising for decision in these petitions.

Transferred Case No. 22 of 1981.

S.M. FAZAL ALI, J.: 144. The petitioners, Advocates practising in the High Court of Bombay, filed a Writ Petition No. 527/81 before the Bombay High Court challenging the constitutionality of Exhibit 'A', a Circular said to have been issued by the Union Law Minister on March 18, 1981 and addressed to the Governor of Punjab and Chief Ministers of States (except the North-Eastern States). The petitioners prayed for several reliefs to which we shall refer hereafter. The writ petition was transferred to this Court with the consent of the parties by an order dated June 9, 1981.

145. the petitioners alleged that the Union Law Minister who was respondent No. l in the original writ petition had issued a Circular Letter dated 18-3-1981 (hereafter referred to as the 'Circular') to the Governor of Punjab and the Chief Ministers of States requesting them to obtain the consent of Additional Judges of the High Courts concerned to their transfer as permanent Judges of High Courts other than those in which they were appointed as Additional Judges. We shall give details of this Circular when we deal with it. The Circular was received by the Chief Justice of the Bombay High Court on 29-3-81 and on 30-3-81 he addressed a letter to the Additional Judges (respondents 3 to 12) and asked them to do the needful. The said Circular seems to have created a serious upheaval in the rank and file of the lawyers of Bombay Bar resulting in a special general meeting of the Advocates Association of Western India on 3-4-81. It is alleged in the petition that the meeting was largely attended and a unanimous .resolution was passed, inter alia, condemning the Circular as being subversive of judicial independence and demanding that the Government be directed to withdraw the Circular. The furore on the Circular seems to have infiltrated into the Bombay Bar Association which also held several meetings and similar resolutions were passed. On 14-4-81 at meeting of the Managing Committee of the Bombay Incorporated Society passed similar resolutions and also resolved that the President of the Society should join as a petitioner, as a result of which the fourth petitioner was added as one of the petitioners. As a mark of serious protest against the Circular and the discourteous language in which the said document (circular) is alleged to have been expressed, the legal practitioners practising in the High Court, city civil courts, Small Cause Courts and the police courts resolved not to attend those courts on 15-4-81. The petitioners further alleged that they represented a large body

of legal opinion of Bombay as also representing public interest in a free and independent judiciary which was the very bulwark of the democratic form of Government contemplated by the Constitution. In the writ petition, which has now been transferred to this Court, the petitioners sought the following reliefs:

(a) that it may be declared that the said letter, Exhibit 'A' to the petition, is ultra vires and void;

(b) that it may be declared that the consent if any consequent on or arising from the said letter given by an additional Judge or any person whose name has been or is to be submitted for his appointment as a Judge is null and void;

(c) that this Hon'ble Court will be pleased to issue an order or direction under Article 226 quashing the said letter Exhibit 'A', and the consent, if any, obtained from any person following on or as a result of the said letter.

(d) that in the alternative to prayer (c) above this Hon'ble Court will be pleased to issue a writ of mandamus (or any other writ, order or direction) directing respondents 1 and 2 to withdraw the said letter and to abstain from using or in any manner acting on the consent, if any, obtained from any person following on or arising from the said letter.

146. The petitioners also prayed for an ad interim injunction pending hearing of the petition. This seems to have been the reaction of the Bombay lawyers to the aforementioned Circular.

Transferred Case No. 20 of 1981.

147. Another writ petition was filed by Shri V.M. Tarkunde, a senior Advocate of the Supreme Court in the High Court o£ Delhi making Union of India, Justice O.N. Vohra, Justice S.N. Kumar and Justice" S.B. Wad as respondents and alleging that the independence of judiciary which was essential for the preservation of civil liberty was being eroded by the actions of the Government, viz., short-term appointment of Additional Judges for 3-4 months and short extensions granted after the term was over. Another grievance made regarding the Circular issued by the Union Law Minister compelling more than 100 Additional Judges all over the country to give their consent for being appointed as permanent Judges outside their State on the ' pain of being dropped was that this was an indirect method of bypassing the consultative process contemplated by Article 222.

148. Apart from these apprehensions the petitioner made serious allegations the purport of which was that a consistent campaign had been launched by some of the Ministers of Central Government and Chief Ministers of States against the higher judiciary. In this connection, statements of a Cabinet Minister and some Chief Ministers were mentioned. Referring to some concrete cases it was alleged that although permanent vacancies in the High Court of Delhi were available yet Justice Goswami and Justice Sultan Singh instead of being made permanent Judges were appointed as Additional Judges for a period of two years in July and August, 1960 respectively whereas Justice Vohra as an Addl. Judge only for three months. It was further alleged that two more Additional Judges, viz., Justice Kumar and Justice Wad were appointed for three months. According to the allegations made by the petitioner, the terms of the aforesaid three Judges, Justice Vohra, Kumar and Wad was to expire on 6-6-81. It appears that after the term of Justice Vohra and Justice Kumar expired on the 6th of June 1981, the Central Government did not reappoint them as a result of which they were sent back to the Bar. Justice Vohra did not file any petition and instead started his practice.

149. The writ petition filed by Mr. Tarkunde in the High Court of Delhi was also transferred to this Court and was numbered as Transferred Case No. 20 of 1981, While this case was pending in this Court the term of Justice Kumar expired and at his request he was impleaded and transposed as third respondent in the case so that he may be in a position to defend his cause. The petition of Mr. Tarkunde apart from challenging the Circular has also assailed the refusal of the Government to grant further extension to Justice Kumar and Justice Vohra. As Justice Vohra's case was not pressed it is not necessary for us to go into the circumstances under which the term of Justice Vohra was not extended.

Transferred Case No. 19 of 1981.

150. This petition has been filed by Mr. S.P. Gupta against the President, Union of India, Chief Justice of the Allahabad Court and the Governor of U.P. In view of similar petitions having been transferred to this Court, this petition was also transferred to this Court from the Allahabad High Court by an order dated 1-5-1981. In this petition, the following reliefs were prayed:

(a) issue a writ, direction or order in the nature of a declaratory writ that Justice Murlidhar, Justice A.N. Verma, Justice N.N. Mitthal have already been appointed as permanent Judges of the High Court of Judicature at Allahabad by virtue of the warrants of appointment dated 12-12-1980, 12-3-1981 and 12-3-1981 respectively.

(b) in the alternative, issue a writ, direction or order in the nature of Mandamus directing the President to appoint Judges of the High Court according, to the submissions made in this petition;

(c) issue a writ, direction or order in the nature of Mandamus directing the President of India to appoint permanent judges of the High Court on the vacancies in the office of the permanent Judges, whenever such vacancies occur, in accordance with the constitutional scheme and provisions, as submitted in this petition and found by this court;

(d) issue a writ, order or direction in the nature of Mandamus directing the President of India to fill the vacancy of the Additional Judges of the High Court without delay.

Transferred Case No. 21 of 1981.

151. A petition exactly similar to the one filed by Mr. S.P. Gupta was also filed by Mr. J.L. Kalra, Advocate and others in the Delhi High Court which was also transferred to this Court by an order dated 1-5-1981 along with the case of Mr. S.P. Gupta. In this case, the following reliefs were sought:

(a) issue a writ of mandamus or any ether appropriate writ, order or direction commanding the respondent to assess the number of permanent and additional Judges required for this Hon'ble Court having regard to its current business and the accumulated arrears of work and create such number of permanent and additional posts of Judges as may be required, within such reasonable time as this Hon'ble Court may deem fit, in accordance with law;

(b) direct the respondent to appoint Hon'ble Mr. Justice N.N. Goswamy, Mr. Justice Sultan Singh and Hon'ble Mr. Justice O.N. Vohra as permanent Judges of this Hon'ble Court against the three vacant permanent posts forthwith;

(c). direct the respondent to extend the term of the additional Judges namely Hon'ble Mr. Justice S.N. Kumar and Hon'ble Mr. Justice S.B. Wad by a period of two years within two weeks from the date of the order;

(d) direct the respondent likewise to confirm/extend the terms of the additional Judges of the High Courts of Madhya Pradesh, Punjab and Haryana and Rajasthan, whose names are mentioned in paragraph No. 5 of this petition;

(e) direct that no such piecemeal extension, but a reasonable long term shall be given to the other additional Judges of this Hon'ble Court as well as of other High Courts in future.

152. Apart from these petitions which have been transferred to this Court other petitions were also filed against the order of the President transferring Justice Ismail, Chief Justice of the Madras High Court to be the Chief Justice of Kerala High Court and Justice K.B.N. Singh, Chief Justice of the Patna High Court to be the Chief Justice of Madras High Court.

Writ Petition No. 274 of 1981.

153. This writ petition was filed by Miss Lily Thomas, an Advocate of the Supreme Court challenging the order of transfer of Justice Ismail from Madras High Court to Kerala High Court. While the petition was pending, Justice Ismail choose to retire from service and hence the petition became infructuous so far as the main relief was concerned. Miss Thomas, however, pressed the petition only on one ground, viz., that even if the grievance against the transfer of Justice Ismail no longer survived yet she was entitled to contact the order of the President of India transferring Justice K.B.N. Singh from Patna High Court to Madras High Court. She was permitted to argue the case on this limited point,

Transferred Case No. 2 of 1981.

154. Another petition was filed by Mr. Rajappa, Advocate in the Madras High Court being writ petition No. 3 of 1981 praying that the orders of the President of India transferring Chief Justice of the Madras High Court to the Kerala High Court and the Chief Justice of the Patna High Court to the Madras High Court be quashed on the ground that they were

null and void and unconstitutional, This case was also transferred to this Court and numbered as T.C. No. 2 of 1981. This case, therefore, raises substantially the same questions as are involved in Writ petition No. 274 of 1981.

Transferred Case No. 24 of 1981.

155. So far as the case of Justice K.B.N. Singh, Chief Justice of the Patna High Court is concerned, Mr. D.N. Pandey, Secretary of the Bihar State Socialist Lawyers' Association along with Thakur Ramapati Sinha filed a Writ Petition No. CMJC 2224/1981 in the Patna High Court against the Union of India, the Chief Justice of India, Mr. Justice K.B.N. Singh, Chief Justice of the Patna High Court and the Registrar, Patna High Court. Justice K.B.N. Singh, respondent No. 3, later after filing an affidavit in this Court prayed that he may be transposed to the category of petitioner. He was directed to file a detailed affidavit which was filed on 16-9-81 and he was transposed as petitioner No 3. This petition was also transferred to this Court as similar points were involved. In this petition, the petitioners prayed that the order of the President transferring Justice K.B.N. Singh be quashed and the respondents be directed not to give effect to the notification issued by the President transferring petitioner No. 3 to Madras.

Transferred Case No. 6 of 1981.

156. A similar Writ Petition No. 553/81 was filed by Mr. P. Subramanian before the Madras High Court praying that the order of the President transferring Justice Ismail from the Madras High Court to Kerala High Court be quashed. This petition also does not survive in view of the retirement of Justice Ismail.

Special Leave petition (Civil) No. 1509 of 1981.

157. This petition has been filed by Bipudaman Prasad Sinha praying for a writ of the quo warranto against Justice K.B.N. Singh, Chief Justice, Patna High Court for not proceeding to join his new posting at Madras and in continuing as Chief Justice of Patna High Court without any sanction of law in view of the order of the President transferring him to Madras. Special leave has not yet been granted in this petition but it has been tagged on with the cases relating to Justice K.B.N. Singh but was ultimately withdrawn before the conclusion of hearing of their cases.

158. Since the various writ petitions and intervener applications transferred to this Court raised almost common questions they were heard together but so far as the petitions relating to Justice K.B.N. Singh, Chief Justice of the Patna High Court are concerned they were relinked. After having heard Dr, Singhvi, counsel for the petitioners, on the point of law regarding the interpretation of Article 222 of the Constitution, we proceeded to deed with the questions of law and the constitutional points raised in the petitions of Mr. Chagla, Mr. Tarkunde, Mr. S.P. Gupta and others as also the constitutional points involved in Justice K.B.N. Singh's case. So far as Justice K.B.N. Singh's case is concerned we delinked it from other cases because his was the only case which had to be heard on facts turning upon mainly on the question -- whether or not there was an effective consultation between the Chief Justice of India, the President of India, and the Chief Justice concerned, viz., Justice K.B.N. Singh.

159. As these petitions more or less involve common and overlapping points, we shall dispose them bf by one common judgment but deal' with individual cases separately wherever necessary. T.C. Nos. 19 and 22//1981.

160. We would first deal with the question relating to the various facets, shades and aspects of Article 222 of the Constitution as contended before us by Messrs Seeryai, Sorabjee, Dr. Singhvi and others duting their respective terms.

161. So far as Mr. Seervai is concerned his contentions on the interpretation of Article 222, apart from its legislative history and setting, may be indicated as follows:

(1) The language of Article 222(1) is clear enough to enable the Court to hold that the transfer must be with the consent of the Judge concerned. Even if it is not so, then the main object of Article 222 is not very clear and plain and, therefore, it is necessary to go into the legislative history of the doctrine of transfer in order to ascertain the real intention of the Founding Fathers of the Constitution and, if so read, it would be amply clear that even if Article 222(1) does not expressly mention 'consent', the same must be implied in the Article by necessary intendment.

(2) As transfer of a High Court Judge from one High Court to another is an extraordinary phenomenon and has to be made in public interest, we must read consent of the Judge concerned before he can be transferred under Article 222, otherwise the very purpose and object of the Article would be defeated.

(3) As a transfer without consent of a Judge amounts to punishment, such a transfer involves a serious stain and stigma. Hence, in order to avoid such an anomalous petition it should be held that no Judge can toe transferred under Article 222 from one High Court to another without his consent.

In the same token it was argued by Dr. Singhvi that before transferring a Judge various aspects of public interest have to be examined qua the circumstances under which the Judge is transferred the compelling reasons why the transfer is being made and .the personal difficulties or hardships that the Judge may suffer as a result of his transfer. In other words, by and large, it was contended that non-consensual transfers should be considered to be prima facie punitive and, therefore, violative of Article 124(4) because if they amount to punishment then the punishment can only be for his misbehaviour or incapacity as contemplated by Article 124(4) and the procedure established by the Constitution or impeachment. We shall, however, develop the detailed aspect of the arguments of Dr. Singhvi when, we deal with the same at a later stage.

(4) It would appear from the historical background Of Article 222, that a transfer of a Judge from one High Court to another really amounts to a fresh appointment as a Judge to the transferee court because before taking oath in the transferee court, the Judge has to vacate his office of the original court and thereby he ceases to be a Judge in, the legal sense of the term of, the transferor court although for purposes of pension, allowances and salary, etc. he continues to be a Judge by virtue of a legal fiction.

As no person can be appointed as a Judge of the High Court in the first instance against his consent the same principle will apply mutatis mutandis to a Judge who is transferred from one High Court to another because his transfer to the transferee court would amount to his first appointment. In other words, the argument comes to this that once an order of transfer is passed by the President of India under Article 222, the Judge so transferred dies a civil death in the original High Court where he was appointed and takes a new birth in the new High Court where he is transferred.

(5) That if a transfer is made by the President without the consent of a Judge, it will seriously undermine and impair the independence of the judiciary which is doubtless the basic structure of our Constitution.

(6) That the majority decision of this Court in Union of India v. Sankal Chand Himatlal Sheth MANU/SC/0065/1977. (Hereinafter referred to as 'Sheth's case') merits a second look and since the present is a larger Bench consisting of seven Judges, the previous decision, should be reconsidered and the view taken therein that consent is not necessary for the application of Article 222 must be overruled.

162. Thus; the sum and substance of the contentions raised by Mr. Seervai is that the words 'with his consent' should be read into Article 222(1) after the words 'transfer a Judge'.

163. Messrs Sorabjee, Garg and S.P. Gupta who followed Mr. Seervai adopted his arguments in toto so far as the interpretation of Article 222 is concerned. They, however, laid greater emphasis on the question of primacy' of the Chief Justice of India (hereinafter referred to as 'CJI') and contended that the opinion of the CJI was final and binding on the President or on the Council of Ministers who should tender advice to the President in accordance with the opinion expressed by the CJI if independence of judiciary was to be ensured.

164. Dr. Singhvi while adopting the arguments of Mr. Seervai submitted that a transfer without consent affects a Judge adversely and results in evil consequences and virtually amounts to a punishment which is worse than removal but he laid greater stress on the efficacy of the consultative process by the constitutional authorities concerned and a proper meeting and application of minds before a transfer is ordered. Other aspects and conditions of Article 222 relating to the nature and content of consultation will be examined when we deal with the case of D.N. Panday (T.C. No. 24/81) in which the Chief Justice of Patna High Court has been transposed as a petitioner.

165. These are the broad contentions advanced before us by the counsel for the parties, in these petitions.

166. The Attorney General, the Solicitor-General and Mr. Mridul appearing for the Law Minister have countered all the arguments advanced by the petitioners and have fully defended the impugned, orders, the Circular and the transfer of Justice K.B.N. Singh, Chief Justice of the Patna High Court to Madras High Court. We shall indicate the arguments in opposition when we deal with the arguments of the counsel for the petitioners.'

167. Thus, from the facts disclosed in the various petitions and in the light of the arguments advanced before us by the counsel for the parties, the following points arise for determination:

1. Locus standi

2. Article 217

(a) where is the power to appoint located, is it with the Executive?

(b) Is the opinion of CJI entitled to, primacy where the two constitutional functionaries, namely, CJ of a High Court and CJI differ, does the adverse opinion of either of them operate as a VETO against appointment; where both the CJ of a High Court and CJI agree upon accepting or rejecting a candidate for appointment, can the executive take a different view and appoint or decide not to appoint?

(c) who can initiate the proposal for appointment tinder this Article?

(d) whether consultation is necessary in case the Executive decides not, to appoint a person?

(e) Does this Article apply when an Additional Judge is to be appointed for a further term or as a permanent Judge?

(f) Scope of judicial review in case of Appointment & non-appointment.

3. Policy of Central Transfers

(a) Is the general policy of transfers of all CJs so what every State has a CJ from outside, good, valid and constitutional and in public interest?

(b) Can this policy he formulated and laid down by a declaration made by the President or Article executive order of the Council of Ministers without any legislation?

(c) Is the policy of recruiting one-third Judges from outside the State good, valid and constitutional and, if so, what should be the mechanism for implementing the said policy and the manner of its formulation?

(d) Has it been shown that the aforesaid policy has already been evolved, formulated and finalised by the Central Government?

4. Article 216.

(a) What is the scope of the power of the President under this Article?

(b) Is the exercise of the power by the President under this Article amenable to the judicial review and, if so, to what extent?

5. Article 224.

(a) What are the conditions and circumstances under which Additional Judges can be appointed?

(b) On the expiration of his term, is an Additional Judge entitled to be continued automatically, if the conditions for appointment of an Additional Judge continue to exist or is he again liable to be subjected to the process of Article 217.

(c) Does the Additional Judge have a right to be considered for appointment for a further term or as permanent Judge on expiration of his term or he can be just dropped without any consideration at all?

(i) Is there any convention that an Additional Judge must on the expiration of his term be continued for a further term or be appointed permanent Judge and if so, what is its legal effect on the interpretation of Articles 217 and 224?

(ii) If there is no convention, is there a practice to the above effect and, if so, what is its effect?

(d) Can an Additional Judge be appointed when a permanent post is vacant: if such an appointment is made, can the Additional Judge be deemed to be a permanent Judge?

(e) Can a short-term appointment of an Additional Judge be made under this Article?

6. Article 222.

(a) Who can initiate the proposal for transfer of High Court Judge?

(b) Is consent of a Judge to be transferred necessary before he can be transferred?

(c) What is the nature and effect of the consultation with CJI?

(d) Does the requirement of public interest limit the exercise of the power of transfer under this Article?

(e) What is the nature of public interest for which transfer of a High Court Judge can be effected'?

(f) Can a Judge be transferred on account of complaints or grievances against him or on recount of anything in his conduct or behaviour?

7. Circular letter dated March 18, 1981.

8. Claim of privilege against disclosure.

9. T.C. No. 20 of 1981-- whether there was full and effective consultation; if not, what relief can be granted.

10. T.C. No. 24 of 1981 -- whether there was full and effective consultation between the Govt. and CJI, whether the transfer of K.B.N. Singh was effected in public interest.

168. We first propose to deal with the various aspects of Article 222, the question of privilege, the nature and extent of consultative process under Article 222, the legal effect of the Circular and its constitutionality.

169. Coming to the interpretation of Article 222, the first question that falls for determination is as to whether or not consent can be read into Article 222 as argued by the counsel for the petitioners. To begin with, this matter was fully considered in Seth's case MANU/SC/0065/1977 where the majority judgment considered almost all the aspects of the matter and held that consent cannot be read into Article 222 and a transfer of a Judge from 'one High Court to another High Court can be made even without his consent subject to effective consultation which has been explained by all the Judges, In that case Bhagwati J. and Untwalia J. dissented from the majority decision and took the view that no transfer of one High Court Judge to another High Court can be made without his consent. In other words the minority was of the view that the word 'consent' has to be read into Article 222 having regard to the extraordinary circumstances in which such a power is exercised and the constitutional position of a Judge, Normally, the decision in Seth's case would have concluded the matter because in the instant case also the points raised are more or less similar but the arguments advanced before us in these cases have revealed many more aspects which may not have been before this court in Seth's case and have opened new vistas which undoubtedly require a further consideration. Moreover, in that case the stand taken by the Union of India was that the matter may be decided as a sort of an academic question as the transfers made by the previous Government would be nullified by retransferring them. In view of this concession made by the Union of India in that case it was not necessary for this Court to go deep into the matter because ultimately the decision would turn out to be purely academic.

170. Thirdly, as the question of general policy of transfer has clearly arisen in these cases and lot of material has been produced before us to justify both the constitutionality and the legality of this policy, Article 222 as also the consultative process now assume a new complexion.

171. For these reasons, therefore, we are of the opinion that the judgment in Seth's case MANU/SC/0065/1977 (supra) may be reconsidered in the light of the fresh facts which have emerged since then though ultimately we may reach the same conclusions as held by the majority judgment.

172. We shall now examine the first limb of the contention of Mr. Seervai that the word 'consent' should be read into Article 222. It cannot be doubted that a transfer Under Article 222 must be made in public interest and it was so held in Seth's case by all the Judges who were completely unanimous on this aspect of the matter. In this connection, Chandrachud J. (as he then was) observed thus:

The power to transfer a High Court Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who, for some reason or the other, has fallen from its grace." (p. 444 of SCR): (at p. 2339 of AIR 1977 SC). And Bhagwati J. made the following observations (at p. 2352 of AIR):

One thing is, however, certain that the power to transfer a Judge from one High Court to another under Article 222, Clause (1) can be exercised only in public interest.

Krishna lyer, J., speaking for himself and one of us (Fazal Ali, J.) expressed his Views thus (at p. 2376 of AIR):

Indeed, the independent of the judiciary is itself a necessitous desideratum of public interest, and so interference with it is impermissible except where other considerations of public interest are so strong, and so exercised as not to militate seriously against the free flow of public justice.

And Untwalia, J, in his judgment struck an identical note and observed as follows (at p. 2388 of AIR):

It was, however, accepted by all concerned that the transfer can be made only in public interest or on the ground of public policy which sometimes has been characterised by eminent jurists as on unruly horse.

173. This position is also conceded by the Attorney General, the Solicitor General and Mr. Mridul. The main reason why this Court had held that the transfer of a Judge from one High Court to another should be in public interest was that the President should not exercise power by way of victimisation or to impede the free flow of public justice or as Chandrachud, J., put it "for an extraneous or collateral purpose". Where, however, the compelling circumstances and the exigencies of administration or situation are objectively considered and it becomes necessary for the exercise of this power, these factors would constitute public interest to justify the exercise of the power by the President under Article 222. In the instant case, a general and unanimous policy of transfer of judges and Chief Justices of High Courts to promote national integration and suppress lissiparous tendencies, would doubtless be in public interest. Although Article 222 does not contain the words 'public interest' in so many words but the very exercise of the power, which is not a normal power but an exceptional one, it follows as a logical consequence that public interest is a necessary concomitant of the exercise of this power.

174. The question that now arises is if it can be said on a parity of reasoning that 'consent' also should be read as a part and parcel of the exercise of the power under Article 222. It is difficult to accede to this contention because if a Judge cannot be transferred without his consent then the power loses its significance and becomes an immunity to a Judge from transfer by withholding his consent. Thus, a power which is to be exercised by the President can be defeated or stalled by a simple act of the Judge in refusing to give his consent to the transfer. This could never have been the intention of the Founding Fathers of the Constitution. Article 222 may be extracted thus:

222. Transfer of a Judge from one High Court to another.

(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and until so determined, such compensatory allowance as the President may by order fix.

175. A perusal of Article 222 unmistakably shows that it is expressed in absolutely clear, explicit, intelligible, plain and unambiguous language which admits of no vagueness or ambiguity, Mr. Seervai, however, by an involved process of reasoning wants us to import the concept of 'consent' by reading the same into the Article by way of necessary intehdment of the Parliament. It is riot the function of the court to supply words to suit a particular course of action so as to be acceptable to a particular act of persons as a doctrine of implied consent. It is just like first raising a ghost and

then trying to kill it. Before we enter into a detailed discussion of the Rules of interpretation of Statutes we might indicate that there is intrinsic evidence in the various constitutional provisions which clearly show that the word 'consent' has been dropped by the legislature deliberately or it is a case of deliberate omission rather than casus omissus. In order to drive home our point we would give a brief survey of the scheme of the Constitution regarding the expressions 'consent', 'concurrence' or 'consultation' used in various Articles to determine the context, the purport and the intention of the Founding Fathers of the Constitution.

176. Take, for instance, Article 127 which expressly deals with previous consent of the President, and may be extracted thus:

127. Appointment of Ad hoc Judges:

(1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an ad hoc Judge, for such period as may be necessary, of a Judge of a High Court duty qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court." This Article may be divided into four parts:

(1) that there should be a lack of quorum of the Judges of the Supreme Court.

(2) that the Chief justice of India may with the previous consent of the President and

(3) after consultation with the Chief Justice of the High Court,

(4) request in writing the attendance, as an ad hoc Judge, for such period as may be necessary of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court.

Clause (2) of the Article provides that It shall be the duty of the Judge to attend the sittings.

177. It would thus appear that when the Constituent Assembly intended that there should be consent, it has said so in very clear terms. The first part clearly shows that the power under Article 127(1) can be exercised only with the previous consent of the President and not otherwise. Similarly, in the second part, the word 'consultation' is used and in Clause (2) the word 'duty' is used which completely rules out 'consent'. An analysis of this Article clearly shows that whenever the Constitution intended a particular expression to have a particular meaning it has made its intention clear and unambiguous by using the word 'duty', 'consent' or 'consultation'.,

178. Article 128 requires consent of the President before an offer is made to a retired Judge to act as an ad hoc Judge of the Supreme Court. Proviso to Article 128 may be extracted thus:

Provided that nothing in this Article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

179. This proviso clearly enjoins that the ad hoc Judge cannot be requested to sit in the court unless he consents to do so. Indeed, if the intention of the Constituent Assembly was that a transfer could not be made without the consent of the Judge, then a similar expression as contained in the proviso or something like that would have been used in Article 222(1). The absence of any such expression shows that the Constituent Assembly deliberately omitted 'consent' by necessary intendment.

180. Article 224-A deals with the appointment of retired Judges at sittings of High Courts which may be extracted thus:

224-A. Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any

other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determnie and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.

181. The provisions of this Article make the exercise of powers conditional on the consent of the Judge concerned. In Chandra Mohan v. State of U.P. MANU/SC/0052/1966 this Court has clearly indicated that where the Constitution intended particular expressions to be used it has expressed its intention clearly and observed thus (at p, 1690 of AIR):

Wherever the Constitution intended to provide more than one consultant, it has said so: see Articles 124(2) and 217(1). Wherever the Constitution provided for consultation of a single body or individual it said so: see Article 222. Article 124(2) goes further ;and makes a distinction between persons who shall be consulted and persons who may be consulted.

182. Article 258 runs thus:

258. (1) Notwithstanding anything in this Constitution the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State, has no power to make laws, confer powers, and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

183. Here also, the President has to exercise his powers with the consent of the Government of a State, either conditionally or unconditionally. In other words, where the power conferred on the President is to be exercised with consent,1 the Founding Fathers of the Constitution have expressly said so in the concerned Articles. On a parity of reasoning, therefore, if the intention of the Founding Fathers was to make 'consent' an essential ingredient of Article 222, they would have used the expression 'the President may, with the consent of the Judge concerned, transfer a Judge from one High Court to another'. The fact that Article 258. requires the President to act with the; consent of the Government of a State, which is also a constitutional authority; the same principle will apply to a High Court Judge who is also a constitutional authority. Therefore, this leads to the irresistible conclusion that the word 'consent' was never intended to be included in the powers to be exercised under Article 222.

184. Article 258-A runs thus:

258-A. Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.

185. Here also, the Governor of a State has' to exercise a particular power only with the consent of the. Government of India and not otherwise. This also shows that the Founding Fathers were fully aware of the situations where consent is necessary find where it is not.

186. Article 254 deals with the legislative powers of the Centre and the States. Clause (2) of Article 254 provides thus:

254(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent list contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

187. It is obvious that here as a legislation is concerned, the expression used is 'assent' and not 'consent' though both the terms are synonymous. The use of the word 'assent' is generally made when we are dealing with statutory enactments.

188. Sub-clause (ii) of Clause (1) of Article 370 may be extracted thus:

(ii) such other matters in the said lists as, with the concurrence of the Government of the State, the President may by order specify.

189. The laws mentioned in Article 370 can be applied to the State of Jammu & Kashmir only with the concurrence of the Government of the State. Here the word 'concurrence', which is stronger than 'consent', has been used to indicate and maintain the special status given to that State. Certain aspects of this matter have been clearly pointed out by Krishna Iyer, J. in Sheth's case MANU/SC/0065/1977 thus:

It would thus appear that the Constitution itself specifies 'consent' where it is intended and omits it when unnecessary. If, therefore, the Constitution makers intended that under Article 222 a Judge cannot be transferred from one High Court to another without his consent then it should have been expressly so mentioned in the Constitution.

190. We have given these dear instances to drive home the point that wherever the Founding Fathers intended that a particular expression should be used in an Article as a condition precedent to the exercise of a particular power, the same has been mentioned and where no such intention was there the expressions have not been used. As against this, Mr. Seervai submitted that in Article 217 which provides for the appointment of High Court Judges, it has nowhere been indicated that the Judge proposed to be appointed should give his consent to the appointment. In Seth's case MANU/SC/0065/1977, Krishna Iyer J. while dealing with an identical argument observed as follows (at p. 2382):

It would be seen that in this constitutional provision the words "appointed" and "transferred" have been used separately conveying different connotations; and if the Constitution makers had used these two terms in the said subject in different contexts it cannot be argued that these two terms are interchangeable. On the other hand, an analysis of Article 217(1)(c) shows that the constitutional provision makes a clear-cut distinction between appointment and transfer.

191. We stick to the view expressed by Krishna Iyer, J. in the majority judgment. The argument of Mr. Seervai appears to be fallacious because this analogy cannot be applied to a Judge who after being appointed is transferred under Article 222. It is obvious that there is no provision in the Constitution empowering the President to appoint for the first time a person as a Judge of High Court against his consent and even if he is appointed, the persons appointed can refuse to act as a Judge and if he does so the matter ends there and he cannot be compelled to act as a Judge Once, however, the person decides to accept the appointment of a Judge of a High Court he becomes a constitutional functionary and therefore would be subject to the provisions of the Constitution because before deciding to accept the appointment he must be presumed to be aware of the constitutional provisions contained in the various Articles regarding High Court Judges, viz., the conditions of service, the salary and other allowances, the date of retirement and also the provision "regarding transfer as provided for in Article 222 which does not contain the word 'consent'. It would thus not be open to any Judge to complain that he had been transferred against his consent or to plead that had he known this he may not have accepted the office of a High Court Judge, As the word 'consent' is conspicuously absent from Article 222, such a plea cannot in the nature of things be permitted to be taken by the concerned Judge. If he does not want to be transferred, it is always open to him to resign for which also there is a clear provision under proviso (a) to Clause (1) of Article 217. Therefore, the argument of Mr. Seervai must be overruled.

192. These are the intrinsic circumstances to show that the Founding Fathers did not intend to use the word 'consent' in Article 222 deliberately. We have already held that Article 222 is expressed in the clearest possible terms, But, assuming for the sake of argument as urged by Mr. Seervai, that there is some element of ambiguity either in the setting and pattern of Article 222 or in the real object which it seeks to subserve, which according to Mr. Seervai finds ample support from the fact that two Judges in Seth's case MANU/SC/0065/1977 have taken the view which Is being propounded by the learned Counsel, we would attempt to construe Article 222 in the light of the well settled rules of interpretation of statutes.

193. Before, however, we discuss the various books, reference and authorities we must take into consideration a very weighty circumstance which is peculiar to our Constitution as also to the American Constitution. It must be

remembered that in England if any error is committed by a court of Appeal, it may be corrected by the House of Lords or eventually by Parliament by a simple majority. Similarly, in Australia also if the High Court gives a wrong interpretation of a particular constitutional provision it can be set right by the privy Council by an appeal against the said order of a High Court and the Parliament may amend the statute to bring it in conformity with the intention and that too by a simple majority. The position so far as our country is concerned is similar to that of America and if any error of interpretation of a constitutional provision is committed by the Supreme Court or any interpretation which is considered to be wrong by the Government can be rectified only by a constitutional amendment which is a very complicated, complex, delicate and difficult procedure requiring not merely a simple majority but two-third majority of the Members present and voting. Apart from the aforesaid majority, in most cases the amendment has to be ratified by a majority of the States. In these circumstances, therefore, this Court which lays down the law of the land under Article 141 must be extremely careful and circumspect in interpreting statutes, more so constitutional provisions, so to obviate the necessity of a constitutional amendment every time which, as we have already mentioned, is an extremely onerous task. S.R. Das, C.J. in the case of Bengal Immunity Co. Ltd. v. State of Bihar MANU/SC/0083/1955 expressly referred to this aspect of the matter and observed as follows (at p. 672):

An erroneous Interpretation of the Constitution may quite conceivably to perpetuated or may at any rate remain unrectified for a considerable time to the great detriment to public well being.

194. Having carefully interpreted a particular provision of the Constitution, the Court should as far as possible stick to the doctrine of stare decisis. It must be remembered that as Lord Wright pointed out in James v. Commonwealth (1936) AC 578 that a Constitution is a federal component and the constituents must hold a balance between all its parts.

195. Thus, so far as the general principles regarding interpretation of statutes are concerned they are now well settled beyond any controversy for the last two centuries in almost all the countries of the world having a democratic Constitution or pattern of Government, As far as this Court is concerned, on some points decisions during the first decade of its existence were somewhat inconsistent but generally the view which found favour with most of the Judges during the first decade was that the methodology of interpretation of statutes should be the same for constitutional provisions as it is for statutory provisions. It has further been held that external aids like Parliamentary debates, report of the Drafting or select committees, the Objects and Reasons of the Act are wholly inadmissible for the purpose of interpreting the provisions of a statute which would depend entirely on the language of the provisions concerned. Here also, some of the cases have held that, where the language of the provisions is shrouded in obscurity or is not fully intelligible so as to ascertain or find out the objects of the Act, external aids may be permissible. So far as speeches made by a Minister is concerned, it has been consistently held to be wholly inadmissible because it represents the individual view of a single person with which the majority of the Members if Parliament or may not have agreed.

196. During the second and third decade this Court made a prominent shift from the original stand and a long course of recent decisions have permitted parliamentary debates of Reports of Drafting or Select Committees to be taken into consideration for the purpose of ascertaining the object or the real meaning of the language employed in a statutory or constitutional provision.

197. But there is one principle on which there is complete unanimity of all the courts in the world and this is that where the words or the language used in a statute are clear and cloudless, plain, simple and explicit unclouded and unobsecured, intelligible and pointed so as to admit of no ambiguity, vagueness, uncertainty or equivocation, there is absolutely no room for deriving support from external aids. In such cases, the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom.

198. It is equally well settled that it is not the duty of the court to import words which have been omitted deliberately or intentionally in order to fill up a gap or supply omissions to fit in with the ideology of concept of the Judge concerned. The words and the language used must be given their natural meaning and interpreted in their ordinary and popular sense.

199. There may be a .third type of cases which may be .on the border line --where the language may admit of two interpretations in which case the court may consider the desirability of resorting to external aids in order to catch and delve into the spirit and object of the statute.

200. These principles have been enunciated over the years by several authorities of various courts to which I shall refer hereafter. Before, however, going to the authorities, it may be necessary to refer to extracts from the various books of legal scholars of the interpretation of Statutes.

201. Crawford in his book captioned "Statutory Construction' (1940 Edition) in para 158 'Purpose of Interpretation and Construction (pp. 244-245) has observed thus:

The basic principle has been announced time after time that if the statute is plain certain and free from ambiguity a bare reading suffices and interpretation is unnecessary.

202. At page 344, it has also been pointed out by the author that alteration, interpolation or elimination of words are not permissible. In this connection, the author makes the following observations while dealing with an American case:

As we have already stated, the intention of the legislature must be primarily ascertained from the language used. This obviously means, as a general rule, that the courts have no power to add to, or to change, alter, or eliminate the words which the legislature has incorporated in a statute, not even in order to provide for certain contingencies which the legislature failed to meet, or to avoid hardship flowing from the language used, or to advance the remedy of the statute.

203. At pages 368-389, the author further observed thus:

Where the meaning of a statute is in doubt, the court may resort to contemporaneous construction--that is, the construction placed upon the statute by its contemporaries at the time of its enactment and soon thereafter -- for as (sic) in removing any doubt. Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its enactment and acquiesced in by the courts and the legislature for a long period of time. As is obvious, the meaning given to the language of a statute by its contemporaries is more likely to reveal its true meaning than a construction given by men of another day or generation. Even words change in meaning with the march of time. And the meaning given by contemporaries can be revealed with no more certainty than by resort to the common usage and practice under the statute itself over a considerable period of time.

204. The author has rightly observed that sometimes it so happens that words change in meaning with the march of times. If this is so, it is manifest that the court while interpreting a statute dealing with socialism cannot ignore the temper of the times and the modern trends of legal thought.

205. Similarly, while dealing with the circumstances and the history of the Statute, the author says thus:

According to the weight of authority and surely the better view, the court may consider the general history of a statute, including its derivation that is the various steps leading up to and at tending its enactment, as shown by the leguslative journals, in its effort to ascertain the intention of the legislature where it is in doubt. Conversely, the legislative history cannot be considered where the statute's meaning is plain. (p. 383)

206. Here also, we find that history, etc., is permissible only where the language of a statute is ambiguous and not where the meaning of the statute is plain and clear.

207. V.P. Sarathi in 'Interpretation of Statutes' (1975 Edn.) observed thus:

In order to arrive at the intention of the legislature, the state of law and judicial decisions antecedent to and at the time the statute was passed are material matters to be considered....

Courts sometimes make a distinction between legislative debates and reports of committees and treat the latter as a more reliable or satisfactory source of assistance.

It is submitted that the subtle distinction that parliamentary history may be referred for ascertaining the intention, foul not for construction, is pedantic. In fact all such material must be freely referred: and it is only by resort to such material that the object of the legislation and how the legislature intended to achieve that object by the particular statute can be correctly ascertained by the Court. (p. 339)

208. At page 367, the author observes thus:

(a) Reference to English and American decisions may be made, because they have the same system of jurisprudence as ours, but do not prevail when the language of the Indian Statute or enactment is clear.

(b) They are of assistance in elucidating general principles and construing Acts in part materia.

(c) But Indian statutes should be interpreted with reference to the facts of Indian life.

209. The observations in Clause (c) are rather important because that seems to us to be the correct approach. Seervai in "Constitutional Law of India" (2nd Edn.) Vol. II, pp. 1543-44 observes thus:

Secondly, where words are clear and unambiguous effect must be given to them regardless of consequences....After all the object of interpretation or documents and statutes is to ascertain "the intention of .them that made it". The literal interpretation has a prima facie preference, but to get at the real meaning it is necessary to apply the rule in Heydon's case.

...

However, where the words of a statutory or constitutional provision are ambiguous, resort may be had to well recognised extrinsic aids to construction and regard may be had to the consequences of adopting one construction rather than another. The meaning of "ambiguity" has been considered at length in paras 2.31 and 2.32 of the text.

210. Craies on "Statute Law" (6th Edn.) while quoting Jervis C.J., at p. 86 observes thus:

It is clear that "if", as Jervis C.J. said in Ableyv. Dale (1850) 20 LJCP 33, 35 the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but, we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning.

211. Similarly, the author has categorically observed that in the interpretative process casus omissus is not to be added or supplied. In this connection, the following observations have been made at p. 70:

A second consequence of this rule is that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made....Although in construing an Act of Parliament the Court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there" and quoting Lord Parker, the author says thus:

Where the literal reading of a statute...produces an intelligible result...there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament.

212. At page 66, the author observes thus:

The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves....If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver.

Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

213. Lord Bacon says that the function of a Judge is jus decere and not jus dare, i.e., to interpret the law and not to make it. Similarly, Marshal, C.J, observed that we must remember that "it is the Constitution that we are expounding". These observations aptly apply to the instant case where we are construing a constitutional provision, viz., Article 222, particularly when a provision like this is not to be found in any Constitution of any other country of the world.

214. According to Maxwell, the golden rule of interpretation is to adhere to the ordinary meaning of the words used unless it is in direct conflict with the intention of the Act. In this connection, the author in his book 'Interpretation of Statutes' (l'2th Edition) observes thus:

It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.

215. I have laid particular stress on the casus omissus aspect of the interpretative process because the main thrust of the argument of Mr. Seervai on interpretation of Article 222 was that the word 'consent' should be read into Article 222 which is not there at all, and if the contention of the counsel is accepted, it will amount to the court supplying an omission which has been made deliberately by the Founding Fathers of the Constitution and would be in direct contravention of the scheme of the Constitution as discussed above.

216. The leading case on the subject is Heydon's case (1584) 76 ER 637 where the broad principle of interpretation of Statutes was spelt out and explained. In this connection the Court observed as follows:

And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th, The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.

217. This case has been followed both by this Court as also by the courts in England for a pretty length of time. This may be the starting point of the manner and the method which the Court should adopt in interpretation of statutes.

218. The authorities-on the question of interpretation of the constitutional provisions may roughly be divided into four categories which may not exactly be absolutely separate or independent so as to be confined in a watertight compartment but in some cases may overalp, yet they generally lay down the law on the subject categorised by us:

Categories

(A) Where the language of a statute is plain, explicit and unambiguous, no external aid is permissible.

(B) Where the language is vague and ambiguous or does not clearly spell out the object and the spirit of the Act, external aids in the nature of parliamentary debates, reports of Drafting or Select Committees may be permissible to determine and locate the real intention of the legislature.

(C) Where certain words are omitted from the statute, the court cannot supply the omission or add words to the statute on a supposed view regarding the intention of the legislature.

(D) Any speech made by a Minister or a Member in the Parliament is not admissible or permissible to construe a statutory or a constitutional provision.

219. We shall now deal with the authorities which fall more or less within the four categories indicated above.

Category (A)

220. The earliest case on the subject 13 A.K. Gopalan v. State of Madras MANU/SC/0012/1950 where Kania C.J. pointed out that external aid was not permissible unless a statute was ambiguous and observed thus (at p. 36 of AIR):

"Our attention was drawn to the debates and report of the drafting committee of the Constituent Assembly in respect of the working of this clause. The \ report may be read not to control the meaning of the article, but may be seen in case of ambiguity....

Resort may be had to these sources with great caution and only when latent ambiguities are to be resolved.

221. Fazal Ali, J. (as he then was) speaking in the same strain made the following observations (at p. 56):

In my opinion, though the proceedings or discussions in the Assembly are not relevant for the purpose of construing the meaning of the expressions used in Article 21, especially when they are plain and unambiguous they are relevant to show that the Assembly intended to avoid the use of the expression without due process of law.

(Emphasis ours)

And Mukherjea, J. observed thus (at p. 03):

It is well settled that the Constitution must be interpreted in a broad and liberal manner giving affect to all its parts, and the presumption should be that no conflict or repugmancy was intended by its framers. In interp reting the words of a Constitution, the same principles undoubtedly apply which are applicable in construing a statute.

As an aid to discover the meaning of the words in a Constitution, these debates are of doubtful value. "Resort can be had to them", says Willoughby, "With great caution and only when latent ambiguities are to be solved....

222. The same view was expressed by Gajendragadkar, J. (as he then was) in Kanai Lal Sur v. Paramnidhi Sadhukhan MANU/SC/0097/1957 where the learned Judge observed as follows (at p. 910):

If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise.

223. In M. Pentiah v. Muddala Veeramallappa MANU/SC/0263/1960 Sarkar, J. observed thus (at p. 1115):

Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a Statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense.

224. In M.V. Joshi v. M.U. Shimpi MANU/SC/0151/1961 Subba Rao, J. expressed the opinion of the Court thus (at p. 1498):

But these rules do not in any way affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the court is bound to accept the expressed intention of the Legislature.

225. In Hansraj Gordhandas v. H.H-Dave, Asstt. Collector of Central Excise & Customs, Surat MANU/SC/0265/1968 Ramaswami, J. speaking for the court observed thus (at page 759):

It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority.

It is an application of this principle that a statutory notification, may not be extended so as to meet a casus omissus.

226. Although these observations were made in respect of a taxing statute, the principle of interpretation of provisions of a statute or of the Constitution is the same; the only difference being that in a taxing statute where two interpretations are possible, benefit of the doubt is normally given to the tax-payer.

227. iD Commissioner of Income-tax, Assam & Nagaland v. G. Hyatt MANU/SC/0280/1971, Hegde, J. speaking for the Court made the following observations (at p. 726):

In our opinion the meaning of Section 17(3)(ii) is plain and unambiguous. Hence there is no need to call into aid any of the rules of construction as was sought to be done by the High Court.

228. In Senior Superintendent, R.M.S., Cochin v. K.V. Gopinath, Sorter MANU/SC/0589/1972, Mitter, J. reiterated this well settled principle thus (at p. 1488):

As has often said that if "the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense", "and not to limit plain words in an Act of Parliament by con-siderations of policy, if it be policy, as to which minds may differ and as to which decisions may vary.

229. In Umed v. Raj Singh MANU/SC/0278/1974, Bhagwati, J. (one of us made the following observations) (at p. 61):

But that does hot mean that a construction should be adopted which ignores the plain natural meaning of the words or disregards the context and the collocation, in which they occur. It is a familiar rule of interpretation that the words used by the Legislature must be construed according to their plain natural meaning.

230. In Anandji Haridas & Co. Pvt. Ltd v. Engineering Mazdoor Sangh MANU/SC/0337/1975 this Court observed as follows (at p. 949):

a general principle of interpretation, where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external evidence such as Parliamentary Debates, Reports of the Committees of the Legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words.

231. In Mangalore Electric Supply Co. Ltd. v. Commr. of Income Tax, West Bengal MANU/SC/0232/1978 this Court observed thus (at p. 1274).

The justification for this submission is stated to be that the word 'transfer', occurs in the collocation of three other words 'sala', 'exchance' and "relinquishment"which are essentially "optional or voluntary acts, leading to the conclusion that the word 'transfer' must take its colour from the three other words in association with which it is used. 'Transfer' therefore, according to the learned Counsel, means a voluntary transfer and cannot include all compulsory acquisition of property.

We find it impossible to accept the submission. In the first place if it was intended that voluntary transfers alone should fall within the meaning of the section, it was unnecessary for the legislature to use the expression 'transfer', an expression acknowledged in law as having a wide connotation and amplitude....Without more, therefore, there is no reason for limiting the operation of the word 'transfer' to voluntary acts of transfer so as to exclude compulsory acquisitions of property.

232. This decision seems to us to be apposite to the facts of the present case, viz., interpretation of the word "transfer" as the argument of Mr. Seervai is that the word 'transfer' used in Article 222 must be confined only to a transfer with the consent of the Judge concerned, thereby limiting the scope and ambit of Article 222, A similar argument was advanced in the case supra and rejected and the Court held that there was no reason to limit the word 'transfer' only to a voluntary transfer so as to include compulsory acquisition of property. On a parity of reasoning, therefore, we are of the opinion that to read 'consent' into Article 222 would be to limit and whittle down the scope, ambit and purpose of Article 222.

233. It is not necessary for us to multiply authorities on the subject covered by category 'A' because the text books and the authorities of this Court as also of some foreign courts referred to above, clearly lay down that where the language of a statute is plain and unambiguous it is not permissible to rely on external aids. Category (B)

234. This category consists of those cases which have laid down that where the language is vague or ambiguous to what extent external aid can be used to locate the actual intention of the Legislature. In Powell v. The Kempton Park Racecourse Co. Ltd. (1899) AC 143. Lord Halsbury indicated the extent to which external aid could be used by courts in construing a statutory provision and observed thus:

It has, indeed been argued that the history of the legislation and of the facts which gave rise to the enactment may in view of the preamble affect the construction of the Act itself, but though I do not deny that such topics may usefully be employed to interpret the meaning of a statute, they do not, in my view, afford conclusive argument here.

235. In A.K. Gopalan's case MANU/SC/0012/1950 (supra), Sastri, J. (as he then was) observed as follows:

It is not a matter for surprise, therefore, that the Drafting Committee appointed by the Constituent Assembly of India recommended the substitution of the expression "except according to procedure established by law" taken from the Japanese Constitution, 1946, for the words "without due process of law" which occurred in the original draft, "as the former is more specific".

236. The learned Judge has clearly Indicated that the reason why our founding Fathers substituted the words 'except according to the procedure established by law' in Article 21 instead of the words "without due process of law" as used in the American Constitution because they implemented the Report of the Drafting Committee which had taken the words 'procedure established by law' from the Japanese Constitution of 1946. His Lordship then indicated the nature, extent and the circumstances in which external aid could be used to construe a constitutional provision, Sastri J., also commented on the extent of the relevancy of a speech made in the course of a debate on a Bill and in this connection observed thus:

A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the/minds of all those legislators were in accord.

237. Thus, the view of Sastri, J. was that a court could locate the objective and intent of the legislature primarily in the words used by the Constitution supported by such historial material as may be available.

238. In Commr. of Income Tax, Gujarat v. Vadilal Lallubhai MANU/SC/0293/1972. Hegde, J. observed as follows (at p. 1019):

In order to find out the legislative intent, we have to find out what was the mischief that the legislature wanted to remedy. The Act was extensively amended in the year 1939. Section 44-F was not in the draft bill. That section was recommended by the Select Committee consisting of very eminent lawyers. It will net be inappropriate to find out the reasons which persuaded the select Committee to recommend the inclusion of Section 44F, if the section is considered as ambiguous.

239. In this case, the Court relied on the recommendation of the Select Committee in order to find out the reasons for inclusion of a particular section.

240. In State of Mysore v. R.V. Bidap MANU/SC/0397/1973 this Court seems to have made a positive shift from the view taken in earlier cases of this Court and held that in order to ascertain the meaning of a statute or its object the court should not confine itself within a particular sphere but should take into consideration whatever is logically relevant or admissible. This is a decision of a Constitution Bench and shows the modern trend of interpretation of statutes. Krishna Iyer, J. speaking for the Court tersely observed as follows (at p. 2558):

The Rule of Exclusion has been criticised by jurists as artificial. The trend of academic opinion and the practice in the European system suggest that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. Recently, an eminent Indian jurist has reviewed the legal position and expressed his agreement with Julius Stone and Justice Frankfurter. Of course, nobody suggests that such extrinsic materials should be decisive but they must be admissible. Authorship and interpretation must mutually illumine and interact. There is authority for the proposition that resort may be had to these sources with great caution and only when incongruities and ambiguities are to be resolved. There is a strong case for whittling down the Rule of Exclusion followed in the British courts and for less apologetic reference to legislative proceedings and like materials to read the meaning of the words of a statute. Where it is plain, the language prevails, but where there is obscurity or lack of

harmony with other provisions and in other special circumstances, it may be legitimate to take external assistance such as the object of the provisions, the mischief-sought to be remedied the social context, the words of the authors and other allied matters.

241. An identical view was taken in a later case of this Court in Faqu Shaw v. State of West Bengal MANU/SC/0041/1973 where Bhagwati, J. relied on the decision extracted above and observed thus (at p. 628):

Since the purpose of interpretation is to ascertain the real meaning of a constitutional provision, it is evident that nothing that is logically relevant to this process should be excluded from consideration. It was at one time thought that speeches made by the members of the Constituent Assembly in the course of the debates on the Draft Constitution were wholly inadmissible an extraneous aids to the interpretation of a constitutional provision, but of late there has been a shift in this position and following the recent trends in juristic thought in some of the Western countries and the United States, the rule of exclusion rigidly followed in Anglo-American jurisprudence has been considerably diluted.

242. It is true that these observations are to be found in the dissenting judgment of Bhagwati, J. (one of us) but on this issue there was no dissent. We are inclined to endorse the observations made by Krishna Iyer, J. and Bhagwati, J. as referred to in the cases mentioned above.

243. In Anandji Haridas & Co. v. Engineering Mazdoor Sangh MANU/SC/0337/1975, Sarkaria, J. speaking for the Court observed as follows (at p. 949):

It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the word in question.

244. In Sole Trustee, Loka Shikshana Trust v. Commr. of Income-tax, Mysore MANU/SC/0273/1975, this Court made the following observations (at p. 22):

But, in the case before us, the real meaning and purpose of the words used cannot be understood at all satisfactorily without referring to the past history of legislation on the subject and the speech of the mover of the amendment who was, undoubtedly, in the best position to explain what defect in the law the amendment had sought to remove.

245. In State of Tamil Nadu v. Pyare Lal Malhotra MANU/SC/0419/1976 Beg, J. (as he then was) observed thus (at D. 803):

The reason given, in the Statement of Objects and Reasons of the 1972 Act, for an elucidation of the "definition" of iron and steel, was that the "definition" had led to varying interpretations by assessing authorities and the courts so that a comprehensive list of specified declared iron and steel goods would remove ambiguity. The Select Committee, which recommended the amendment called each specified category "a sub-item" falling under "iron and steel.

246. In this case, the court relied on the Report of the Select Committee as also on the Statement of Objects and Reasons of the Act in order to elucidate the definition of certain words used in the statute.

247. To the same effect is a later decision of this Court in Jaisingh Jairam Tyagi v. Mamanchand Ratilal Agarwal MANU/SC/0471/1980, where the court observed as follows (at p. 1203):

Amending Act 22 of 1972 was, therefore, enacted for the express purpose of saving decree which had already been passed. The Statement of Objects and Reasons of the Amending Act stated.

248. Same view was taken in a batch of appeals by this Court in Polestar Electronic (Pvt.) Ltd. v. Addl. Commr. Sales-Tax MANU/SC/0337/1978 where Bhagwati, J. (one of us) took into consideration the subsequent history of the Act as also the Statement of Objects and Reasons in order to construe certain provisions of the statute concerned and observed thus (at p. 910):

The subsequent history of the Act also supports the construction which we are inclined to place on Section 5(2)(a)(ii) and second proviso. Section 5 (2) (a) (ii) was amended with effect from May 28, 1972 by Finance Act, 1972 and the

words 'in the Union Territory of Delhi' were added after the word 'manufacturer' so as to provide that manufacture should be inside the territory....It is clear from the Statement of Objects and Reasons that this amendment was not introduced by Parliament ex abundanti cautela, but in order to restrict the applicability of the exemption clause in Section 5(2)(a)(ii). The Statement of Objects and Reasons admitted in clear and explicit terms that....

249. In Mangalore Electric Supply Co. MANU/SC/0232/1978 (supra) Chandrachud, J. (as he then was) relied on the legislative history of the provision of the statute concerned in order to construe the intention of the legislature and pointed out thus:

The legislative history of Section 12B (I) furnishes an important clue to the question raised by the appellant's counsel.

250. In Dadaji v. Sukhdeobabu MANU/SC/0346/1979 this Court made the following observations (at p. 155):

Even though the proceedings of the Joint Committee cannot be relied upon for the purpose of construing the order, they may be looked into to ascertain the circumstances in which the several communities were grouped under one entry or the other." Category (C)

251. This category consists of those cases which take the view that words cannot be omitted from the statute or supplied to it if they are not there. In other words, in interpretation of statute, the doctrine of casus omissus is a fundamental test. In A.K. Gopalan's case MANU/SC/0012/1950 (supra) S.R. Das J. very poignantly pointed out thus:

The Constitution has by Article 21 required a procedure and has prescribed certain minimum requirements of procedure in Article 22. To add to them is not to interpret the Constitution but to recast it according to our intellectual yardstick and our unconscious predilections as to what an ideal Constitution should be.

(Emphasis supplied)

252. A similar view was taken by Das, J. in Nalinakhya Bysack v. Shyam Sunder Haldar MANU/SC/0076/1953 where he very pithily observed thus (at p. 152):

It must always be borne in mind, as said by Lord Halsbury in Commissioner for Special Purposes of Income Tax v. Pemsel L.R. (1891) AC 531 at p. 549 that it is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature the Court cannot, as pointed out in Crawford v. Spooner 6 Moo PC 1 aid the Legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is a casus omissus, it is, as said by Lord Russel of Killowen in Hansraj Gupta v. Official Liquidator of Dehra Dun Mussorie Electric Tramway Co. Ltd. 1933 60 LA 13 : AIR 1933 PC 63 for others than the courts to remedy the defect.

253. Thus, this Court has clearly held that in construing a statutory or Constitutional provision, the court should not presume that the legislature has either committed a mistake or has omitted something which was very necessary. Das J. very rightly remarked that it was not for the Court but for others to remedy the defect, if any, found in a statutory provision. If we accept the argument of Mr. Seervai and read the word 'consent' in Article 222 by supplying the omission, we will be violating the cardinal principle of interpretation as adumbrated by Das J. in the case supra.

254. In Sri Ram Ram Narain Medhi v. State of Bombay MANU/SC/0132/1958 the law on the subject was very succinctly and clearly laid down by this Court and N.H. Bhagwati J. observed thus (at p. 470):

Acceptance of the interpretation which is sought to be put upon these words by the petitioners would involve the addition of words "in the process of the acquisition by the State of any estate or of any rights therein" or "in the process of such acquisition" which according to the well known/ canons of construction cannot be done. If the language of the enactment is clear and unambiguous it would not be legitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the legislature.

255. We find ourselves in complete agreement with these observations which aptly apply to the present case so far as Article 222 is concerned and are sufficient to demolish the argument of Mr. Seervai that the word 'consent' should be added to or read into Article 222 even if it is not there.

256. In Commr. of Income Tax, Central Calcutta v. National Taj Traders MANU/SC/0310/1979 Tulzapurkar, J. speaking for the Court highlighted the importance of the doctrine of casus omissus in a very poignant exposition of the law on the subject and opined thus (at p. 489):

In other words, under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily referred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute.

257. Thus, Tulzapurkar J, laid down three conditions under which omissions could be supplied to a statute--

(1) that there was a clear necessity for the same,

(2) that the reason for supplying the omission was to be found in the provisions of the statute itself expressed or by necessary intendment and

(3) that the omission was to be supplied only to make the provision consistent with the object of the statute.

258. It is manifest that none of these conditions apply to Article 222 and therefore to supply the omission by reading the word 'consent' would really be going against the principles laid down by this Court in the aforesaid case.

259. In Gurbaksh Singh Sibbi'a v. State of Punjab MANU/SC/0215/1980 Chandrachud C.J. while dealing with this particular aspect of canon of construction of a statute, very pithily observed thus (at p. 1639):

By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose.

260. It follows from the observations made by this Court that if the word consent is read into Article 222 then it with amount to imposing unnecessary restraints and conditions in the Article which are not there at all and which cannot be done under the well known rules of interpretation of statutes. Category 'D'

261. In this category we shall include those cases which hold that a speech made by a Minister or by a Member of Parliament is neither admissible' nor permissible to construe a statutory or a constitutional provision. It may, however, be noted that a speech made in a debate is different from the Report of a Select Committee or views expressed in close proximity to the making of a statute or introduction or insertion of a statutory provision where the statement would undoubtedly be relevant because it forms part of the formative process of "the statutory provision itself. We have highlighted this particular aspect of the matter because in the instant case. we shall show that there 'are statements made by some of the Founding Fathers when the Constitution was being framed and the reasons given by the speakers formed the basis and foundation, of the constitutional provisions inserted in the Constitution,

262. In A.K. Gopalan's case MANU/SC/0012/1950 (supra) Sastri J. while dwelling on the admissibility of the speech made by a Minister on the floor of the House observed thus:

A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it coufd not reflect the inarticulate mental process lying behind the majority vote which carried the bill, Nor is it reasonable to assume, that the minds of all those legislators were in accord.

263. Similar view was 4aken in United States v. Trans Missouri Freight Association (1896) 166 US 290 where the following observations were made:

Those who did not speak may not have agreed with those who did, and those who spoke might differ front each other.

264. To the same effect is a decision of this Court in Aswini Kumar Ghosh v. Arabinda Bose MANU/SC/0022/1952 where Sastri C.J. speaking for himself, Bose and Ghulam Hasan JJ. observed as follows (at p. 378):

As regards the speeches made by the members of the House in the course of the debate, this Court has recently held that they are not admissible as extrinsic aids to the interpretation of statutory provisions. Mukherjea J. also spoke in a similar strain and observed as follows (at pp. 384, 385):
...the language of a "Minister of the Crown" in proposing a 'measure in Parliament which, eventually becomes law is inadmissible.

A reference to the legislative debates or the speeches that were actually delivered in the floor of the House is, in my opinion inadmissible to ascertain the meaning of the words used in the enactment". and Das J. observed thus (at p. 395):

that the debates and speeches in the Legislature which reflect the individual opinion, of the speaker cannot be referred to for the purpose of construing the Act as it finally, emerged from the Legislature and so the debates must be left out of consideration.

265. It appears that while all the Judges were unanimously of the opinion that speech by a Minister or a speaker in the course of a debate was not admissible to construe the intention of the legislature, the majority judgment held that external aid in the nature of the legislative debates which resulted in the coming into existence of the constitutional provisions and, were in close proximity to the same, could be pressed into service. On this point we would like to follow the majority decision on the subject, subject of course to the condition that the language of a statute does not clearly spell out the dominant object which was sought to be achieved by the legislature.

266. In State of West Bengal v. Union of India MANU/SC/0086/1962 Sinha, C.J. speaking for himself, Jafer Imam, Shah; Ayyangar and Mudholkar JJ. observed as follows (at p. 1247):

A statute, as passed by Parliament, is the expression of the collective intention of the legislature as a whole, and any statement made by an individual, albeit a Minister of the intention and objects of the 'Act cannot be used to cut down the generality of the words used in the statute.

(Emphasis ours)

267. In artother Constitution Bench decision in Shyamlal Mohanlal v. State of Gujarat' MANU/SC/0092/1964 Shah J. speaking for the Court endorsed the stand taken in the case referred to above and observed as follows (at p. 1255):

In construing the words used by the Legislature, speeches on the floor of the Legislature are inadmissible. I do not refer to the speech for the purpose of interpreting the words used by the Legislature, but to ascertain the historical setting in which the statute, which is parent to Section 94(1) came to be enacted.

268. The learned Judge clearly held that while a speech on the floor of a legislature was inadmissible in ascertaining the real meaning of the word used by the legislature, the historical setting in which the statute was passed could! doubtless be admissible. This decision, therefore, make a clear departure, on the point of admissibility of historical setting, from the minority dissenting judgment of Das J. as indicated above.

269. In Anandji Haridas's case MANU/SC/0337/1975 (supra) this Court observed thus (at p. 949):

We are afraid what the Finance Minister said in his speech cannot be imported into this case and used for the construction of Clause (e) of Section 7. The language of that provision is manifestly clear and unequivocal. It has to be construed as it stands, according to its plain grammatical sense without addition or deletion of any words.

270. In Lok Shikshana Trust's case MANU/SC/0273/1975 (supra), this Court made the following observations:

It is true that it is dangerous and may be misleading to gather the meaning of the words used in an enactment merely from what was said by any speaker in the course of a debate in Parliament on the subject. Such a speech cannot be used to defeat or detract from a meaning which clearly emerges from a consideration of the enacting words actually used.

271. Thus, on a full and complete consideration of the decisions classified under the various categories, the propositions that emerge from the decided cases of this Court and other foreign courts are as follows:

(1) Where the language of a statute is clear and unambiguous, there is no room for the application either of the doctrine of casus omissus or of pressing into service external aid, for in such a case the words used by the Constitution or the statute speak for themselves and it is not the function of the court to add words or expressions merely to ,suit what that courts think is the supposed Intention of the legislature.

(2) Where however, the words or expressions used in the constitutional or statutory provisions are shrouded ill mystery, clouded with ambiguity and are unclear and unintelligible so that the dominant object and spirit of the legislature cannot be spelt out from the language, external aids in the nature of parliamentary debates, immediately preceding the passing of the statute, the report of the Select Committees or its Chairman, the Statement of Objects and Reasons of the statute, if any, or any statement made by the sponsor of the statute which is in close proximity to the actual introduction or insertion of the statutory provision so as to become, as it were, a result of the statement made, can be pressed into service in order to ascertain the teal purport, intent and will of the legislature to make the constitutional provision workable. We might make it clear that such aids may neither be decisive nor conclusive but they would certainly assist the courts in interpreting the statute in order to determine the avowed object of the Act or the Constitution as the case may be.

(3) Except in the aforesaid cases, a mere speech of any member made on the floor of the House during the course of a parliamentary or legislative debate would not be admissible at all because the views expressed by the speaker may be his individual views which may or may not be accepted by the majority of the members present in the House.

I (4) Legislative history of a constitutional provision though not directly germane for the purpose of construing a statute may, however, be used in exceptional cases to denote the beginning of the legislative process which results in the logical end and the finale of the statutory provision but in no case can the legislative history take the place of or be a substitute for an interpretation which is in direct contravention of the statutory provision concerned

(5) Where the scheme of a statute clearly shows that certain words or phrases were deliberately omitted by the legislature for a particular purpose or motive, it is not open to the Court to add those words either by conforming to the supposed intention of the legislature or because the insertion or the omission suite the ideology of the Judges deciding the case. Such a course of action would amount not to interpretation but to interpolation of the statutory or constitutional provisions, as the case may be, and is against, all the well established cannot of interpretation of statutes.

272. The main reason behind the principles enunciated above is that the legislature must be presumed to be aware of the expanding needs of the nation, the requirements of the people and above all, the dominant object which the legislation seeks to subserve.

273. Thus, where the language is plain and unambiguous the court is not entitled to go behind the language so as to add or supply omissions and thus play the role of a political reformer or of a wise counsel to the legislature.

274. On the other hand, the counsel for the respondents have strongly urged that the entire argument of Mr. Seervai to the effect that the word 'consent' should be read into Article 222 is in vacuo and there is not the slightest vagueness or ambiguity in the words used in Article 222 to necessitate the reading of the word 'consent' therein. The counsel further urged that the attempt of Mr. Seervai is merely to create a so called cloud of suspicion and mystery and then to resolve it by asking the court to read consent into it. In other words, the counsel for the respondents have fully supported the propositions which we have adumbrated above.

275. Assuming for the sake of argument particularly in view of the farreaching consequences of our decision and the large magnitude of the arguments that have been addressed to us, that the dominant object of Article 222 is not very clear or unambiguous, we may discuss the legislative history of introduction of Article 222 in the Constitution as also the parliamentary debates or Reports of the Drafting or Select Committees as a direct result of which the said Article came into existence.

276. So far as the legislative history of the provisions prior to the Constitution regarding the functioning and the Constitution of High Court is concerned, we might start from the Government of India Act, 1915 (hereinafter referred to as the '1915 Act') because the prior Acts an neither helpful nor germane for construing the questions at issue in these petitions. Sections 101 to 114 of the 1915 Act are the provisions which relate to the High Courts. It may be noted that in this Act, there was no provision at all for transfer of a Judge from one High Court to another. Section 101 provided that each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think at to appoint This is the precursor of Article 217 of our Constitution. It may be noticed that in the 1915 Act while the appointment of Judges vested in His Majesty the King but the power of appointment of Addl. Judges was vested in the Governor-

General-in-Council although the Addl, Judges so appointed had the same powers as the Judges appointed by His Majesty. This complexion has been completely changed so far as the provisions of our Constitution are concerned Further, under Section 102 a Judge of a High Court was to hold office during His Majesty's pleasure unless he resigned on his own. This provision has not been incorporated in our Constitution which has provided complete security of tenure to a Judge of a High Court who is to continue until he reaches the age of superannuation which is 62 years in the case of a High Court Judge and 65 years in the case of a Supreme Court Judge. The only manna in which a Judge can be removed before his term is by impeachment as provided under Article 124(2) read with the provisions of the Judges (Inquiry) Act of 1968. The other provisions are not relevant for the purpose of deciding this issue. Section 113 conferred powers on His Majesty to establish an Additional High Court in any territory in British India.

277. Thus, the only common feature which has been retained in our Constitution is regarding the appointment of Additional Judges of any High Court for a period not exceeding two years and while this provision was introduced by the 7th Amendment of the Constitution, it was slightly different from the one contained in proviso (i) to Sub-section (2) of Section 101 of the 1915 Act which may be extracted thus:

the Governor-General in Council may appoint persons to act as additional judges of any High Court for such period not exceeding two years, as may be required; and the judges so appointed shall whilst so acting, have all the powers of a judge of the High Court appointed by His Majesty under this Act;

In Article 224, the purpose, viz., arrears, is mentioned which was conspicuously absent from the 1915 Act perhaps because at that time there were no heavy arrears.

278. The next statute which merits consideration is the Government of India Act 1935 (hereinafter referred to as the '1935 Act') which is merely a precursor of our. Constitution as most of its provisions are based on the pattern and structure of this Act The relevant sections dealing with High Courts are Section 213-231 and 253-256. Section 220 makes two marked improvements on the previous provisions of the 1915 Act -- (1) that every Judge appointed by His Majesty held office until he attained the age of 60 years and not at the pleasure of His Majesty as provided by Section 101 of the 1915 Act, and (2) Section 220(2)(b) expressly states that a Judge can be removed on the ground of misbehaviour or infirmity of body or mind if the Judicial Committee of the Privy Council, on a reference made to it by His Majesty, reported that the Judge ought on any such ground be removed. This provision has been retained by our Constitution but the procedure of removal has been substituted by the procedure of impeachment as contained in Article 124(4) read with Article 218.

279. Although there is no specific provision for transfer of a High Court Judge from one High Court to another, an implied power seems to have been conferred in Section 220(2)(c) of the 1935 Act, which may be extracted thus:

The office of a judge shall be vacated by his being appointed by His Majesty to be a Judge of the Federal Court or of another High Court

280. It may be pertinent to note that Section 220(2)(c) provides that a Judge shall vacate his office either on his being appointed as a Judge of the Federal Court or of another High Court This provision does not contain any element or concept of transfer of a Judge from one High Court to another. What it contemplated is that if a Judge of a High Court was to be transferred he would have to be appointed to that High Court. Our Constitution, however, makes a clear distinction so far as this aspect of the matter is concerned inasmuch as Article 222 expressly uses the word 'transfer' rather than the word 'appointment' when a Judge is transferred from one High Court to another.

281. So far as our Constitution is concerned while Article 222 confers on the President the power of transferring one Judge of a High Court to another in consultation with the Chief Justice of India, Article 217(1)(c) provides that the office shall be vacated on his being appointed as a Judge of the Supreme Court or if he is transferred to any Other High Court. It may thus be noticed that Article 217(1)(c) is placed in Chapter V which deals with High Courts and may be extracted thus:

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

282. While in the case of a Judge who goes to the Supreme Court, the word "appointed" is used to indicate that this is a fresh appointment in a higher Court, or rather the highest Court in the country, whereas when a Judge is transferred from one High Court to another, the word transfer' in contradistinction to the word appointed' as mentioned in Section

220(2)(c) of the 1935 Act, has been deliberately used which clearly shows that the two modes of vacation of office by a sitting Judge are quite different. We have mentioned this fact because Mr. Seervai has argued before us that the transfer of a Judge from one High Court to another results in vacation of his office and therefore must be construed to be a fresh appointment implying thereby that he could be transferred only if he gives his consent as when he is first appointed to the High Court. The fact that he gives his consent has to be implied, for he cannot be appointed as a High Court Judge against, his consent.

283. We have mentioned these circumstsances in order to highlight the second argument of Mr. Seervai regarding interpretation of Article 217(1)(c) on the basis of which he contended that this would show that the transfer of a Judge under Article 222 amounted to a first or a fresh appointment in the transferee Court as the moment a Judge is transferred to another High Court, he vacates his office in the original High Court and assumes the charge of a new office only after taking the oath. It was suggested by Mr. Seervai that under proviso (c) "to Article 217(1) just as a Judge vacates his office on being appointed as a Judge of the Supreme Court, identical consequences follow when he to transferred to fray other High Court.

284. The Attorney General has rightly pointed out that the proviso itself makes a difference between vacating the office by a Judge who is appointed to the Supreme Court and a Judge who is transferred. A Judge 'who is transferred merely vacates the office in a limited sense, namely, that he cannot act as a High Court Judge in the High Court where he was appointed but the fact remains that until he takes oath in the transferee High Court, he continues to be a Judge of the Original High Court. For these reasons, this argument does not appeal to us.

285. Finally, there is one more circumstance which clearly shows that a transfer cannot be treated as a first or fresh appointment. It would be seen that the heading of each Article which deals with the appointment of Judges clearly mentions this fact. Take for instance, Article 217 -- the heading is appointment and conditions of a Judge of a High Court. Article 223 relates to appointment of acting Chief Justice and Article 224 deals with appointment of additional and acting Judges. It may be pertinent to note here that Article 223 comes immediately after Article 222 where the heading is transfer of a Judge from one High Court to another. The Constitution has thus itself brought out a clear distinction between transfer and appointment. Similarly, Article 224A deals with appointment of retired Judges at sittings of High Courts. There are number of other instances where the word 'appointment' is used in contradistinction to transfer in respect of authorities other than High Court Judges. This is, therefore, also an important circumstance to negative the argument of Mr. Seervai that as transfer amounts to a fresh or a first appointment in the transferee High Court and, therefore, consent becomes a necessary concomitant of such a transfer.

286. It may also be pointed out that whenever a legislature or constituent assembly uses a particular phrase in contradistinction to another phrase it is not possible to read the two phrases so as to indicate the same purpose, the instant case, the Constitution has used the word 'appointed' in the case of a Judge of the Supreme Court and 'transfer' in the case of a Judge of a High Court. A perusal of the language of Article 217(1) Proviso (c) leads to the irresistible conclusion and" logical inference that the founding Fathers have made a clear distinction between transfer and appointment. It is true that in both cases the office held by a Judge is vacated in a fictional sense because there is a complete change m the life of the Judge but that does not mean that the incidents of both these appointments .are the same, A Judge of the High Court when appointed as a Judge of the Supreme Court cannot be equated in any respect with a Judge of the High Court who is transferred to another High Court and continues to possess the same status, position and emoluments which is essentially different from a Judge of the Supreme Court. Mr. Seervai, however, submitted that both, Article 124 which relates to the appointment of a Supreme Court Judge and Article 217 which provides for the appointment of a High Court Judge do not mention anything about obtaining the consent of a Judge which has to be implied in both the cases. On a parity of reasoning it was submitted that where a Judge is appointed in a High Court or transferred to another Court, every time it is a new appointment as a result of which the Judge of the High Court oh being transferred to another Court has to take a fresh oath because he ceases to be a Judge in the Court of its orgin. It is true that on being transferred to another High Court a Judge ceases to be a Judge but then he ceases to be "a Judge of the transferor Court only and does not cease to be a Judge for all times to come so as to make his transfer in the transferee Court a fresh appointment. This is clear from para. 11(iii) to the Second Schedule to the Constitution which runs thus:

joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

287. It is true that in Para 41(iii) to Schedule 2 of Constitution this schedule joining time is mentioned on transfer from a High Court to Supreme Court or from one High Court to another and the word 'appointment' has not been used as such. That however makes no difference because this schedule only refers to a small matter of joining time which both the judges, viz., a judge appointed to the Supreme Court and the judge transferred, are entitled to avail, Nothing, therefore, turns upon the language of para 11 (iii) of the Second Schedule.

288. lastly, it was contended that the fact that a Judge who is transferred from the original High Court to another. High Court has to take oath suggests that his transfer amounts to an appointment and that is why the taking of a fresh oath becomes necessary. We are, however, unable to agree with this contention. It is obvious that when a Judge was appointed in the original High Court he had taken the oath of his office which bound him to act as a Judge of that particular High Court. Since by virtue of the transfer, the Court is changed, a fresh oath becomes necessary as a clerical formality to indicate that although his appointment as a Judge of a High Court does not cease to exist he discharges his duties as a Judge in another Court in respect of which he had not taken the oath of office. In these circumstances, it cannot be said that merely because a transferee Judge has to take a fresh oath the transfer becomes a new or a fresh appointment. Moreover, it is doubtful if the taking of a fresh oath is necessary at all because the warrant signed by the President appointing a person as a Judge of a High Court holds good in the transferee Court and the place is indicated by the notification issued under the authority of the President which really means that after the notification the warrant would have to be read to indicate that the Judge was transferred to the transferee Court where he is to act as a Judge. At any rate, we do not consider it necessary to go into this question in this particular case.

289. The last plank of the argument of Mr. Seervai was that no stress can be laid on the distinction between 'appointment' and 'transfer' because these are synonymous and interchangeable terms and in this connection he relied on a decision of this Court in His Holiness Kesavananda Bharti Sripadagalavaru v. State of Kerala MANU/SC/0445/1973 where Chandrachud, J. (as he then was) observed as follows : (at p. 2027).

These are not words occurring in a school text-book so that one can find their meaning with a dictionary on one's right and a book of grammar on one's left. These are words occurring in a Constitution and one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in "a single complex instrument, in which one part may throw light on another," so that "the construction must hold a balance between all its parts. A word is not crystal, transparent and unchanged; it is the skin of living thought and may very greatly in colour and content according to circumstances and the time in which it is used.

290. This Court merely held that in certain circumstances different words may not necessarily produce a change in the meaning and those observations have to be read with reference to the context. In the instant case, however, the plain and unambiguous language of Article 217(1) proviso (c) & Article 222 cannot be stretched to indicate that "appointment' and 'transfer' are synonymous terms when the constitutional provisions make it very clear that the power of transfer and the power of appointment are two different kinds of powers to be exercised in different ways. We, therefore, reject this part of the argument of Mr. Seervai as being without substance.

291. Having dealt with the legislative history and the setting of Article 222 which, as pointed out by us earlier, took its birth for the first time in our country in the form of Section 220(2)(c) of the 1935 Act and was later inserted in the Constitution after a full parliamentary debate. As we have already held that detailed speeches made on the floor of the house or the statement of Ministers are not admissible, we would confine ourselves only to those debates or statements which have been made by the sponsors or the architects of the Constitution itself and which immediately resulted in the introduction of Article 222 in our Constitution.

292. On September 16, 1949 one of the architects of our Constitution, Dr. Ambedkar while proposing the insertion of Article 128 (which became the present Article 222) highlighted the various aspects of the philosophy and the doctrine of transfer of Judges and speaking with persuasion and poignancy observed thus (Constituent Assembly Debates Vol. 11 (1949), p. 580):

The only question that we are called upon to consider is when a person is appointed as a judge of a High Court of a particular State, should it be permissible for the Government to transfer him from that Court to a High Court in any other State. If so, should this transfer be accompanied by same kind of pecuniary allowance which would compensate him for the monetary loss that he might have to sustain by reason of the transfer? The Drafting Committee felt that since all the High Courts so far as the appointment of judges is concerned form now a central subject, it was desirable to treat all the judges of the High Courts Throughout India as forming one single cadre like the I.C.S. and that they should be liable to be transferred from one High Court to another. If such power was not reserved to the Centre (the) administration of justice might become a very difficult matter. It might be necessary that one judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talent which may not be locally available. Secondly, it might be desirable to import a new Chief Justice to a High Court because it might be desirable to have a man who is unaffected by local politics and local jealousies. We thought therefore that the power to transfer should be placed in the hands of the Central Government.

We also took into account the fact that this power of transfer of judges from one High Court to another may be abused. A Provincial Government might like to transfer a particular judge from its High Court because that judge had become very inconvenient to the Provincial Government by the particular attitude that he had taken with regard to certain judicial matters, or that he had made a nuisance of himself by giving decisions which the Provincial Government did not like. We have taken care that in effecting these transfers no such considerations ought to prevail. Transfers ought to take place only on the ground of convenience of the general administration. Consequently, we have introduced a provision that such transfers shall, take place in consultation with the Chief Justice of India who can be trusted to advise the Government in a manner which is not affected by local or personal prejudices.

293. Thus, the speech coming as it did Immediately before Article 222 was inserted completely demolishes the argument of Mr. Seervai because the apprehensions and fears expressed by him are found in the statement of Dr. Ambedkar and he had made it a point to emphasise that the power of transfer should serve three purposes:

(i) that it might be necessary to transfer a judge from one High Court to another to strengthen the transferee Court by importing better talent in which the said Court may be lacking.

(ii) that it might be desirable to have a Chief Justice from outside who is unaffected by local politics and local jealousies, and

(iii) that transfer should be made only on the ground of convenience and general administration and since the transfers could be made by the President in consultation with the Chief Justice of India, who is the highest authority in the country, it can be safely presumed that exercise of such a power would not be affected by local or personal prejudices.

294. These observations, therefore, furnish a complete answer to the two arguments of Mr. Seervai that 'consent' should be read into Article 222 or that the transfer amounted to a fresh appointment.

295. It may be mentioned that even in the Revised Draft, Article 222 ran thus: "The Framing of India's Constitution" by B. Shiva Rao, Vol. IV p. 826:

222. Transfer of a Judge from one High Court to another.

(1) The President may transfer a Judge from one High Court to any other High Court within the territory of India.

(2) When a Judge is so transferred, he shall, during the period he serves as a Judge of the other Court, be entitled to receive in addition to his salary such comepensatory allowance as may be determined by Parliament by law and until so determined such compensatory allowance as the President may by order fix.

296. It would be noticed that in this draft Article there was no mention of consultation of CJI by the President but this seems to have been later introduced as a result of the speech of Dr. Ambedkar as indicated above. Furthermore, it would appear from the Note appended by Mr. Santhanam in his book 'Constitution of India' as to how and under what circumstances the present Article 222 came to be incorporated in the Constitution where at page 169 the author says thus:

This is a new article inserted in the final stage. It was objected that this power might be used to punish a judge who might not be in the good books of the Central Government. It was also suggested that such transfer should be made only with the consent of the judge concerned. This suggestion was rejected because it might become necessary in the national interests to send a competent judge to some part of India in spite of to own inclinations. The President may be trusted not to use this power to the detriment of judicial independence.

(emphasis supplied)

297. This note clearly shows that even at the time "when Article 222 was taking its birth there was some talk of making the transfer with the consent of the Judge concerned but this idea was given (sic) when it was pointed out that in the national interest it may be necessary to send a competent judge to another High Court and this policy may be stalled toy the judge by withholding his consent. In other words, the idea of 'consent' havings been conceived, discussed and rejected clearly shows that the Founding Fathers deliberately omitted the word 'consent' from Article 222 and that

knocks the bottom out of the argument of Mr. Seervai that if the Founding Fathers rejected the concept of 'consent', the Court should still read h into the Article which is patently against all canons of interpretation of statutes.

298. It was suggested that the note of Mr. Santhanam cannot be treated to be the last word in the matter. We are unable to agree with this contention. Santhanam is not merely the author of the Constitution but he was also a Member of the Drafting Committee and the Note fully shows that the speech made by Dr. Ambedkar regarding Article 222 (which in its draft form was Article 128) was incorporated according to the guidelines indicated by Dr. Ambedkar. The Note, therefore, finds ample support from what Dr. Ambedkar had said. No material has been placed before us to show that the Note of Mr. Santhanam was wrong either on point of fact or on a point of law. In our opinion, therefore, read with the speech of Dr. Ambedkar, the Note of Mr. Santhanam in regard to Article 232 clinches the issue and no further argument on this question, can be entertained.

299. Finally there is yet another aspect to which we may advert in order to understand the spirit, philosophy and pattern of our Constitution. Shiva Rao in The Framing of India's Constitution' (Vol. IV) refers to various speeches made after the adoption of the Constitution. To begin with, Dr. Ambedkar while explaining the various sources of the Constitution reminded the Member that before finally drafting the Constitution, the Member of the Drafting Committee had before them almost all the important Constitutions of the big countries of the world. The American Constitution was considered, the Australian Constitution was also taken into account and comparisons were made with American, Canadian, South African and Australian Constitutions. Dr. Ambedkar further pointed out a distinctive feature in our Constitution which he highlighted thus: ('The Framing of India's Constitution' by B. Shiva Rao, Vol. IV, p. 936)

In making comparisons on the basis of time consumed, two things must be remembered. One is that the Constitutions of America, Canada, South Africa and Australia are much smaller than ours. Our Constitution as I said contains 395 Articles while the American has just seven articles, the first four of which are divided into sections which total up to 21, the Candian has 147, the Australian 128 and the South African 153 sections. The second thing to be remembered is that the makers of the "Constitutions of America, Canada, Australia and South Africa did not have to face the problem of amendments. They were passed, as moved. On the other hand, this Constituent Assembly had to deal with as many as 2,473 amendments. Having regard to these facts the charge of dilatoriness seems to me quite unfounded and this Assembly may well congratulate itself for having accomplished so formidable a task in so short a time.

300. Similarly, Dr. Rajendra Prasad, who was President of the Drafting Committee, observed thus : (The Framing of India's Constitution by B. Shiva Rao, Vol. IV, p. 936).

We considered whether 'we should adopt the American model or the British model where we have a hereditary king who is the fountain of all honour and power, but who does not actually enjoy any power. All the power rests in the Legislature to which the Ministers are responsible. We have had to reconcile the position of an elected President with an elected Legislature and in doing so we have adopted more or less the position of the British monarch for the President.

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Then we come to the Ministers. They are of course responsible to the Legislature and lender advice to the President who is bound to act seconding to, that advice. Although there are no specifie provisions, so far as I know, m the Constitution itself making it binding on the .President to accept the advice of his Ministers, it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and the President, not so much on account of the written word in the Constitution, but as the result of this very healthy convention, will become a constitutional President in all matters.

301. Dr. Prasad expressed a wish that by working the Constitution, the people of the country will evolve a convention by which the advice of the Council of Ministers would be binding on the President and his historical words have proved to be true and have now taken a constitutional shape because by virtue of the Constitutional 42nd Amendment, the advice of the Council of Ministers has been made binding on the President and he has to act on such advice. Thus, a convention which was ingrained in the Constitution has how taken a constitutional shape.

302. Lastly, Dr. Rajendra Prasad expressed his view that the Constitution undoubtedly made' clear provisions for an independent judiciary and observed thus : (The Framing of India's Constitution by Shiva Rao (Vol: IV), p. 954)

We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence. One of our articles makes it easy for the State Governments to introduce separation of executive from judicial functions and placing the Magistracy which deals with criminal cases on similar footing as civil Courts. I can only express the hope that this long overdue reform will soon be introduced in the States.

303. We have mentioned these facts at this stage for two reasons. In the first place we wanted to illustrate and emphasise the actual philosophy of the Constitution so that the various articles may be read in the light of the views and the desire expressed: lay the Founding Fathers Secondly, the fact that our Constitution is based not on the American but on the British Pattern is established from the observations extracted above and the internal evidence furnished: by the various provisions of the Constitution itself. It is true that we have borrowed some provisions from the American Constitution and others from the Japanese Constitution but by and large our Constitution is fashioned on the British pattern. Therefore," white Considering the doctrine of privilege of the doctrine of candour it would be safer to rely on English cases rather than the American doctrine. However, this aspect of the matter will be dealt with at the appropriate stage.

304. It was next contended both by Mr. Seervai and Dr. Singhvi that non-consensual transfers of High Court Judges' are punitive in nature and amount to punishment. Detailed contentions in this regard have already been narrated byus when we dealt with their contentions 6n this point. One of the cardinal points made out by the learned Counsel for the petitioners against non-consensual transfers was that if a transfer, is made without the Consent of the Judge it will arm the Central Government with a strong weapon to punish a High Court Judge who either does not share the ideology of the Government or is not prepared to oblige it, by compelling him to toe the line of the Government at the risk of being transferred. Reliance was placed, in support of this argument on a large number of transfers that Were made during the emergency resulting in writ petitions filed in the Gujarat High Court in Seth's-case MANU/SC/0065/1977 where this very point was argued on behalf of one of the Judges who had moved the petition before the Gujarat High Court. It was also pointed out that in the supreme. Court both Bhagwati and Untwalia, JJ., dissented, from the majority view and particularly Untwalia, J. mentioned the fact that the large number of transfers had created a panic. It is true that there were, quite a few transfers during the emergency which were not in consonance with the spirit of Article 222 and that is why the Government had conceded this fact and took steps to revoke the transfers by retfansferring, almost all the Judges to the High Courts from where they had been transferred. Even so the Government insisted, that the point of law involved should be decided by this Court as a result of which the majority judgment held that Article 222 does not contemplate that a transfer should foe made only with the consent of the Judge, concerned. Taking the argument at its face value, we cannot jump immediately to the conclusion that in all cases non-consensual transfers would amount to a punishment so as to arm the Government with a weapon to punish a Judge for not toeing the line of the Government, It is a well-known saying that one sparrow does not make a summer, it, seems that it is neither logical nor congruent to draw an irresistible inference merely from the massive transfers made during the emergency inspired by particular motive to the conclusion that the power of the President enshrined fin Article 222 would be exercised for collateral reasons always in future also more particularly so when this Court in the majority judgment in Seth's case had laid down the guidelines for transferring a Judge from one Court to another and also laid very great stress on the process of effective consultation, the possibility of abuse of power is completely ruled out. This Court in that case had laid down sufficient safeguards against a wrong or colourable exercise of power by the President under Article 222. Therefore, there is no reason to presume that any order which is passed by the President under Article 222 henceforward is bound to be mala fide or colourable and even if it is in a particular case or cases, it is doubtless subject to judicial review.

305. It was then contended that a transfer of a Judge from one High Court to another entails evil consequences inasmuch as it uproots the Judge from his hearth and home and transplants him in 4 new and alien place where he has to start his life or career anew and face Several personal difficulties and inconveniences. Once it is conceded that the power of transfer under Article 222 is to be exercised in public interest, then any in convenience that is felt by the Judge would have to yield to the larger interest of the community so as to make the said article workable. Although Article 222 is an extraordinary power, whenever a person accepts judgeship of a High Court he is fully aware that during his career as a Judge the power under Article 222 could be exercised by the president without his consent and if knowing this he accepts the position of a High Court Judge, he cannot be heard to say that he ought not to be transferred because he would suffer lot of inconvenience.

306. It is true that the transfer of a High Court Judge is an extraordinary phenomenon and is resorted to very sparingly. Though not the usual incident of the career of a High Court Judge as in the case of other services, particularly the subordinate judiciary the provision for transfer is undoubtedly there and has to be worked out in suitable cases. We shall deal with this aspect of the matter in greater detail when we come to the limb of the argument regarding the policy of general transfers.

307. Furthermore, the very concept of transfer under Article 222 being a punishment is highly derogatory to the high constitutional position that a High Court Judge holds. Such a constitutional appointment, which makes a Judge a constitutional functionary and not a Government servant, more so when he obtains certain special privileges having regard to the high position he holds, is against the very concept of penalty or puinshment. It is manifest that when a person is punished for an offence or a mistake or an error, then he is to undergo some penal process. In the case of a Judge who is transferred, no such penal consequences are at all visited because on the plain term of Article 222 the Judge has to get special facilities before being transferred to the transferee High Court. Clause (2) of Article 222 clearly provides that a transferred Judge is only to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and until so determined such compensatory allowance as the President may fix. Thus, the granting of compensatory allowance to a Judge in lieu of transfer completely destroys the concept that the transfer involves a stigma or a punishment. You don't have to award a person additional facilities if you punish him und if you do, then the act cannot amount to a punishment. Apart from the allowances, the High Court Judges (Conditions of Service) Act and the Rules made therein clearly provide that a Judge who is transferred from one High Court to another can always avail of the special leave concession rules by visiting his home State, along with his family, at Government cost once a year. The Judges Rules, as amended, further enjoin that the Judge must be supplied with a free furnished house which under the Amendment Act of 1981 is not even to be treated as a perquisite under the Income-tax Act. It is true that some of these facilities are available to a Judge in his original High Court also but the totality of the facilities taken into consideration undoubtedly seek to make him as comfortable as possible in the transferee Court also.

308. In view of the speeches and statements of the Members of the Drafting Committee particularly' those of Dr. Ambedkar Article 222 (which was 128 in Draft Constitution) was introduced not by way of punishing a Judge but to import better talents in other High Courts and enable the Judge to work in a free and fair atmosphere where he can work without any local influence. Indeed, if our Founding Fathers were alive today and were to be told to their utter dismay that transfer amounts to a punishment, they would have got the greatest shock of their life.

309. Far from being a punishment the transfer of a Judge does not involve any stain or stigma nor even the slightest reflection oh his legal functioning or his judicial character or integrity. The transfer of a Judge contemplated by Article 222 is in the nature of a response to a call of duty in the larger national interest of the country in order to maintain and ensure absolute purity of judicial administration. On being transferred the Judge would find himself free to work in an independent atmosphere untrammelled by any provincial or parochial consideration, undaunted by any external or internal influences or local pulls or pressures and unifluenced by the considerations of class, caste or creed. He would also generate much greater confidence in the people to whom he imparts justice which is bound to enhance his judicial prestige and as a logical result would subserve the concept of independence of judiciary. For a true and conscientious Judge there can be no higher honour than to create a feeling that justice is not actually done but also appears to have been done, the latter being more important and fundamental quality of judicial approach. The apprehension that a Judge on being transferred to another State is likely to face a hostile Bar is merely an anathema and an illusion which has neither a factual nor a legal existence. If the Judge's behaviour towards the Bar is polite and courteous 'and he gives a little accommodation to the Bar he is bound to win laurels of the Bar. In fact, the Bar always welcomes an outside Judge who is likely to build up a new judicial structure and establish a flawless and unblemished reputation. This is not merely a pious wish or an ideal dream but a stark and speaking reality which is, evident from the performance and reputation of Judges who had been transferred outside their States and had proved to be not only successful but memorable Judges.

Judges transferred as CJ/Judges outside their State:

1. Justice Sinha of the Patna High Court was transferred and appointed as CJ in Nagpur High Court.

2. Justice Sarjoo Prasad of the Patna High Court was appointed as CJ of Assam and later of Raj as than High Courts.

3. Justice C.P. Sinha of Patna High Court to be CJ of Assam High Court.

4. Justice Malhotra of Allahabad High Court to be CJ of Assam High Court.

5. Justice Narasimham from Orissa to Patna as CJ

6". Justice Khalil Ahmed from Patna to Orissa as CJ

7. Justice A. T, Harries from Punjab to Calcutta as CJ

8. Justice S.R. Dasgupta from Calcutta to Karnataka High Court

9. Justice Ansari from Andhra Pradesh to Kerala High Court

10. Justice A.D. Koshal from Punjab & Haryana High Court to M adras High Court.

310. Apart from these there were other transfers, a list of which was submitted by the counsel for the respondents.

311. These Judges have left an indelible imprint in the judiciary of the State where on transfer or appointment they worked. We might also mention that the Solicitor General in his statement at the Bar drew our attention to the excellent manner in which, our collegague Justice A.D. Koshal shaped himself when he was transferred to Madras during the emergency. The Solicitor-General said that he had left behind an unparalleled reputation of being a very sharp and independent Judge. These circumstances therefore, fully justify transfer of Judges from one High Court to another.

312. The Attorney General with his usual ingenuity submitted a very plausnow that transfer of a Judge from one High Court to another under certain circumstances even though inconvenient cannot by any process of reasoning amount to a reflection or stigma. It was submitted by the Attorney -General that there may be two contingencies where a Judge may or may not give his consent. One type of Judges may consent to the transfer against the background of public interest and the Judge responds to the sensitive call of duty ignoring his private losses and inconveniences and gives his consent to the said transfer. There may be other type of Judges who care more for their personal conveniences or losses and refuse to give their consent. The hardship involved in both the cases is the same. The only question to consider is as to whether or not Article 222 operates to the disadvantage of a more conscientious Judge or of a Judge who is not willing to meet the demands of public interest or, if we may say so, national interest, for either public or national interest may some time make it not only desirable but imperative that a Judge should be transferred

313. Furthermore, the Attorney General pointed out that there may be several factors which may affect the administration of justice or the confidence of the community which may involve the Judge himself on a purely environmental basis. For instance, the atmosphere may be vitiated by his close relations or friends even without the knowledge of the Judge who may remain innoncent and become an unfortunate victim of environments. In such cases, his continued presence in the High Court is bound to vitiate the very atmosphere in which justice is to be dispensed with so that a conscientious Judge would himself opt for a transfer outside his State. We have to take into account the advice given by the CJI in one of the Seminars that where close relations of a Judge or the Chief Justice practise in the same Court and are likely to gain undue advantage, the concerned judge should himself, in obedience to the keen sense of justice which every Judge possesses opt to be transferred to some other High Court. This is undoubtedly a very valuable advice which seems to have been given by our CJI to the Judges in the country.

314. Mr. Seervai in his anxiety to drive home his opposition to non-consensual transfers submitted that if the father-Judges or the uncle-Judges are transferred from one High Court to another and the relations who exploited him also follow suit and start practice in the transferee Court, could such a transfer be a sufficient cure for this malady? The answer to this argument is very short and simple. Where a Judge is transferred because the environment or the atmosphere is not congenial or conducive to administration of impartial justice, he does so as a conscientious Judge responding to a call of duty but where his sons or relations follow him in the transferee Court then it becomes the most cogent and reliable evidence to show that the Judge openly allows himself to be exploited by his sons or relations and this per se would be conclusive proof of misbehaviour for which he can be impeached under Article 124(4) read With Article 218. If these facts are proved, then he will have to be removed, for no Court can ever accept a plea of the Judge that even after he was transferred to some other Court his close relations followed him there without his knowledge.

315. Another difficulty which was pointed out before us was regarding the language problem. This, however, appears to be of a very minor significance as compared to various plus points indicated above. After all, the British Judges could administer justice for two centuries in our country without knowing our language. Furthermore, at the High Court level there are ample facilities for translating the record into the language with which the Judge is conversant, and if necessary these facilities could be increased. The Law Commission suggested that even if transfers are made from one High Court to another they could be made on zonal basis which will eliminate the language difficulty to a great extent.

316. For these reasons, therefore, we are unable to accept the argument of the counsel for the petitioners that non-consensual transfer amounts to punishment or a reflection on the integrity of the Judge concerned or can in any way be described as penal.

317. The next pillar of the argument of Mr. Seervai regarding non-consensual transfer was that such a transfer would seriously affect and impair the independence of judiciary. Dr. Singhvi who followed him not only adopted this argument but elaborated it by giving illustrations from various constitutional provisions which we shall deal presently.

318. Dr. Singhvi submitted that non-consensual transfer was against the very spirit of the doctrine of separation of powers contained in our Constitution. We have already shown from the concluding speeches of the Members of the Drafting Committee that our Constitution is based mainly on the British pattern although some provisions of the American Constitution have been borrowed. Secondly, a detailed survey of the various provisions of the Constitution dealing with judiciary would clearly reveal that our Constitution does not envisage a complete separation of powers between the judiciary and the executive as such. What our Constitution has done is to effect no separation at powers as such but separation of judicial and executive functions. In achieving this object, our Constitution has particularly relied on the American Constitution while rejecting the British pattern of conventions. For instance, the judiciary is absolutely independent and supreme in the decision-making, process, that is to say, in deciding cases between men and men and State and man without being influenced by any governmental or official consideration. In England, in spite of the independence of judiciary even the highest judiciary does not have the power to strike down a law made by the Parliament. In contradistinction to this, our Constitution confers absolute powers on the High Courts and the Supreme Court to strike down not only legislations brought about by the legislature but also Acts passed by the Parliament and the peak of the judicial power reached when in Kesavananda Bharati's case MANU/SC/0445/1973 (supra) this Court held that the amending power enshrined in Article 368 of the Constitution could not be amended so as to affect the basic structure of the Constitution. We might mention that it has, however, not been doubted by counsel for any of the parties that independence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution, while this absolute judicial power has been conceded by the Constitution to the judiciary, a certain amount of executive control has already been vested in the higher judiciary in respect of the subordinate judiciary. At the same time the power of appointment of High Court Judges including the CJ or Supreme Court Judges, including the CJI, vests entirely in the executive i.e., the President of India, who acts on the advice of Council of Ministers. Here again, this executive power is not absolute and has to be exercised in consultation with the C.J.I. in the case of appointment of Supreme Court Judges, as also in consultation with the CJI and the Governor of the States concerned in case of the appointment of Chief Justice of the High Court--in the case of appointment of High Court Judges, the Chief Justice of the concerned High Court is also to be consulted. This Court has in several cases, which need not be repeated here, clearly held that consultation contemplated by the Constitution must be full and effective and by convention the view of the concerned CJ and CJI, should always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by these Constitutional authorities.

319. Thus, in fine, the doctrine of separation of power, so far as our Constitution is concerned, reveals an artistic blending and an adroit admixture of judicial and executive functions. The Constitution has taken the best of both the British and the American Constitution. In order to illustrate our point and to show that the separation sought to be achieved by our Constitution is not absolutely or completely separate, let us compare our Constitutional provisions with those of the Amercian Constitution.

320. Under the Amercian Constitution Supreme Court Judges are appointed by the President with the advice and consent of the Senate and no qualifications are necessary for the appointment to the Court nor are any stipulations mentioned therein. The Judges, however, serve for life during good behaviour and may be removed by impeachment almost in the same manner as provided for in our own Constitution. Section 1 of Article I of the American Constitution runs thus (Americal Constitution Law by Rocco J. Tresolini (1959 Edition):

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

And Section 1 of Article II reads thus (American Contitutional Law by Rocco J. Tresolini 1959 Edition):

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

321. Thus, under Section 1 of Article I while legislative powers completely vests in the Congress, the executive powers vests in the President. Here our Constitution makes a distinct departure by making the President, in whom the executive power vests, to be bound by the advice of the Council of Ministers. Therefore, under our Constitution for all practical intents and purposes the executive power vests in the Council of Ministers only and the President is bound to accept the advice of the Council of Ministers. Proviso to Clause (1) of Article 74 may be extracted thus:

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

322. Under this proviso, the President has no doubt the power to require the Council of Ministers to reconsider the advice if he (President) entertains any doubt in respect of the advice tendered to him, but if the same advice is given to him after reconsideration, the same is binding on him. Clause (2) of Article 74 bars any inquiry by a Court into the nature of the advice tendered by the Council of Ministers to the President.

323. Thus, under our Constitution the executive power does not vest absolutely in the President as in the case of America where the President has got vast powers and is assisted by his Advisers who are called Secretaries.

324. Then we come to Article III of the U.S. Constitution, which is most relevant for our purpose. Section 1 of the said Article runs thus (American Constitutional Law by Rocco J. Tresolini (1950 Edition):

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The, Judges, both of supreme and inferior Courts shall hold their office during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

325. Thus, the Judicial power vests completely in the Supreme Court or such inferior Courts as the Congress may from time to time establish or ordain. Section 2 of Article III provides that the judicial power shall extend to all cases in law and equity arising under the Constitution, including laws of the United States, Treaties made and cases affecting Ambassadors, Ministers and Consuls, etc.

326. Thus, in the American Constitution by virtue of the fact that the entire judicial power is vested in the Supreme Court or other Courts, the appointments have to be made by the Supreme Court, unlike the provisions of our Constitution where appointments are to be made by the President in consultation both with judicial and executive authorities as indicated above. Therefore, in expounding the concept of separation, the essential distinctive features which differentiate our Constitution from the American Constitution must be kept in mind.

327. An attempt was made by Mr. S.P. Gupta, one of the petitioners, to establish that even, under our Constitution the judicial power exclusively vests in the CJI who takes the place of Council of Ministers. This argument is wholly unacceptable and cannot be countenanced because it is against the clear and express provisions of Articles 224, 222 and 217 of our Constitution. However, this matter has been elaborately dealt with by brothers Desai and Venkataramiah, JJ. and I entirely agree with their opinions and have nothing useful to add so far as this aspect of the matter is concerned.

328. Lastly, on the question of separation of powers, apart from what we have said it may be noticed that so far as framers of our Constitution are concerned they had deliberately rejected the theory of complete insulation of the judicial system from the executive control. During the formative process of our Constitution though jurists like Shri B.N. Rau and Dr. Ambedkar wanted to give larger powers to the CJI or to a Council of State which may be appointed so as to be a judicial Body but these ideas were not accepted and ultimately the Constitution emerged as a valuable document which vests complete power in the President. The facts will be borne out from the observations made on pages 338-339 of Shiva Rao's Framing of India's Constitution (Vol. IV), and on pages 128-132 of the Indian Constitution Cornerstone of a Nation by O. Austin. Even an attempt of Dr. Austin and others to introduce instruments of instructions to provide guidelines for the action to be taken by the President was rejected.

329. In fact, the method of appointment adopted by our country seems to have been followed in every democratic country except the United States where, as already shown, the Judges are not appointed by the executive excepting the Chief Justice of the Supreme Court but by the judiciary. Even in America, the Federal Court Judges of the States are not appointed by the judiciary. Similarly, in France, West Germany, Japan, Malawi and Sri Lanka the power of appointment of Judges vests in the executive (vide Garner. Political Science and Government pp. 726-727; Harold Laski: Grammer of Politics, pp. 545-548; 80th Report of the Law Commission, pp. 7-11; and Basil; Commentary on the Constitution of India (4th Ed.) Vol. 3, pp. 77-79).

330. It would appear that our Constitution has devised a wholesome and effective mechanism for the appointment of Judges which strikes a just balance between the judicial and executive powers so that while the final appointment vests in the highest authority of the executive, the power is subject to a mandatory consultative process which by convention is entitled to great weight by the President. Apart from these safety valves, checks and balances at every stage, where

the power of the President is abused or misused or violates any of the constitutional safeguards it is always subject to judicial review. The power of judicial review, which has been conceded by the Constitution to the judiciary is in our opinion the safest possible safeguard not only to ensure independence of judiciary but also to prevent it from the vagaries of the executive. Another advantage of the method adopted by our Constitution is that by vesting the entire power in the President, the following important elements are introduced:

(1) a popular element in the matter of administration of justice,

(2) linking with judicial system the dynamic goals of a progressive society by subjecting the principles of governance to be guided by the Directive Principles of State policy,

(3) in order to make the judiciary an effective and powerful machinery, the Constitution contains a most onerous and complicated system by which Judges can be removed under Article 124(4), which in practice is almost an impossibility.

(4) in order to create and subserve democratic processes the power of appointment of the judiciary in the executive has been vested so that the head of the executive which functions through the Council of Ministers, which is a purely elected body, is made accountable to the people.

331. If absolute powers were to be vested in the judiciary alone for all its spheres of activities (appointment, retirement, removal, etc.) then the element of absolutism may have crept in, resulting in irreparable harm to the great judicial institution. Another reason why the power of appointment in the judiciary was not vested absolutely was to avoid judicial interference in the day-to-day working of the legislative or parliamentary institutions.

332. Dr. Singhvi submitted that independence of judiciary comprises two fundamental and indispensable elements, viz., (1) independence of judiciary as an organ and as one of the three functionaries of the State, and (2) independence of the individual Judge.

333. There can be no quarrel that this proposition is absolutely correct. Our Constitution fully safeguards the independence of Judges as also of the judiciary by a three-fold method--

(1) by guaranteeing complete safety of tenure to Judges except removal incases of incapacity or misbehaviour which is not only a very complex and complicated procedure but a difficult and onerous one.

(2) by giving absolute independence to the Judges to decide the cases according to their judicial conscience without being influenced by any other consideration and without any interference from the executive. Article 50 clearly provides that the State shall take steps to separate the judiciary from the executive in the public services of the State. This important Directive Principle enshrined in Article 50 has been, carried out by the CrPC, 1973 which seeks to achieve complete separation of judiciary from the executive.

(3) so far as the subordinate judiciary (is concerned the provisions of Arts, 233-236 vest full and complete control over them in the High Court. Only at the initial stage of the appointment of munsiffs or the District Judges, the Governor is the appointing authority and he is to act in consultation with the High Court but in all other matters like posting, promotion, etc., as interpreted by this Court in Samsher Singh's case MANU/SC/0073/1974, the High Court exercises absolute and unstinted control over the subordinate judiciary. Promotion, holding of disciplinary inquiry, demotion, suspension of Sub Judges lie with the High Court and the Governor has nothing to do with the same. Hinting on the nature of the separation of powers brought about by our Constitution, this Court in Chandra Mohan v. State of U.P. MANU/SC/0052/1966 made the following observations (at p. 1993):

The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including inappropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction.

334. This Court has in several cases held that the condition of consultation which the Governor has to exercise implies that he would have to respect the recommendations of the High Court and cannot turn it down without cogent reasons

and even if he does so, it is manifest that his order is always subject to judicial review on the ground of mala fide or exceeding his jurisdiction.

335. These are sufficient safeguards to ensure the independence of judiciary. The argument of Dr. Singhvi goes a step further so as to import the American concept of absolute independence in our Constitution which, however, is not permissible because as indicated above the provisions relating to judiciary of our Constitution and American Constitution are essentially different.

336. Dr. Singhvi then advanced the same argument which was put forward by Mr. Seervai that a transfer without consent would be punitive both in concept and consequences and would promote a relationship of master and servant which is Inapplicable to the case of Judges and the Chief Justices, We are, however, unable to accept this extreme argument because for the reasons that we have already given a transfer in public interest is an extraordinary provision which does not entail any stain or stigma and is a constitutional step which completely excludes the concept of master-servant relationship.

337. Dr. Singhvi later rightly laid greater stress on the nature and extent of the consultative process in the case of transfer. It was also submitted that even if a Judge is transferred individually, public interest, which leads to his transfer, would also have to be examined by the court: We propose to examine this aspect in greater detail when we deal with Transferred Case No. 24/81. At the moment it is sufficient to state that for the reasons that we have already given a non-consensual transfer cannot be treated as punitive, penal or punishment. Furthermore, we might state here that after a general policy is evolved by the Government for transfer of Judges of the High Court in order to ensure the goal of having 1/3rd Judges in each State from outside the State, such a policy Would be fully justified not only on the ground of public interest but in the larger interest of the country as a whole to promote integration and crush parochialism and provincialism. If this is done, then the question of effective consultation would have to be looked from a different angle. Similarly, a general policy to have CJs from outside in every State would serve the same national interest and there also the effective consultation is to be confined only to the just exceptions that may be made while pursuing this policy.

338. The last question that remains to be determined is as to whether the proposal for transfer of Judges from one High Court to another should emanate from the CJI or from the President. In this connection, the Solicitor-General has produced a memorandum showing the procedure to be adopted in connection with the appointment and transfer of Judges. This memorandum cannot take the place of a statute or a constitutional document. It merely prescribes, the manner in which the proposal can be processed. From a plain language of Article 222 it is manifest that the proposal for transfer can emanate either from the CJI or from the President through the Union Minister for Law and Justice. What is Important is whichever authority, initiates the transfer, the conditions prescribed under Article 222 must be complied with, viz.,

(a) if the proposal emanates from the President, he must ascertain the views of the CJI which are entitled to great weight, and

(b) as Article 222 contemplates consultation with the highest judicial authority in the whole country, it is obvious that the CJI also represents the Judges or the Judges who are sought to be transferred.

339. As a logical result of this concept, it would be necessary for the CJI, on receiving the proposal from the President, to ascertain the views of the Judge concerned and his personal circumstances or objections, if any, and then after applying his mind to them, place the same before the President through the Law Minister. Thereafter, the Matter would have to be processed according to the Rules of Business and advice sent to the President for formal orders.

340. Where, however, the proposal emanates from the CJI himself, then he should collect the necessary facts and examine the reasons given by the Minister concerned for the transfer and before giving his opinion or advice to the Minister he would have to consult the Judge concerned and ascertain his views and give due consideration to them. Thereafter he should also communicate the views expressed by the Judge concerned--whether against or in favour of the proposal--to the President through the Minister concerned so that even if the CJI does not agree with the view of the Judge, the President may be in a position to give his decision finally one way or the other.

341. These are the essential requirements of Article 222 which are briefly contained in the memo, though not strictly in consonance with what we have said above. We might hasten to add here that although the Constitution does not mention either the Chief Minister or the Governor of the State being consulted in the manner of. transfer of a Judge from one High Court to another but the memo provides for this procedure in order to solve some practical difficulties

because when a Judge is transferred from one State to another the transferor State must be told, to make necessary arrangements for appointing his successor and similarly at the other end the receiving State would have to make adequate arrangements for the residence and other facilities which are to be given to the Judge concerned. In this process, the Chief Minister or the Governor of the two States may express their opinion but the President is not bound under Article 222 to accept their views. It does not appear to be the intention of the Memo to supplant. two additional authorities for the purpose of consultation, for that would be in direct contravention of Article 222 which merely stipulates consultation with the CJI and impliedly the Judge concerned. Thus, the information given by the Chief Ministers and the Governors of the States is merely for the limited purpose of ascertaining their views and other matters referred to above and is not, therefore, a part of the consultative process enshrined in Article 222 otherwise, if additional authorities are introduced for the purpose of being consulted, then the Memo will be clearly violative of Article 222.

342. Thus, the Memo, while prescribing that the proposal should emanate from the President does not exclude the other alternative, viz., that the proposal should emanate from the CJI. In Transferred Case No. 24/81 it is clear that the proposal of transfer of Justice K.B.N. Singh and others emanated from the CJI and that in our opinion was perfectly Legal, and constitutional and does not offend the provisions of the Memo as suggested by counsel for the petitioners because the Memo, does not and cannot in any way debar the CJI from initiating the proposal if he wants to do so.

343. This, therefore, disposes of all the contentions of the counsel for the parties so far as the various aspects of interpretation of Article 222 is concerned. On a, consideration, therefore, of the facts, circumstances and authorities the position is as follows:

(1) that Article 222 expressly excludes 'consent' and it is not possible to read the word 'consent' into Article 222 and thereby whittle down the power conferred on the President under this Article.: (2) that the transfer of a Judge or a CJ of a High Court under Article 222 must be made in public interest or national interest,

(3) that non-consensual transfer does not amount to punishment or involve any (sic).

(4) that in suitable cases where mala fide is writlarge on the face of it, an order of transfer made by the President would be subject to judicial review,

(5) that the transfer of a Judge from one High Court to another does not amount to a first or fresh appointment in any sense of the term,

(6) that a transfer made under Article 222 after complying with the conditions and circumstances mentioned above does not mar or erode the independence of judiciary.

344. For the reasons given above, the contentions of Mr. Seervai, Dr. Singhvi and others fail and are overruled.

Point No. 3 - Policy of General Transfers'

345. We now come to the question of evolving a general policy of transfers (for short, to be referred to as the 'Policy') of Judges of Chief Justice from the home State to other States so that each State or a majority of them has a GJ from outside. Policy has two important limbs--(1) transfer of CJ or Judges from one High Court to another, and (2) recruitment of one-third judges in each High Court from outside the State in which the High Court is situate. The earliest roots and the foundation for evolving the aforesaid policy are to be found even when Article 222 was in the process of its birth. The most prophetic and pregnant observations of Dr. Ambedkar give a clear clue to the desire expressed and the goal sought to be achieved by introducing Article 222. these lines from his speech may be extracted thus:

Secondly, it might be desirable toimport a new Chief Justice to a High Court because it might be desirable to have a man who is unaffected by local politics and local jealousies. We thought therefore that the power to transfer should be placed in the hands of the Central Government.

(Emphasis ours)

(p. 580, Constituent Assembly Debates Vol. 11 (1949).)

346. These observations have a historical significance having been made by one of the greatest jurists, constitutionalist and one of the eminent Founding Fathers of our Constitution and perhaps the highest tribute that .we can pay to the dedicated service of Dr. Ambedkar is to evolve a policy and thus fulfil the pious wish and the last desire of the great jurist

347. Nevertheless, the idea of evolving the Policy came to be seriously thought of when the States Reorganisation Commission (hereinafter referred at as the 'SRC') was entrusted with the arduous task of recommending reorganisation of States on linguistic basis--a step which was long overdue having been the subject of one of the earlier Resolutions passed by our freedom fighters--a solemn promise made to the Nation by its political leaders to be fulfilled as soon as the country attained freedom. This process of reorganisation was not a bed of roses but was fraught with grave consequences leading to parochialism and provincialism which, if not properly checked, controlled or safeguarded, might have brought about disintegration of the entire country. Perhaps this was one of the main reasons why the SRC being fully alive to these dangers tried its best to see that the reorganisation of States did rot lead to disintegration and accordingly suggested a number of measures including a strong and independent judiciary free from parochial and flssiparous tendency. We, therefore, start the question of policy of transfers with the Report of the SRC which tried to tackle the second limb of the policy of importing one-third Judges in the High Court from outside. In this connection, it might be appropriate to refer to certain observations made by the SRC in the concluding portions of its Reports:

846. We have now come to the end of our appointed task. The problem of reorganisation of States has aroused such passions and the claims which have been made are so many and so conflicting that the background against which this whole problem has to be dealt with may quite often be obscured or even forgotten. In order that the recommendations which we have made may be viewed in proper perspective, we should like to emphasise two basic, facts. Firstly the States, whether they are reorganised or not, are and will continue to be Integral parts of a Union which is far and away the more real political entity and the basis of our nationhood. Secondly, the Constitution of India recognises only one citizenship, a common citizenship or the entire Indian people, with equal rights and opportunities throughout the Union.

348. Speaking in the same strain the SRC further observed thus:

849. Unfortunately, the matter in which certain administrations have conducted their affairs has itself partly contributed to the growth of this parochial sentiment. We have referred earlier to the domicile rules which are in force in certain States, governing eligibility to State services. The desire of the local people for the State services being manned mainly be "the sons of the soil" is understandable, but only up to a point. When such devices as domicile rules operate to make the public services an exclusive preserve of the majority language group of the State, this is bound to cause discontent among the other groups, apart from impending the free flow of talent and imparting administrative efficiency.

349. The SRC repeated the same concept in paras 854 and 856 of its Report thus:

854. There are certain other measures which, if adopted, will, we hope, help in correcting particularist trends and also in securing greater inter-State coordination for the efficient implementation of all-India policies.

856...The Central and State Governments have to work in very close cooperation in executing important development projects, which necessitates that technical personnel should be recruited and trained on a common basis and that they should have uniform standards of efficiency and the feeling of belonging to common and important cadres.

(Emphasis ours)

350. The SRC made the following further observations in paras 868, 870 and 871:

868. From the point of view of national unity, it is also of great importance that there should be closer understanding between the north and the south. All institutions and establishments which help to bring about such an understanding should receive particular encouragement from the Government of India...

870. The proposals which we have made in the preceding paragraphs are intended to bring about greater administrative integrity and to provide against any particularist trends being promoted within the administration itself or in the country at large. Important as these measures are, it is obvious that they are by themselves not adequate to give a deeper content to Indian nationalism. National unity can develop into a positive and living force capable of holding the nation together against the disruptive and narrower loyalties only if there is a real moral and mental in tegration of the people.

Fortunately, forces making for such integration are already at work. What is necessary is that nothing should be done to impede their freeplay. We should like to say something on this subject before we conclude.

871. India is now on the eve of vast economic and social changes. These changes must affect every institution and will call for a constant review of our traditional methods of thought and ways of life.

351. Here also the SRC took special care to lay great emphasis on the feelings of commonness, unity and integration in all spheres of activity so as to give a deeper content to independence and nationalism. In para 861 of its Keport while dealing with the judiciary the SRC recommended that at least one third of the number of judges in a High Court should consist of persons recruited from outside the State and in this connection observed as follows:

Guided by the consideration that the principal organs of State should be constituted as to inspire confidence and to help in arresting parochial trends, we would also recommend that at least one-third of the number of Judges in a High Court should consist of persons who are recruited from outside that State, In making appointments to a High Court bench, professional standing and ability must obviously be the overriding considerations. But the suggestion we have made will extend the field of choice and will have the advantage of regulating the staffing of the higher judiciary as far as possible on the same principles as in the case of the Civil Service." And at page 263 in para 58 the SRC reiterated the policy indicated in para 861 extracted above. The SRC consisted of a very eminent Judge of the Supreme Court and two persons of very great public and political eminence like Shri K.M. Panikkar and Shri H.N. Kunzru. When the Commission was appointed Shri Saiyid Fazal Ali was Governor of Orissa, Shri H.N. Kunzru was a Member of the Council of States and Sri Panikkar was Ambassador of India in Egypt. Shri Saiyid Fazl Ali was the Chairman of the SRC. Thus, the ideas coming as they did from such great and important personalities who had varied experience not only in all branches of the law but also in other socio-economic activities is undoubtedly entitled to great weight. The SRC tried to face some hard facts and prophetically foresaw what has now come to be a stark reality and the need to crush the fissiparous and parochial tendencies which may lead to the disintegration of the country is felt much more today than ever before. The concluding words of the Report light up the entire history, apprehension and views of the SRC. If the need to achieve unity in all spheres of activities, judiciary not excluded, is not only in public interest but also in national interest, we fail to see what else could be in public interest.

352. Perhaps it was due to the terse observations, recommendations and suggestions of the SRC that a high-powered Law Commission was set up by the Government in 1958 which was headed by Mr. M.C. Setalvad, ex-Attorney General of India, and this high-powered Commission fully endorsed the SRC Report and even suggested a mechanism to implement the recommendations.

353. It is true that at that time -he idea of having Judges or CJs from outside the State had not been suggested or conceived though, as pointed out above, Dr. Ambedkar had hinted at even during the formative process of Article 222. This now brings us to the 14th Report of the Law Commission headed by Mr. Setalvad, where for the first time the policy having a CJ in every High Court from outside was not only suggested but supported by a large body of independent persons. Dwelling on this aspect of the matter the Law Commission in its 14th Report at page 76 (Para 26) observed thus:

26. A large body of evidence before us has suggested, that it should be made an invariable practice to fill a vacancy in the office of Chief Justice by appointing a Judge from outside the State. Such course, it is said, will have the advantage of giving the Chief Justice of India a wide choice in recommending a person suitable for that office. It has also been pressed upon us that bringing a Chief Justice from outside the State will have a very healthy influence, in that, it will promote a sense of unity in the country and prevent the Chief Justice being swayed by local connections and local influences. It may be mentioned that Chief Justices from outside the State have been appointed in some of the States and these appointments have proved a success. Though the analogy may not be very pertinent, we may refer to the practice of appointing Governors who do not belong to the State, which has been in vogue since the advent of the Constitution.

354. The observations referred to above clearly show that as far back as 1958 there was a strong view in favour of filling up the vacancies of CJs by appointing a Judge from outside the State. Although the Law Commission did not entirely agree with this opinion but it did notice that there was sufficient evidence to justify the same. As regards the other limb of the Policy to appoint one-third Judges in each High Court from outside the State, the Law Commission fully endorsed it and its recommendations on this subject may be extracted thus:

74...The recent creation of various zones in the country and the efforts to treat the States forming part of these zones as one unit for various purposes would, we hope, lead to the States forming part of each zone to be the recruiting ground

for appointments to the High Court from the members of the Bar in these States. It is hoped that in this manner the expectation of the States Reorganisation Commission that at least one-third of the High Court Judges would be persons drawn from outside the state will be realized.

355. In September 1963 a Study Team was appointed by the Administrative Reforms Commission (hereinafter referred to as 'ARC Study Team') to give its report on Centre-State relations. The laid study Team in its Report at p. 190 (paras 13-20) suggested that so far as practicable one-third of the number of Judges of the High Court should be from outside. In other words, the ARC Study Team also endorsed the SRC Report and the 14th Report of the Law Commission.

356. Immediately following the ARC Study Team Report, a meeting of the Committee of Zonal Council for National Integration was held on 31st August 1964 and in its Report on item 1 (viii)(b) the said Committee made the following recommendations.

The Committee also commended the idea that as convention, the Chief Justice of the High Court of a State should be a person from outside the State.

357. It would appear that the said Committee gave full effect to the large body of public opinion which had expressed its intention before the Law Commission (14th Report) that in every High Court the Chief Justice should be from outside the State, and the Committee fully endorsed this view. Thus, the inescapable conclusion seems to be that right from 1954 up to 1964, the two limbs of the Policy referred to above were being debated and ultimately definite views were expressed by independent persons that a policy, consisting of the two limbs, be evolved and followed.

358. In 1967 the ARC Study Team headed by Mr. M.C. Setalvad, passed a clear Resolution that as far as practicable, one-third of the number of judges should be from outside.

359. Another Law Commission was set up some time in 1978 and the Bar Council of India in its reply dated 8-9-1979 to questions Nos. 11 and 12 answered thus:

Question Answer 11. What is your view with regard Yes to the suggestion that we should more frequently appoint a Judge from outside the State as Chief Justice of the High Court. 12. What is your view with regard Yes to the suggestion that we should have a convention according to which one-third of the Judges in each High Court should be from another State.

360. In his speech on 26-2-1979 is the Lok Sabha Debates, Mr. P. Shiv Shanker, who was then a Member of Parliament only and not even in the then Ruling Party, expressed his opinion thus:

Various reports of the Law Commission with reference to recruitment policy and the policy on transfer of Judges from one High Court to the other have been only gathering dust. While I am one among those persons who will fight till the last for the independence of Judiciary, I would say that the policy as to the transfer of Judges as enunciated by the Law Commission in the year 1958, under the chairmanship of late Shri Setalvad, of which one of our very eminent members of the profession, viz., Shri Palkhivala was also a member, was salutary which opined that one-third of the Judges of a High Court must be from outside. This would have achieved a better national integration in the field of Judiciary. I am not one of those people who would support transfer if it is based on extraneous considerations.
(Lok Sabha Debates: Vol XXII No. 6, Sixth Series--Seventh session)

361. In a meeting of the Consultative Committee for the Law Ministry, held on 7-6-1980, where Members of Parliament belonging to opposition parties were also present, the unanimous view was:

(2) the Chief Justice of a High Court should be from outside the State, and

(3) at least one-third of the Judges in a High Court should be appointed from outside the State.

362. Another meeting of the Consultative Committee for the Ministry of Law held on 24-7-1980 fully reiterated and affirmed the view taken by the earlier Committee mentioned above.

363. Another meeting of the Consultative Committee held on 17-12-1980 which consisted of Members of Parliament of the opposition parties including Bapusaheb Parulekar, also favoured outside appointments.

364. In its 80th Report, the Law Commission headed by an eminent Judge of this Court, Mr. Justice H.R, Khanna, in paras 6.21 and 6.22 made the following observations:

6.21...Likewise, the Study Team on Centre-State Relation appointed by the Administrative Reforms Commission also suggested that so far as practicable one-third of the number of judges of a High Court should be from outside.

We have given the matter our earnest consideration and are in substantial agreement with the recommendations mentioned above. In our opinion, there should be a convention, according to which one-third of judges in each High Court should be from another State. This would normally have to be done through the process of initial appointments, and not by transfer. It would also in the very nature of things be a slow and gradual process and take some years before we reach the proportion.

6.22 Evolving such a convention would, in our opinion, not only help in the process of national integration but would also improve the functioning of various High Courts. It would secure on the Bench of each High Court the presence of a number of judges who would not be swayed by local considerations or affected by issues which may rouse local passion and emotions... We in India are in the fortunate position of having a vast country. There can, therefore, be no difficulty in having a certain percentage of judges who hail from other States. The advantages gained by having persons from other States as judges would be much greater compared with any disadvantage which might result therefrom.

365. A national Seminar was held on judicial appointment between 17-19 October 1980 at Ahmedabad, in which various eminent speakers participated and freely expressed their views. The Seminar was organised by the Bar Council of India Trust and its deliberations may be extracted thus:

The Seminar was of the view that the principle of transfer of Judges in all circumstances is not to be considered as violative of independence of judiciary. In fact, in certain situations transfer of a judge may be a very desirable course to follow for preserving independence of the judiciary, promoting national integration and avoiding balkanisation of the country on linguistic or other similar considerations.

The ideal of having one-third of High Court Judges from outside the State helps promotion of national integration and the preservation of a unified judicial system. However, it is desirable that this composition of the High Court should be accomplished by way of initial appointments rather than by transfers.

366. Thus, the preponderance of opinion in the Seminar favoured the dominant aspects of the policy, viz., principle of transfer of Judges and that one-third judges should be from outside the State, in order to promote national integration and preservation of a unified Judicial system.

367. Another meeting of the Consultative Committee of Members of Parliament for the Law Ministry was held on 3-9-81, in which Members belonging to the opposition parties were also present, and there also the preponderance which emerged was in favour of having CJs from outside the State and one-third of judges to be recruited in each High court from outside. In this connection, it may be useful to extract certain relevant portions from the speeches of the Members. Shri Nanda (Congress (S)) observed thus:

Participating in the discussion, Shri Nanda Congress (S) made particular reference to the Seminar organised, by the Bar Council of India at Ahmedabad and the discussions held there on the issue of transfer of Judges and appointments from outside. He wanted to know Government's reaction to the various proposals made at the Conference on this aspect. He emphasized that on the question of appointments of outsiders and transfers, the Consultative Committee had made definite and positive recommendations and Government should implement them...

(Emphasis ours)

367A. Shri S.C. Mohanta (LD) expressed his views thus:

Shri S.C. Mohanta (LD) said that initially he had reservation about supporting the policy of transfers but ever since the Law Minister had said that he would leave the mechanism and modalities to the Supreme Court, he was convinced that

such a policy should be followed and pressed that those who were newly appointed, should be transferred to outside courts. There could be no status quo approach in the present times. A suitable mechanism should be evolved and implementation left to the judiciary.

367B. Shri Jamil-ur-Eahman (Congress) observed thus:

It would be in the national interest to transfer Judges from one High Court to other, and there should be no hesitation in doing this.

368. Shri Dandapani (DMK) supported the view and observed thus:

Shri Dandapani (DMK) supported the view that judges should be transferred from the High Courts in their own interest to other High Courts. He was of the view that in many cases, judges continuing in the High Courts of their own State were likely to develop vested interests... Fresh appointments could certainly be made from outside the State. This should be done as a matter of policy so that there was no pick and choose.

369. Shri Hari Nath Mishra (Congress) was of the following view:

Shri Hari Nath Mishra (Congresa) mentioned that it had been agreed at earlier meetings that one-third of the judges and the Chief Justice should be from outside the State. The need for such a policy arose not from any theoretical consideration but from the reality of the situation. He wished to project this need to the Law Minister and through the Law Minister to the Chief Justice of India.

370. Shri Bhogendra Jha (CPI) observed thus:

Shri Bhogendra Jha (CPI) supported the idea of transferring judges of High Courts outside their own State.... He also observed that while members of the Committee belonging to the different parties had agreed that transfer and appointments of outsiders should be made, the idea should be propagated amongst the respective parties.

(Emphasis supplied)

371. The Law Minister presiding over the deliberations of the Consultative Committee pointed out that the delay in evolving a policy was due to the fact that he was ascertaining the views of the Chief Justice of India but a final decision was yet to be taken. In this connection, he observed thus:

The Law Minister mentioned that he had sought the views of the Chief Justice of India on the policy of having Chief Justices from outride, as that by itself would considerably improve the functioning of the High Courts. He apprised the members of the approach of the Chief Justice of India in the matter of transfers and appointments of outsiders, A final decision in the matter of a policy of transfers was still to be taken.

372. So far as the CJI is concerned, he was firmly opposed to the wholesale transfers of all CJs from one High Court to another without objective reasons though selective transfer could be made in appropriate cases for objective reasons. On 18-3-1981, the CJI observed that at least a few of the new appointments to every High Court were in fact made from outside the State. In April 1981 he opined that at least one-third of the new appointments to the High Court should be made from outside.

373. So far as the second limb of the Policy is concerned, viz., that each High Court should have one-third of is strength of Judges from outside the State, the CJI clearly concurred with this view but his main grievance seems to have been against the wholesale transfers of CJs so that each High Court had a CJ from outside. According to the CJI, such a policy was fraught with grave consequences and serious inconvenience which may be caused to most of the CJs. In spite of the stand taken by the CJI the Law Minister on behalf of the Central Government, tried his best to persuade him (CJI) to agree to a uniform policy of transfer of CJs--a policy which had found favour with eminent jurists, politicians, lawyers and parliamentarians, but the CJI seems to have posed stiff resistance to the aforesaid Policy.

374. The Law Minister participating in the discussions in the Rajya Sabhaon 30-7-80 on the question of transfer of CJs from one High Court to another spoke thus:

Mr. Chagla and Mr. Palkhivala--they supported the approach that one-third of the Judges should be from outside so that it would be in the interest of national integration; regionalism will not come in, and also it would be in the interest of a caste-ridden society. That was the approach they had taken.

I will go only into the recent past. Even my predecessor, Mr. Shanti Bhushan felt that a Chief Justice should be from outside on the same grounds which were urged by the Law Commission in its 14th Report...The policy is whether a Chief Justice should be from out-side or not, and if so, whether the seniormost person based on the all-India seniority should be appointed wherever the vacancies occur, or any other mechanism has to be evolved which should be in the best interest at the society... This very Bar Council--except one or two members who have changed; otherwise, the personnel are the same --said: "Yes, the policy should be that the Chief Justice should be from outside." The other question that was posed by the Law Commission was question No. 12 which said: "What is your view with regard to the suggestion that we should have a convention according to which one-third of the Judges of each High Court should be from outside the State"? This very Bar Council answered in the affirmative.

(Rajya Sabha Debates: Vol. CXV No. 6 dt. 30-7-80, pp. 219-221)

375. In his speech, the Law Minister also said a few things about the manner In which the mechanism to give effect to the policy may be devised. In a later speech on 24-7-1980 in the Lok Sabha while dealing with the question of mechanism for giving effect to the policy, the Law Minister observed as follows:

Mr. Deputy Speaker, Sir, on the first question of mechanism I must frankly bring to the notice of this Hon. House that even my predecessor Shri Shanti Bhushanji seems to be of the view that a Chief Justice should be from out side because of the various factOrs. And I am glad that the Hon. Member, Shri Agarwal, did support this approach. A I said we have not finally come to a conclusion...The matter of mechanism is an affair where we have to necessarily seek the guidance of the Supreme Court. And in this matter I can assure you that as and when we come to a final conclusion, we will see to it that the least injustice is done to the persons concerned. I am at the disposal of the Supreme Court to suggest any mechanism which they feel would be suitable in the interest of the independence of the judiciary.

I am prepared to leave everything to the Supreme Court to decide the mechanism of the whole approach.

(Emphasis ours)

376. In order, however, to be fair to the CJI for having expressed a strong view against the proposal for giving effect to a uniform policy of transfer of CJs, it may be necessary to go through the various letters exchanged between the CJI and the Law Minister to know the reasons and the circumstances under which the CJI had voiced his opposition.

377. To begin with, in a Note dated 15-5-80 (which is contained in one of the files disclosed under the majority Order of this Court), the Law Minister once more wanted to ascertain the final view of the CJI thus:

While this file may be referred to the CJI for his advice, I feel that we should also examine about evolving the policy to appoint the Chief Justice of a High Court from the High Court other than the High Court to which the Chief Justice is to be appointed. I had pasaingly discussed this issue some time back with the C.J.I. The fact remains that in the various High Courts the problems of caste and regionalism, etc., are looming large.

378. In reply to this, the CJI drew the attention of the Law Minister to the following facts which may be extracted thus:

It would become necessary in the very near future to evolve an All India policy for appointments of Chief Justices in the various High Courts, The difficulties in taking any ad hoc decision on that question are of such grave magnitude that it would be impossible at this stage to appoint an outsider as a Chief Justice either of the Delhi High Court or of the Andhra Pradesh High Court.

379. It would appear from the contents of the Note extracted above that the CJI was opposed only against any ad hoc decisions without evolving an All-India policy for appointment of CJs-He had deliberately remained silent on the question of the Policy regarding transfer of CJs.

380. In his minute dt. 31-7-80 while expressing his opposition to the uniform policy the GJI clearly stated that he had an open mind, the relevant, portion may be extracted thus:

The heart of the matter however is whether, as a general All India policy a Judge of a High Court ought never to be appointed as the Chief Justice of that High Court. I am prepared to keep an open mind on this question because the pros and cons of the issue has still to be thrashed out. But the better view may be that transfers of sitting Chief Justices may be made only in appropriate cases, that is to say, when a strong case for the transfer has been made out.

At this stage it is unnecessary to say anything more on the subject except to clarify that though I recognise the need to evolve an All India policy for appointments, of Chief Justices in the various High Courts, I do not think that it will , be either feasible or proper to transfer each and every sitting Chief Justice of the High Court to another High Court, or to appoint an outside Judge as the Chief Justice whenever a vacancy of a Chief Justice arises.

(Emphasis supplied)

381. It appears that the CJI himself appears to be in two minds--whether or not to accept the uniform policy--and was weighing the merits and demerits in the balanced scales of justice. Ultimately, it seems that he appears to have finally made up his mind to oppose the policy of wholesale transfer of CJs. This would be clear from his letter dated 7-12-80 addressed td the Law Minister where he had expressed his opinion fairly, frankly and without any reservation thus:

Though I am firmly opposed to a wholesale transfer of the Chief Justices of High Courts, I take the view, which I have expressed from time to time, that such transfers may be, made in appropriate cases for strietly objective reasons. Personal considerations must, in the matter of such transfers, be wholly kept out.

382. This, therefore, marks the end of the epoch so far as the CJI was concerned. After examining the entire history of the case, the various opinions expressed by top legal luminaries, statesmen, politicians and jurists right from 1958 to 1981, we are absolutely convinced that the idea of the Central Government of a uniform policy of transfer of CJs, so that each State has a CJ from outside, is a very essential, useful, sensible and a wise one which cuts at the roots of so many evils with which not only our country but even the higher judiciary is faced. Some of these aspects have been dealt with by the Law Minister and other legal luminaries in the various extracts quoted above.

383. Secondly, such a uniform policy will be in the better interest of the concerned Judge himself because however disinterested or independent he may be, he is bound to be influenced either consciously or unconsciously by Interested persons who choose to exploit him even without his knowledge. A clear instance of this is to be found in the case of Justice K.B.N. Singh which has been fully clarified by the CJI in his counter-affidavit in Transferred Case No. 24 of 1981. As, however, this is a very sensitive matter we would not like to go into the details or comparative merit or demerit of the Policy but by and large we are absolutely confident that such a policy would enhance the prestige of the judiciary, ensure its Independence and make the working of the head of the judiciary in the State more efficient and generate a greater confidence in the people of the new State where he is transferred.

384. The only objection which has been pointed out against this Policy is the language problem but that also does not appear to be an insurmountable obstacle because white laying down the policy the Government can start with transfers of CJs within the Zones as recommended by the Law Commission which will minimise the language difficulty. In making the transfers, there would be no serious objection if the CJ is allowed to indicate his choice regarding the State where he would be prepared to be transferred and the same may be accepted as far as practicable. So far as recruitment of one-third Judges at the initial stage is concerned, this will no doubt present some diff-cullies in the beginning because several constitutional authorities would have to be consulted but this difficulty can be overcome either by the appropriate method adopted by the Circular or any mechanism similar to the same, We would like to suggest that the Chief Justice of each High Court should be asked to prepare a panel of suitable persons who are considered for appoint merit as High Court Judges both from the Bar and from the subordinate judiciary, Before including the name of the persons concerned their previous consent for being appointed outside the State may be obtained by the CJ. This can be done by determining the strength of the panel so that it may form one-third of the total strength of permanent Judges already fixed by the President or as may be fixed from time to time. The Civil List of Judges of the Supreme Court and High Courts gives the sanctioned strength of permanent and Additional Judges. One-third of the strength of the permanent Judges according to the vacancies that fall should be reserved for the persons found suitable and who are willing to serve outside the State. It would be better If the persons whose names are included in the panel are appointed outside the State as permanent Judges which would provide an attractive offer and give a better impetus to the persons aspiring for judgeship and would tempt them to serve outside the State.

385. This procedure should be continued without any break through a phased programme and the ultimate result would be that after a few years, the outside Judges in each High Court will pick up their seniority and would become eligible for being appointed as CJ of the High Court in which they were appointed. Thus, after the retirement Of the present CJs

or the transferee CJs a time may come when automatically every High Court will have a CJ from outside because the seniormost Judge who was initially recruited from outside would, if found suitable in all respects, be appointed Chief Justice of the said High Court, Such a scheme would be a continuous Implementation of the Policy.

386. Moreover, once the Government takes a final decision considering the diverse views expressed by politicians, jurists, lawyers, parliamentarians and respectable citizens, in respect of having a uniform policy by which every CJ should be from outside the State, the Government can lay down such a policy by Presidential order. If that is done, there would be no just or lawful cause for the CJI to withhold his consent to implement such a uniform policy because once a policy is evolved and given effect to, the idea of making selective transfers would lose its significance and value and would perhaps be violative of Article 14 of the Constitution because selective transfers would always result in some sort of discrimination, for in each case, the CJI would have to justify the classification made by him.

387. It is true that neither the Law Commission set up in 1958 nor the one set up in 1978 had totally agreed with the first limb of the policy, i.e. transfer of CJs from one State to another so that each State has a CJ from outside although they did find in unequivocal terms that there was a sufficiently vocal section of the public favouring such a policy of transfers. This was perhaps because by that tune all the various shades and aspects, mechanisms, and methods of evolving such a policy had not been fully explored nor did the State policy till that time ripen into a wholesome policy after having considered the various facets of the matter with frankness, forthrightness and objectivity.

388. Indeed what had been noticed by the Law Commission in 1958, that is about more than two decades hence, has become absolutely essential today in view of the modern trends of casteism, nepotism and patronage in the higher echelons of judiciary. Furthermore, as a result of the insufficient emoluments and poor conditions of service, we are not able to muster men of high calibre and eminence for appointment to the High Courts. With great reluctance we have to observe that an atmosphere seems to prevail today in most of the High Courts Judges are being exploited and in some cases perhaps without their knowledge, which has brought the most sacred and sacrosanct institution of the judiciary into serious disrepute. The only honourable remedy for this malady is the implementation of the first limb of the Policy,

389. Nevertheless, regarding the second limb of the Policy in regard to recruitment of one-third Judges from outside the State, as far as possible at the initial stage; both the Commissions have unanimously acclaimed and approved such a step.

390. Brother Venkataramiah has taken the view that although the CJI was opposed to the wholesale transfers of all CJs, his opposition was only with respect to all these transfers being made at a particular time. In other words, Venkataramiah J., suggests that the CJI was quite agreeable to the Policy being carried out if the CJs are transferred not in a block but by stages and in due course of time. We are, however, unable to agree with this argument because this runs counter to the clear intention expressed by the CJI in the letters discussed above. Moreover; it will be rather unfair to the CJI also to say that he had merely opposed wholesale transfers made at one time but had agreed to the Policy of uniform transfers if made by stages. The view taken by the CJI may not appeal to us or perhaps to the majority of the jurists but it connot be said that there is absolutely no substance in the stand taken by the CJI His point of view is also quite understandable but, with greatest respect to him, what he has missed is the great public interest, the policy subserves by promoting national integration and curbing fisslparous tendencies that have started raising their heads and completely excludes discrimination which may result in cases of selective transfers]

391. Brother Venkataramiah has also expressed his view that the transfers proposed by the CJI, which were quite a number of them, were actually in aid and implementation of the policy formulated by the Government and, therefore, even if there was no effective consultation, the transfers would be valid. We regret that we are unable to "accept this view because it is the* common case of all the parties that although the suggestion to evolve a Policy ha" been mooted no such Policy has yet been evolved or finalised because even according to the Law Minister, the mechanism is yet to be determined which would have to be left to the Supreme Court. This is further supported by the statements of the Law Minister which was produced by the Solicitor-General where the Law Minister merely says that the Policy view was put across to the CJI who expressed his opposition to all the CJs of the High Courts being from outside. The Government, however, acceded to the transfers proposed by the CJI as (1) it was felt that not agreeing to these transfers may be construed as though the Government was departing from Us view of having CJs from outside, and (2) the policy aspect could still be pressed into service later.

392. Thus the statement of the Law Minister clinches the issue and establishes the fact beyond doubt that no uniform Policy has so far been evolved and the said Policy, if any, is still an the making. This being so, the question of the CJI proceeding to implement the Policy by proposing the transfers would not arise.

393. On other points, we entirely agree with Brother Venkataramiah and other Brother Judges that the Policy is good, reasonable, fruitful and constitutionally valid.

394. Thus, a close and careful scrutiny of the correspondence between the Law Minister and the CJI over a year on the issue of evolving a general policy of transfer of CJs so that each State has a CJ from outside could not be finalised and what happened was that only sporadic transfers were recommended by the CJI. As indicated above Brother Venkataramiah has in his lucid judgment seems to have construed the letter dated 7-12-1980 of the CJI to indicate merely that he was against wholesale transfers to be made at one stroke and what he suggested was that these transfers should be made in stages and not on a single day. In other words, Venkataramiah, J., is of the view that the transfers "recommended in the CJI's letters dated 7-12-1980 and 20-12-1980 were merely in implementation of the general policy of transfer of CJs so that every High Court has a CJ from outside. With due respect, we are unable to spell out such an intention of the CJI from the clear contents of the letters which in fact and in purpose rejects the general policy of wholesale transfers of the CJs as suggested by the Law Minister, He has ultimately expressed himself very clearly and strongly that he was against such a universal policy of wholesale transfers and would be willing only to consider individual cases on their merits leaving apart, personal considerations and for objective reasons.

395. Secondly, since it is the admitted case of the Government that while they were thinking of evolving a general policy of transfer of CJs, the policy had not yet taken any final shape nor did the Government take any conclusive decision on this important matter. With due respect, therefore, we do not agree with the view taken by Brother Venkataramiah J. on this point,

396. As regards the Government's idea of evolving a general policy to effect transfers of CJs in a manner which puts every High Court under the CJ from outside the State, is undoubtedly a very sound and acceptable policy as found by us. We have pointed out from the various Reports discussed above that ever since the date of the Report of the SRC was given the idea of having Judges from outside the State was clearly mooted. Furthermore, while we are examining the Policy sought to be evolved by the Government, at the present moment we cannot shut our eyes to the stark and hard realities of life. Ever since the linguistic provinces came into existence as a result of the SRC Report, attempts have been made to see that the linguistic division of the State does not create disintegration of our big country which is the largest democracy in the world. In fact, lawyers, Judges, politicians, jurists, members of the Bar and other statesmen have applied their minds and expressed themselves strongly in favour of the policy sought to be evolved by the Government. In view, however, of the changed circumstances, in our opinion, such a policy is not only proper but essential as being the prime need of the hour. We cannot but take notice of the fissiparous and parochial tendencies that have sarted raising their heads threatening disintegration of the country. The dark clouds of separatism, conservatism and parochialism have started casting their shadows on the entire country and it is high time that such a sacred and sacrosanct institution like the High Courts should be protected and kept aloof from such evil forces. It is manifest that a CJ from outside will apply an independent approach both in discharging his judicial duties as a Judge and in recommending appointment of members of the Bar or service to the High Court and his selection will not be inspired or tainted by any local or personal consideration because he would be an outsider in the High Court of a State where he presides. Further, even the litigant would have much greater confidence in such a CJ than in a local person,

397. We would like to reiterate at the risk of repetition that having regard to the inadequate emoluments of the. High Court Judges and their conditions of service which leave much to be desired, there has been a fall in the standards of efficiency and competency! Lawyers possessing great calibre and eminence are extremely reluctant to accept judgeship of a High Court. Thus, the choice and selection of suitable persons has become extremely difficult and experience has shown that in a number of High Courts suitable persons have not been appointed.

398. It has been vehemently argued by Mr. Seervai as also by Mr. Sorabjee who followed him that their main concern is that independence of judiciary should be maintained at all costs. Indeed, if they are really concerned that we should build up an independent judiciary then it is absolutely essential that new talents from outside should be imported in every High Court either to man it or to head it so that they may generate much greater confidence in the people than the local Judges. The position of a CJ is indeed a very high constitutional position and Our Constitution contains sufficient safeguards to protect both his decision making process and his tenure. It is a well-known saying that power corrupts and absolute power corrupts absolutely. As man is not infallible, so is a Chief Justice, though a person holding a high judicial post is likely to be incorruptible because of the quality of sobriety and restraint that the judicial method contains. Even so, if a CJ is from outside the State, the chances of his misusing his powers are reduced to the absolute minimum. We have pointed out that the power to formulate or evolve this policy dearly lies within the four corners of Article 222 itself which contains a very wide power conditioned only By consultation with CJI who is the highest judicial authority in the country. It is always open to the President, which in practice means the Central Government, to lay down a policy, norms and guidelines according to which the Presidential powers are to be exercised and once these norms are followed, the powers of the President would be beyond judicial review.

399. We might also mention that as against policy transfer selective transfers of CJs to High Courts other than the one where they are working or may be appointed, contains the colour of discrimination and arbitrariness because however careful the CJI may be if he starts picking and choosing CJs from outside the High Courts the element of discrimination or arbitrariness cannot be reasonably excluded. On the other hand, if a general policy applying to all and sundry (CJs) is evolved by which State would have a CJ from outside no complaint of discrimination can ever be made. In fact, the very foundation of discrimination would disappear. The view taken by the CJI, with greatest respect to him, does not appear to be correct or acceptable and perhaps in his own interest selective transfers should not be made because even if. in one or two cases discrimination is made due to oversight or bona fide lapse, it will amount to a great slur on such a nigh position as the CJI holds. On the other hand, if a uniform policy of appointing or promoting CJs to High Courts outside the State is followed it will promote national integration and curb the fissiparous and parochial tendencies and preserve and protect the purity of judicial administration. We cannot conceive of any better policy which would be in greater public interest than the policy of having CJs in every State from outside. We have already observed that whenever a general policy or radical change of this kind is made it has to be subject to just exceptions and the formulation of such a policy would also have to take within its fold exceptional circumstances applicable to a particular CJ or CJs --a matter which we shall discuss here-after.

400. Even as regards the constitutional validity of the general policy which may be evolved by the Centra Government. This Court in Seth's case MANU/SC/0065/1977 had clearly expressed the view that such a Policy would be in public interest. In this connection, Chandrachud J., (as he then was) speaking for the majority judgment observed as follows (at pp. 2344, 2347 of AIR 1977 SC):

As regards the first, no one can deny that whatever measures are required to be taken in order to achieve national integration would be in public interest. Whether it is necessary to transfer Judges from one High Court to another in the interests of national. integration is a moot point. But that is a policy matter with which courts are not concerned directly.

Policy transfers on a wholesale basis which leave no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution.

401. Doubtless, there appears to be some apparent contradiction between the two passages extracted above from the judgment of Ghandrachud J. On a closer scrutiny of these observations his view that policy transfers on wholesale basis would leave no scope for considering facts of each particular case cannot be read out of the context and have to be read in the light of the peculiar facts and circumstances of Seth's case MANU/SC/0065/1977 in which transfers were made by the Government not in pursuance of a policy or public interest but purely with political motives to punish Judges for sharing a particular ideology. This is, however, not the case here and therefore as we read the observations of Chandrachud J. he has not held the policy of transfer to be not In public interest in order to promote national integration.

402. For the reasons that we have Already given above, we are unable to agree with the observations where the learned Judge has said that interest of national integration is a moot point. We have already shown from the opinions expressed by high constitutional and legal authorities that a policy of having CJ in every High Court from outside to in great national interest and perhaps very necessary in order to curb and crush the fissiparous tendencies which seem to sway our entire country. Bhagwati, J. while adverting to this aspect Of the case observed as follows MANU/SC/0065/1977:

It was admittedly part of mass transfers of 16 High Court Judges and though a suggestion was made by the Government of India in its affidavit in reply that the transfers were made with a view to strengthening national integration but cutting at the barriers of regionalism and parochialism; the Government of India did not choose to disclose the principle on which these 16 High Court Judges were picked out for being transferred.

403. These observations show that Bhagwati, J., did not dispute the correctness of the Policy of National integration but found fault with the manner in which it was applied by justifying the transfers on a ground which was not supportable in law. It is obvious that if the transfers would have been made to strengthen national integration n order to cut the barriers of regionalism and parochialism, the Judge would have no hesitation in upholding the State Policy. Krishna Iyer, J, and one of us (Fazal All J.) also sounded a similar note and observed ,thus MANU/SC/0065/1977:

But to promote the community's concern for impeccable litigative justice policy-oriented transfer of Judges after compliance with constitutionally spelt-out protocols may not be ruled out.

. . . . . .

Salutary safeguards to ensure judicial independence with concern for the All-India character of the superior Courts in the context of the paramount need of national unity and integrity and mindful of the advantages of inter-State crossfertilization and avoidance of provincial perviciousness were all in the calculations of the framers of the Constitution.

404. Even Untwalia J. who has dissented from the majority judgment had admitted that the purpose of national integration was a good thing to be achieved and in this connection observed thus MANU/SC/0065/1977:

The purpose of national integration if otherwise it is a good thing to be achieved...

405. Thus, it would appear that even the judicial pronouncements of this Court in Seth's case MANU/SC/0065/1977 extracted above fully favour the formulation of such a policy. Added to this the commitment made by the Law Minister that once the Policy of wholesale transfers of CJ is evolved the mechanism would be left to the Supreme Court and the Policy be started from the grass-root level by taking consent of the persons nominated for appointment of Additional Judges who have not yet been made permanent, the policy can be fully worked out without any hitch or hindrance.

406. The next question that arises for consideration is as to how the two limbs of the Policy, viz., (1) transfer of CJs from outside, and (2) recruitment of one third of Judges from outside the State at the initial level, can be effectuated. Here, we do not find any difficulty whatsoever. Article 222 confers an express power on the President to transfer a Judge (which includes the CJ) from one State to another. This power is not circumscribed or hedged by any conditions or stipulations excepting that the CJI has to be consulted. In determining as to how this power can be exercised, the President undoubtedly possesses an implied power to lay down the norms, the principles, the conditions and the circumstances under which the said power is to be exercised so long as he does not overstep the limits or confines of the power enshrined under Article 222. Since the implied power lies with the President it is not at all necessary that this power should be regulated by a legislation or an Act or a Rule or a bye-law or any other instruction. A declaration by the President regarding the nature and terms of the policy which virtually means declaration by the Council of Ministers is quite sufficient and absolutely legal and constitutional to effectuate the policy decided upon.

407. Secondly, as the policy is a general one which applies to all and sundry without any discrimination or selections, it cannot be violative of Article 14 of the Constitution because the policy will operate equally on all the Judges of the CJs without any difference or distinction,

408. Thirdly, it is necessary to put the policy beyond the charge of unreasonableness or arbitrariness that the State policy must be subject to just exceptions which may be very few, so that the exceptions do not become a rule or a ruse to destroy the effect of the main policy itself. For instance, while evolving or formulating a general policy the following exceptions can be made by the President--

(1) that where the personal circumstances of a Judge, purely on humanitarian grounds, are such as may endanger his life, e.g., he may be a heart patient and so he may not be transferred to a High Court which is situated in a hill station or at a particular height or he may be suffering from such disease which may imperil him there or such other circumstance of a very compelling or pressing nature,

(2) where the Judge or the CJ concerned is about to retire and is to serve only for a very short term before retirement, his transfer to some other Court would not serve any useful purpose and would be very inconvenient to him--such a period may vary from one day to six months but not more,

(3) where due to some physical infirmity the CJ concerned has become immobile and cannot be moved beyond his home State, this may be a just and humanitarian ground for bringing him under the exceptions to the policy, and

(4) such other circumstances, either similar to or identical with the circumstances mentioned above, which in the opinion of the CJI or the President requires due consideration on humanitarian grounds.

409. It is manifest that even if a Policy has been finally evolved and formulated and transfers are sought to be made in pursuance of the policy, the President has to consult the CJI or where the CJI initiates the proposal he is to consult the Judge concerned as also the President but the process of consultation would have to be confined to the four corners of the just exceptions indicated above and not beyond the same which form part of the Policy laid down by the President.

410. At the same time, the exceptions should not be so broadly construed as to destroy the effect and fruitfulness of the Policy.

411. Another aspect of the matter is as to whether or not the policy is legally justifiable and is in public interest so as to be legal and constitutional. On this aspect of the matter unimpeachable materials have been placed before us to show that right from the framing of the Constitution up-to-date public opinion has always favoured the transfer of Judges as a matter of uniform policy. As late as 1949 when the Draft Constitution was made, Dr. Ambedkar, as already indicated, had expressed a pious wish that Judges should be transferred to other States so that they can apply an independent approach and generate more confidence being above all local or parochial interests.

412. We must hasten to add that The President before formulating the Policy should consult the CJI and have his views because the laying down of the Policy would be under Article 222 and consultation with the CJI being necessary concomitant of the said power, even while laying down the Policy, the consultative process is essential. Although the CJI has at present shown his stiff opposition to the Policy we hope and trust that when the matter is reassessed and a Policy is finally formulated, the CJI would eschew his opposition in view of the various factors and circumstances indicated above as also in due deference to the view of some of the Judges of this Court who have decided these cases, which, as pointed out by us, is not only in great public interest but also in national interest of the country. Moreover, the Policy has been amply supported and sponsored not only by the Government but also by a very large body of publicmen including Jurists, politicians, lawyers, parliamentarians and others. If despite these circumstances the CJI does not change his view and sticks to his opposition of the Policy, then we think this will be a fit and proper case where the President might overrule the CJI and enforce the Policy. We However solemnly hope and trust that such an eventuality would not arise,

413. Before closing this Chapter, we would like to say a few words about the mechanism of giving effect to this Policy. The Law Minister has already made a statement in the Parliament as indicated above that he is prepared to leave the mechanism to be devised to the CJI or to the Supreme Court. If the Supreme Court, which represents cream of all legal and judicial master minds of 70 crores of the people of our country, is left to adopt the mechanism, viz., as to which CJ should be posted where and judge the suitability and the atmosphere of the place of posting, then we think that nobody can ever complain of any injustice or discrimination against the mechanism adopted by the Court. We might further state that only the mechanism is to be left to the Supreme Court which will require a small Constitutional amendment in Article 222 which uses the word CJI alone. For the time being the mechanism could be left to the CJI who, we hope and trust, will consult his colleagues before adopting the mechanism in each case.

414. Before closing this chapter we should now say a few words about the legal and constitutional effect of the Circular said to have been written by the Union Law Minister. In order to understand the real import of the said Circular, the same may be extracted in lull:

"D. O. No. 66/10/81/-Jus

Minister of Law, Justice & Company Affairs, India
New Delhi-110001.

March 18, 1981.

My dear

It has repeatedly been suggested to Government over the years by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to farther national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the peat in this direction The feeling is strong, growing and Justified that some effective steps should be taken very early in this direction.

2. (a) In this context, I would request you to obtain from all the Additional Judges working in the High Court of your State their consent to be appointed as Permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of "preference, to which they would prefer to be appointed as Permanent Judges, and

(b) Obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along With a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the parti of Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons re-commended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also pending a copy of this letter to the Chief Justice of your High Court.

With regards

Yours Sincerely,

Sd/-.
(P. Shivshankar)

To:

1. Governor of Punjab.

2. Chief Ministers (by name) (excep North-Eastern States)

415. In the first place, the contents of the letter have to be understood against the background of the uniform policy sought to be evolved by the President which we have dealt above exhaustively. Before we make any comments it seems to us that what was purely a useful and innocuous, meaningful and pointed document has been described by the petitioners as a most mischievous act of the Law Minister which endangers and erodes the independence, of the judiciary. In our opinion, with due respect to the counsel for the parties the Circular neither does nor does it intend to do any such thing.

416. To begin with the preamble of the Circular clearly gives the reasons and the background why the letter was written, viz., that the unanlmous view that has now emerged is that one-third of the Judges should as far as possible be from outside the State in which that High Court is; situated. From the elaborate disscussions in respect of the various circumstances and documents to which we have referred while dealing ' with the question of Policy, it is manifest that nobody has ever objected to the second limb of the Policy, that is to say, taking one-third of the Judges in a High Court from outside the State. We have-shown that even the CJI has expressed -his entire agreement with this part of the Policy. The Circular merely seeks 'to provide an easy and practical, rough and ready, and an ingenious and Scientific 'mechanism' to achieve this end.

417. Let us assume that all parties agree that one-third of the Judges in each High Court should be taken from outside,' which seems to be the absolute consensus that has emerged from the evidence produced by both the parties. The question is how is this objective to be achieved? One method may be as suggested by-some Commissions that each High Court should maintain a panel of 'members of, the Bar and the services who; are suitable for appointment as Judges of the High Court and exchange these panels, with the CJs of all High Courts Before making the panel, it is manifest that the State Government also would have to be consulted, which is also the, requirement of the statute. This is, however; a very complex and complicated .procedure and will take quite-;a- few years before the panel in formed'.

418. So far as Mr. Seervai is concerned, ' he 'argued that this cannot be done, ^e lire; however, unable to agree with him that merely because it may not be 'very 'easy to evolve this limb of the Policy, 'if should be rejected as being impossible of performance. After all, eminent Jurists like Justice Saiyid Fazl AU, Justice H.R, Khanna, Mr. M.C, Setalvad and let of others must be given the credit of possessing great knowledge of law and if they thought that this was an idea which was most impracticable, they would never have suggested it.

419. The Law Minister by virtue of the Circular seeks, to hit upon a device by Which this limb of the Policy can be achieved. It is obvious that in almost all the High Courts apart from the permanent Judges, Additional Judges are working according to the strength fixed by the President in each High Court, The Circular does not cover the permanent Judges of the High Court at all but it applies only to two kinds of Judges--(1) persona who are about to be appointed as Additional Judges, and (2) persons who are working as Additional Judges and whose term is likely to expire: The Circular merely says that the CJs may obtain the consent of the aforesaid additional Judges if they would like to be appointed as permanent Judges in any other High Court in the country and they could name three High Courts of their choice. There is no compulsion on the Judges to give their consent: it is merely an option or suggestion which they may or may not accept.

420. Secondly, consent is to be obtain-ed from persons who had already been or may in future be proposed for initial appointment as Additional Judges to give their consent to be appointed in any other High Court. Here also, there is no element of compulsion. Clause (3) of the Circular, which has been severely criticised by Mr. Seervai and those who followed him, merely says that furnishing of the consent or indication of the preference would not imply any commitment on the part of the Government. While criticising this part of the Circular the counsel for the petitioners have however completely overlooked the most important circumstance that it was impossible for the Government to have made any commitment without ascertaining the views of the State Governments concerned, the CJs as also the CJI. It could only be after these functionaries would have intimated their option that the ball could be set rolling and the CJs of the High Courts where they were proposed to be sent could be sounded for consultation as also the Government. Furthermore, the CJI would come into the picture only after the proposal has passed through the High Court and the State Government concerned and it would be open to the CJI at this stage either to agree with this proposal or to drop it.

421. We, therefore, fail to see what harm is done to the Judges. On the other hand, the Circular provides an additional facility to the Judges who may like to go out of the State in accordance with the Policy. It appears that in actual practice quite a few of the Judges have given their consent.

422. Mr. Seervai vehemently contend-ed that the tone and tenor of the Circular amounts to pressurising the Judges and putting them under coercion to give their consent at the peril of their being dropped at the initial stage. The plea of coercion or undue influence is to be pleaded by the persons on whom undue influence or coercion is used. None of the Judges have either by any statement or affidavit complained that they had given their consent under duress.

423. Mr. Seervai submitted that Judges are not used to indulge in litigation and if they chose to remain silent, the lawyers can take up their cause and prove that duress and coercion has been practised on them. We are really amazed that such an argument has been advanced before us which completely ignores the elementary norms of law. Manifestly before the highest Court, a Judge of a High Court cannot be governed by a law or rule of evidence different from the one which applies to all citizens. It is now well settled by several authorities that allegations of coercion Or undue influence must be expressly pleaded by the party who is the victim, and proved to the satisfaction of the Court.

424. In the instant case, there is neither any plea nor any proof by the so-balled victims. A mere statement in the petition that undue ° influence or coercion or duress was practised on the Judges is not sufficient for this Court to come to the conclusion that the consent of the Judges was obtained under duress or coercion. Mr. Seervai contended that although there was a clear indication in the petition, none of the Judges has come forward to deny the same. This is indeed a most unusual way of proving a case of fraud or undue influence. Suppose today we accept the argument of Mr. Seervai and hold that by virtue of the Circular the Judges who have given their consent did so under coercion or duress and tomorrow the very Judges who had given consent come forward to this Court protesting against our finding and inform us that they had voluntarily given their consent, what shall be the answer of this Court. On what principle of law or equity can we decide the plea of fraud, undue influence or coercion? This argument which is the sheet-anchor of Mr. Seervai, with due respect to him, cannot be accepted for a moment.

425. Another comment against the Circular was that by the indirect process of obtaining consent of the Judges concerned, the provisions of Article 222 have been rendered otiose because when the matter goes to the CJI, he would be faced with a fait accompli and would have no discretion in the matter. This argument also, in our opinion, is wholly untenable. A person of the status and calibre of the Head of the judiciary in India would not be worth his salt if he exercises his constitutional power of consultation merely on the consent of a Judge without at all applying his mind. There if no question of presenting a fait accompli to the CJI because he has to consider all the shades, aspects and problems of the matter in its entirety and would also have to consult the Judge concerned and if he feels that a proper case for transferring the Additional Judge to other High Court has not been made out, he can refuse to give his consent in which case in all probability the proposal would die a natural death. We are, therefore, unable to accede to the contention that the Circular tries to interfere with the supreme authority of the CJI in the matter of consultation under Article 222.

426. Another circumstance that furnishes a complete answer to this problem is that no question of transfer is involved in the mechanism sought to be devised by the Circular. The Additional Judges have only to be appointed for the first time in other High Courts and are not to be transferred. Even if the Judges concerned give their consent and are appointed in an outside High Court, they would not be transferee Judges and therefore not entitled to the facilities which are available to transferee Judges like compensatory allowance, visiting his home State every year, etc. Therefore, the entire argument stands on a pack of cards.

427. Lastly, the Circular issued by the Law Minister is not mandatory but purely directory. It is open to the Judges to refuse to answer the queries made from them by the CJI in pursuance of the Circular and no adverse inference can be taken against them, though the law will take its own course.

428. We are clearly of the opinion that once the Policy is finally formulated and translated into action, it would enhance the image and independence of the judicial institutions and verily the judiciary would see its halcyon days where the Judges would be able to function with drive and dedication in a free and independent atmosphere without the fear of any local or parochial influence entering into their verdict either consciously or unconsciously. The grateful nation shall pay its homage to our grate Founding Fathers for giving unto this country a most ideal, flexible, sound and solid Constitution which has sustained the largest democracy in the world and has stood the test of times despite severe storms and crise like an impregnable rock.

429. For these reasons, therefore, we are unable to agree with the counsel for the petitioners that the Circular in any way tarnishes the image of the Judges or mars the independence of judiciary. This, therefore, disposes of Point No. 3 relating to policy of General Transfers and the question of validity of the Circular.

430. As regards the question of appointment of Additional Judges under Article 224, the interpretation of Article 217, the questions of locus and primacy, the exposition of the concomitants of consultative process, I generally agree with my Brothers Bhagwati, Desai and Venkataramiah JJ., who have elaborately dealt with these points.

431. So far as the question of privilege is concerned, the matter was argued with all its ramifications by counsel for the parties. All my Brother Judges after hearing the arguments passed an interim Order on 16-10-81 directing disclosure of the documents concerning the secret correspondence between various authorities. I, however, found myself, with due respect to my Brother Judges, unable to agree with the view taken by them and passed the following Order on the same date:

"I am afraid, I am unable to persuade myself to agree with and express my respectful dissent from the Order passed by Brother Bhagwati J. and other Brother Judges directing disclosure of the contents of the documents, I am clearly of the opinion, after inspecting the documents and considering the pros and cons, various shades and aspects of the matter with all its ramifications that it is not in public interest to disclose the contents of the documents and I accordingly uphold the plea of privilege taken by the Union of India. I am aware that my voice is a lone dissent but I am satisfied that I am in good company with my judicial conscience.

Reasons for this Order will be given by me along with the judgment rendered in the cases.

432. I now set out to give the detailed reasons which led me to dissent from the views taken by my learned colleagues. I had mentioned in my interim Order that mine was a lone voice of dissent but I felt consoled that I was in good company with my judicial conscience.

433. To begin with, in dealing with the question of privilege, we cannot view this important branch of law divorced from the socio-economic conditions of our own country nor can we overlook the special conditions--political, economic and social--prevailing in the largest democracy of the world. Any judicial reform however radical or meaningful it may be, must like a sage counsel be slow and gradual because it is the last refuge for those who seek Justice from the courts of law, One of the most prominent distinctive features of the laws of our country on the question of privilege is that the doctrine of privilege is governed not merely by case law but by statute law as also by Constitutional provisions, These provisions are contained in Sections 123 and 124 of the Evidence Act, Section 162 of the CrPC and Article 74(2) of the Constitution of India. In deciding the plea or privilege taken by the State or the party concerned, the provisions of the codified law, which have not been changed so far, must receive full and effective consideration at our hands. It is not for the first time that claim of privilege has been taken by the Government in this case but the law is now well settled by the decisions of this Court as also of various High Courts including the Privy Council. I would not like to burden this judgment, which has already become unduly long, with, the long course of

decisions of the High Courts covering a period of more than a century but would like to confine myself to the authorites of this Court and some English and American cases on which reliance has been placed by counsel for the petitioners.

434. Before proceeding to the decisions, it may be necessary to extract the relevant provisions of the codified law of our country. Article 74(2) which contains a constitutional mandate by preventing any inquiry into an advice tendered by the Minister to the President runs thus:

"74(2). The question whether any, and if so what, advice was tendered by by Ministers to the President shall not be inquired into in any Court.

435. Sections 123 and 124 of the Evidence Act may be extracted thus:

"123. Evidence as to affairs of State--No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit,

124. Official communications--No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure.

436. Section 162(1) of the CrPC runs thus:

162(1). No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

437. A plain reading of these provisions would show that these provisions are expressed in a negative form which is the clearest possible proof of the fact that the legislature has incorporated a direct prohibition against the use of documents mentioned in the aforesaid provisions.

438. Thus, a disclosure can be allowed only in exceptional circumstances where there is no injury to public interest because public interest is always paramount to private interest. In fact, these provisions clearly contain four important attributes of the doctrine of disclosuret--

(1) public interest,

(2) confidentiality,

(3) candour, and

(4) expediency.

439. A reading of these provisions would also show that the legislature seems to have laid the greatest possible emphasis on public interest and confidentiality aspects of these documents. I shall now refer to some of the leading decisions of this Court which have construed the doctrine of privilege as contained both in Section 162 of the Coda of Criminal Procedure and Section 123 of the Evidence Act, and have laid down principles which should be adopted by courts in allowing disclosure or upholding the plea of privilege.

440. I would first refer to the case of State of Punjab v. Sodhi Sukhdev Singh MANU/SC/0006/1960 which may justly be regarded as the locus classicus regarding the doctrine of disclosure where Gajendragadkar J., with whom Sinha C.J. and Wanchoo J. agreed, observed as follows (at p. 501):

...A valid claim for privilege made under Section 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that, where a conflict arises between public and private interest, the latter must yield to the former.

441. It may be noticed here that Gajendragadkar J. was fully alive to the fact that even as a result of the non-production of the relevant material or documents the litigant may feel dissatisfied but that will not affect the basic principle that public good and interest must override considerations of private good. Here this Court made a distinct departure from the view taken by the American Courts where the concern for the amount of prejudice caused to the litigant is so paramount as to form the bulwark and fundamental consideration for directing disclosure and in some cases even injury to public interest has to yield to the requirements of the litigant.

It is, therefore, clear that this Court has not accepted and in my opinion rightly, the extreme view of the American courts. This Court in Sodhi Sukhdev Singh's Case MANU/SC/0006/1960 (supra) made the following observations:

Care has, however, to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provision of Section 123. Subject to this reservation the maxim silus populi est supreme lex which means that regard for public welfare is the highest law is the basis of the provisions contained in Section 123. Though Section 123 does not expressly refer to injury to public interest that principle is obviously implicit in it and indeed is its sole foundation.

Having regard to the notion about governmental function and duties which then obtained, affairs of State would have meant matters of political or administrative character relating, for instance, to national defence, public peace and security and good neighbourly relations. Thus, if the contents of the documents were such that their disclosure would affect either the national defence or public security or good neighbourly relations they could claim the character of a document relating to affairs of State. There may be another class of documents which could claim the said privilege not by reason of their contents as such but by reason of the fact that, if the said documents were disclosed, they would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies. In this class may legitimately be included notes and minutes made by the respective officers on the relevant files, opinions ex-pressed or reports made, and gist of official decisions reached in the course of the determination of the said questions of policy.

. . . .

In other words, if the proper functioning of the public service would be impaired by the disclosure of any document or class of documents such document or such class of documents may also claim the status of documents relating to public, affairs.

. . . .

It is, however, necessary to remember that where the legislature has advisedly refrained from defining the expression "affairs of State" it would be expedient for judicial decisions to attempt to put the said expression into a strait-jacket of a definition judicially evolved, It must be clearly realised that the effect of the document on the ultimate course of litigation or its impact on the head of the department or the Minister incharge of the department or even the Government in power, has no relevance in making a claim for privilege under Section 123.

. . . .

The sole and only test which should determine the decision of the head of the department is injury to public interest and nothing else.

. . . .

Thus our conclusion is that reading Sections 123 and 162 together the Court Cannot hold an inquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the court is competent, and indeed is, bound, to hold a preliminary inquiry and determine the validity of the objections to its production, and that necessarily involves an inquiry into the question as to whether the evidence relates to an affair of State under. Section 123 or not.

(Emphasis mine)

442. Duncan v. Cammell, Laird & Co. (1942) AC 624 was also noticed by this Court and it was pointed put that it was not necessary to consider the true nature and effect of the principle as adumbrated in that case, because in India we are governed by the provisions of Section 162 of the CrPC which clearly confers powers on the court to determine the validity of objections raised in Section 123 of the Evidence Act. Hence, there would be no occasion to exercise the inherent, power of the Court. In this connection, this Court made the following observations in Sodhi Sukhdev Singh's case MANU/SC/0006/1960 (supra),

Without knowing more about the contents of the said documents it is impossible to escape the conclusion that these documents would embody the minutes of the meetings of Council of Ministers and would indicate the advice which" the Council ultimately gave to the Rajpramukh. It is hardly necessary to recall that advice given by the Cabinet to the Rajpramukh or the Governor is expressly saved by Article 163, Sub-article (3) of the Constitution; and in the case of such advice no further question need to be considered. The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers.

443. These observations come very close to the matters in dispute contained in the secret correspondence sought to be disclosed because here also they dealt with the Minute of the meeting of the Ministers, viz., the Law Minister, the CJI and the CJ, Delhi which form the foundation, though not an actual part of the advice tendered to the President. These documents were held to be fully privileged. Kapoor J. in a concurrent judgment in Sodhi Sukhdev Singh's case MANU/SC/0006/1960 (supra), however, clarified the position thus:

Thus the documents, which are protected from production, are those the production of which would be prejudicial to the public interests or those which belong to that class which as a matter of practice, are kept secret for the proper maintenance of the efficient working of the public service.

(Emphasis supplied)

444. The learned Judge after summing up the entire English law on the subject observed as follows: (at p. 516)

Thus the law as stated in these old English cases shows that what was injurious to the public interest or prejudicial to the proper functioning of the public services was not to be disclosed and if the objection was based on these grounds it must prevail.

445. Construing the provisions of Section 123 of the Evidence Act, the learned Judge observed thus MANU/SC/0006/1960:

The words of Section 123 are very wide and the discretion to produce or not to produce a document is given to the head of the department and the court is prohibited from permitting any evidence to be given which is derived from any unpublished documents relating to affairs of State.

446. Subba Rao J. also in a concurring judgment while maintaining the claim of privilege pointed out that the earlier decisions of, English courts indicates that the ground of privilege was sustained only in regard to the documents pertaining to matters of administration, defence or foreign relations whose disclosure would be against public interest. In the instant case, the documents in question undoubtedly relate to matters of administration of high-powered constitutional functionaries and would, therefore, fall within the ambit of the Rule of law laid down by the English courts. Subba Rao J. (as he then was) took care to point out that the Evidence Act was enacted when the concept of a Welfare State had not arisen but even after independence the interpretation of the words 'affairs of the State' cannot be given a separate meaning but have to be construed on the basis that our Constitution aims at setting UP of a Welfare State. In this connection, the learned Judge observed as follows (at p. 527 of AIR 1961 SC):

But when the words are elastic there is no reason why they should not be so construed as to include such activities also, provided the condition of public injury is also satisfied. It is, therefore, clear that the words "affairs of State" have acquired a secondary meaning, namely those matters of State whose disclosure would cause injury to the public interest.

447. Stressing that the cardinal test for upholding the plea of privilege should be that the disclosure of the documents would be injurious to the public interest the learned Judge observed as follows (at p. 527 of AIR 1961 SC):

I cannot, therefore, give a wide meaning to the words records relating to affairs of State" so as to take in every unpublished document pertaining to the entire business of State, but confine them only to such of the documents whose disclosure would be injurious to public interest.

448. The learned Judge further pointed out that there was no conflict between Sections 123 and 162 of the Evidence Act even on the interpretation sought to be put on the doctrine of privilege by the learned Judge. In this connection he observed thus (at p. 530 of AIR 1961 SC):

There is no conflict between Section 123 and Section 162 of the Act: the former confers a power on a head of a department to withhold permission from the stand-point of State Administration, whereas Section 162 recognises the over-riding power of a court in the interest of higher, public interest to overrule the objection of privilege.

449. Finally, while laying down the working rules of guidance regarding matters of privilege, the learned Judge laid down the following guidelines (at p. 532 of AIR 1961 SC):

Subject to the overriding power of the court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State: (a) "records relating to affairs of State" mean documents of State whose production would endanger the public interest; (b) document pertaining to public security, defence and foreign relations are documents relating to affairs of State: (c) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relatitng to affairs of State; but in special circumstances they may partake of that character: (d) in cases of documents mentioned in (c) supra, it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer.

450. In Amar Chand Butail v. Union of India MANU/SC/0330/1964 another Constitution Bench adopted the same view which was taken in Sodhi Sukhdev Singh's case AIR 1961 SC 4931 (supra). Gajendragadkar CJ speaking for the Court observed thus (at p. 1661 of AIR 1964 SC):

In view of the fact that Section 123 confers wide powers on the head of the department, this Court took the (sic)tion of sounding a warning that the heads of departments should act with scrupulous care in exercising their right under Section 123 and should never claim privilege only or even mainly on the ground that the disclosure of the document in question may defeat the defence placed by the State. Considerations which are relevant in claiming privilege on the ground that the affairs of the State may be prejudiced by disclosure must always be distinguished from considerations of expediency which may persuade the head of the department to raise a plea of privilege on the ground that if the document is produced, the document will defeat the defence made by the State.

451. In this case, a clear distinction was sought to be drawn between the doctrine of confidentiality and that of expediency, In other words, this Court decided that where a particular document did not relate to affairs of the State as such, but if the document was produced it may defeat the defence taken by the State, that alone would not be sufficient to uphold the plea of privilege. In the instant case, however, this doctrine does not apply at all.

452. In State of U.P. v. Raj Narain MANU/SC/0032/1975. another Constitution Bench of this Court observed thus (at Pp. 872, 875):

A witness, though competent generally to give evidence, may in certain cases claim privilege as a ground for refusing to disclose matter which is relevant to the issue. Secrets of State, State papers, confidential official documents and communication between the government and its officers or between such officers are privileged from production on the ground of public policy or as being detrimental to the public interest or service.

(Emphasis supplied).

The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national Interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The Court will proprio motu exclude evidence the

production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contained material which it would be damaging to the national interest to divulge but rather that the documents would be of clam which demand protection.

(Emphasis mine).

453. The aforesaid observations of Ray CJ appear to be on all fours with the facts and circumstances of the present case because the documents consisting of the secret correspondence, amply answer the description of the documents which were being dealt with in that case.

454. Mathew J. in his concurring judgement expressed a similar view and after dealing with a large number of English cases observed as follows (at p. 883 of AIR 1975 SC):

In other words, if injury to public interest is the foundation of this so called privilege, when once the Court has enquired into the question and found that the disclosure of the document will injure public interest and therefore it is a document relating to affairs of State, it would be a futile exercise for the minister or the head of the department to consider and decide whether its disclosure should be permitted as he would be making an enquiry into the identical question. It is difficult to imagine that a head of the department would take the responsibility to come to a conclusion different from that arrived at by a court "as regards the effect of the disclosure of the document on public interest unless he has or can have a different concept of public interest.

455. The learned Judge, however, was prepared to make exception in cases of documents which related to common routine business which had no relation to interests of the public. The Judge pointed out that a mere veil of secrecy put on such documents would not prevent the court from directing disclosure and observed thus (at p. 884):

To justify a privilege, secrecy must be indispensable to induce freedom of official communication or efficiency in the transaction of official business and It must be further a secrecy which has remained or would have remained inviolable but for the compulsory disclosure.

456. The documents in question fall squarely within the test laid down by Mathew J.

457. The Privy Council in Henry Greer Robinson v. State of South Australia (1931) AC 704 held that the foundation upon which the protection against disclosure of official record is based is that the information cannot be disclosed without injury to the public interest, and Lord Blanesburgh observed as follows:

As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production.

458. Thus, in the instant case the twofold tests laid down by Lord Blanesburgh are fully satisfied because (1) the papers, are in the nature of public official documents of administrative character, and (2) the disclosure of these documents will lead to serious injury to the public.

459. In Duncan'a case ((1942) AC 624) (supra) the following observations were made:

...but the rule that the interest of the State must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering Justice, quite unconnected with the interest or claims of the particular parties in litigation, and, indeed, is a rule on which the Judge should, it necessary, insist, even though no Objection is taken, at all.

The minister in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of with-holding production except in cases where the public interest would otherwise be damnified for example, where disclosure would be injurious to national defence, Or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration.

(Emphasis supplied).

460. This case goes even to the extent, that if the Minister does not claim the plea of privilege, it is for the Court itself not to allow disclosure where the disclosure would be injurious to national defence, good diplomatic relations or proper functioning of the public service. This decision, therefore, is fully in accordance with the principles enunciated by this Court as referred to above.

461. It was contended that the validity of Duncan's case ((1942) AC 624) has been considerably weakened by a later English decision in Conway v. Rimmer (196B) AC 910 and therefore no reliance should be placed on Dun-can's case. We are, however, unable to agree with this argument because Conway's case has not only not overruled Duncan's case but has held that it was rightly decided In this connection Lord Reid made the following observations:

I have no doubt that the case of Duncan v. Cammell. Laird it Co. Ltd. was rightly decided.

462. Lord Reid reiterated the same principle which has been enunciated by the English courts and followed by this Court and observed thus:

It is universally recognised that there are two kinds of public interest which may clash. There is the public Interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

463. The twin tests which flow from these observations fully apply to the facts and circumstances of this case. We are, therefore, unable to regard Conway'a case ((1968) AC 910) as having overruled the ratio in Durican's case. ((1942) AC 624). On the other hand; Even on the authority of Conway's 'case, the disclosure of the documents in question ought not to be allowed. Moreover, these observations clearly show that the principles enunciated by Lord Simon in Duncan's case were approved. It is true that the ratio in Duncan's case after having been approved was explained away and limited to cases where disclosure of documents was not in public interest and disclosure could be permitted only by striking a just balance between the public and the private interest.

464. Thus, Conway's case does not fully support the contention of Mr. Sorabjee. So far as this Court is concerned, it has not gone to the extreme limit to which Conway's case goes and therefore, I would like to prefer the decisions of this Court to that of Con-way's case where the law appears to have been somewhat Overstated by Lord Reid.

465. Reliance was also placed by Mr. Sorabjee on the case of Rogers y. Home Secretary (19731 AC 388 and particularly on the observations of Lord Pearson which may be extracted thus:

The court has to balance the detriment to the public interest on the adminisrative or executive side. which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non-disclosure of a document or information which is relevant to an issue in legal proceedings. Therefore, the court, though naturally giving great weight to the opinion of the appropriate minister conveyed through the Attorney General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed.

466. Another passage which explains the ratio in clear terms may be extracted thus:

It is true that the public interest which demands that the evidence be withheld has to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material (Rex. v. Hardy (1794) 24 State Tr. 199. 808; Marks v. Beyfus (1890) 25 QBD 494. Conway v. Rimmer 1968 AC 910, but once the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted.

467. Ultimately while taking a broad and practical view on the question, Lord Salmon observed thus:

In my view, any document or information that comes to the board from whatever source and by whatever means should be immune from discovery. It is only thus that the board will obtain all the material it requires in order to carry out its task efficiently. Unless this immunity exists many persons, reputable or disreputable, would be discouraged from communicating all they know to the board, They might well be in fear not only of libel actions or prosecutions for libel but also for their safety and may be their lives.

468. Taking the facts of this case at their face value, I do not see how it can help the argument of Mr. Sorabjee on the question of disclosure of the documents. In fact, this case also does not depart from the previous views taken by the House of Lords and the privy Council regarding the importance of public interest or injury to public interest in respect of the documents sought to be disclosed. This case, however, takes a step forward by insisting that the principles enunciated in Conway's case ((19,68) AC 910) would show that a just balance should be struck between the ground on which the Union of India claims privilege and the claim of the petitioners for disclosure. Applying the ratio of this case to the facts of the present case, it would be seen that if the documents are not disclosed, the petitioners would not suffer serious prejudice because the undisputed facts show that the Chief Justice of Delhi High Court had for reasons given by him opined that the term of Justice Kumar ought not be extended. The CJI, however, expressed a contrary view. It was, therefore, for the President to choose any of the two views. Thus, disclosure of details would have undoubtedly caused serious damage to public interest by exposing not only the petitioner-Kumar but also the CJ. Delhi High Court and the CJI to public gaze and criticism which would be highly derogatory to the high position that these high constitutional functionaries hold and would in future deter them from expressing any opinion on the merit of future appointments which might result in an insoluble stalemate. Thus, balancing the two factors, there can be no doubt that the weight is on the side of the Union of India.

469. Strong reliance was placed by Mr. Sorabjee in Sankey v. Whitlam 21 Australian LR 505 where Stephen J. relying on Rogers' case ((1973) AC 388) (supra) and other cases dwelt on the doctrine of balancing process and observed as follows:

If in the balancing process the circumstances of a particular case can affect the relative weight to be given to each of the respective public interests when placed in the scales, the outcome in the present case seems to me to be clear.

* * * *

The affidavits sworn by members of the present ministry and by senior public servants make it clear that all the claims to Crown privilege are class claims, not contents claim; it is not suggested that to disclose the contents of any of the documents, the Loan Council documents apart, will of itself result in detriment to the public interest flowing directly from the nature of what is disclosed.

(Emphasis mine).

470. A perusal of the facts of this case would show that in the said case the documents were really not of a secret nature so as to fall within the contours of the claim of privilege. There was also a finding given by the court that the documents would not result in any detriment to public interest flowing directly from the nature of what is disclosed. Contrary appears to be the case so far as the documents, which are the subject matter of disclosure, in the instant petitions are concerned These observations do not help the petitioners because they are based on a clear finding of fact that there was nothing remarkable about the documents in order to tilt the scales in favour of nondisclosure. It was also held that the affidavits did not clarify whether the claim of privilege was class-claim and not contents-claim. As already indicated, the documents in this case pertain to high official secrets revealed in the documents of high constitutional functionaries regarding matters which if disclosed would doubtless cause serious injury to the public and has in fact caused the most colossal damage not only to the Government but also to the judicial institution itself.

471. In Sankey'g case (21 Aug. LR 505) the following observations were made:

An explanatory memorandum and schedule relating to a meeting of the Executive Council held on 7 January, 1975. It should be explained that when a matter is brought before a meeting of the Executive Council a minute paper is prepared; it sets out the advice tendered to His Excellency the Governor-General in Council and is signed by the minister concered. Each minute is accompanied by an explanatory memorandum which usually sets out the reasons for the advice. All minutes to be submitted to the Executive Council are listed on a schedule, which is signed by those present at the meeting. If the Governor-General is not present at the meeting the minutes and schedule are later submitted to him for signature. The Commonwealth did not claim privilege for the minute paper to which the explanatory memorandum and schedule now in question related.

472. Gibbs, ACJ upholding the claim Of privilege observed as follows:

Privilege was claimed for the documents in category 1 by the affidavit of Mr. Carmody, which stated that all members of the Executive Council are required to make an oath or affirmation of secrecy. The affidavit contained the following" "The documents referred to ...relate to advice given and recommendations made to the Federal Executive Council and the deliberations and decisions of that Council as to the inner workings of the Executive Government of the Commonwealth of Australia. In my opinion such documents belong to a class of documents which public interest requires should not be disclosed. Further, disclosure of such documents would inhibit the proper functioning of the Executive Government and non-disclosure of such documents is necessary for the proper functioning of the public service.

473. In Marconi's Wireless Telegraph Co. Ltd. v. The Commonwealth 13 Commonwealth LR 178, Isaacs, J. observed as follows:

Now, when that "State paper", or, as here, a "State wireless instrument". As sought to be produced, and, its official character is unquestioned, the plaintiff's contention is, as I have already said, the court must still in some way and to some extent satisfy, itself by some further inquiry, that the object is within a privileged class, I suppose by reason of its being of a nature that may require concealment, before it can accept the minister's assurance as to public prejudice.

474. In this case also, the Court merely held that where an instrument is judged by the court to be of an official character the Minister's plea of public prejudice must be upheld. Even so, the facts of this case are clearly distinguishable from the facts of the present case.

475. In Alfred Crompton Amusement Machines Ltd, v. Customs & Excise Commissioners (1974) AC 405. Lord Cross of Chelsea while dwelling on the nature of confidentiality which is doubtless one of the aspects of privilege, observed as follows:

Confidentiality" is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the document in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other.

476. Here also it was held that while dealing with the question of confidentiality the most material consideration would be whether privilege was claimed on the ground of public interest and the duty of the court is to balance the considerations of public interest against the injury which may be caused by disclosure and if it finds that the injury to public interest would be minimal, disclosure can be allowed. This case also does not in any way seem to be of any assistance to the petitioners.

477. Mr. Sorabjee strongly relied on the famous American case of United States v. Richard M. Nixon (1974) 41 L Ed 2d 1309 and particularly on the following observations made by the court:

Neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute unqualified presidential privilege of immunity from judicial process under all circumstances;

478. These observations must be read in the light of the peculiar provisions of the American Constitution contained in Articles 2 and 3. The doctrine of absolute candour so as to prevail over the unqualified privilege of immunity from judicial process is absolutely foreign to the nature and character of the provisions enshrined in Article 74(2) of our Constitution and Sections 123 and 131 of the Evidence Act. Therefore, these observations cannot be called into aid by our courts in dealing with the question of privilege. I have already pointed out that this Court has clearly held that we ought not to be guided by American decisions because in framing our Constitution, we have chosen to select the English pattern even though the American Constitution was available and was in fact considered by the Founding Fathers of our Constitution.

479. Thus, the United States decision referred to above must be understood in the light of its own facts and the special provisions of the American Constitutional law under which there is a complete separation of powers unlike our Constitution where to some extent there is separation of power but by and large all the powers of the appointment of

the higher judiciary and their transfer vests in the executive, viz.. the President of India. In these circumstances, therefore, the doctrine of 'candour' or 'confidentiality' propounded by the American Supreme Court cannot be blindly applied to the provisions of the Indian Constitution which has features of its own substantially different from those of the American Constitution as indicated while dealing with interpretation of Article 222. The extreme limit to which the U.S. Supreme Court appears to have gone is directly opposed to the scope of Sections 123 and 124 of the Evidence Act as interpreted by this Court in Sodhi Sukhdev Singh's case MANU/SC/0006/1960 (supra).

480. This Court in Shyamlal Mohanlal's case AIR 1965-SC 1251 (supra) has clearly held that the plea of privilege cannot be determined, on the principles enunciated by the American Judges which could not apply to our country. This is particularly so, when the habits and tempers of our people, their outlook and vision, and their concepts and way of life are quite different from the ways of life of the American people.

481. In Shyamlal Mohanlal v. State of Gujarat AIR 1965 SC 1251 at p. 1253 (supra) this Court observed thus:

In the United States of America where the immunity against self-incrimination is constitutional, the Fifth Amendment provides:

No person...shall be compelled in any criminal case, to be a witness against himself.

By judicial interpretation the rule has received a much wider application. The privilege is held to apply to witnesses as well as parties in proceedings civil and criminal: it covers documentary evidence and oral evidence, and extends to all disclosures including answers which by themselves support a criminal conviction, or furnish a link in the chain of evidence, and to production of chattel sought by legal process.

The rule of protection against self-incrimination prevailing in the United Kingdom, or as interpreted by Courts in the United States of America has never been accepted in India. Scattered through the main body of the statute law of India are provisions which establish beyond doubt that the rule has received no countenance in India. Section 132 of the Evidence Act enacts in no uncertain terms that a witness shall not be excused from answering any questions as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind. This provision runs directly contrary to the protection against self-incrimination as understood in the common law in the United Kingdom.

(Emphasia mine).

482. On a parity of reasoning, it can be safely concluded that the statutory provisions of Sections 123 and 124 of the Evidence Act as also those of Article 74(2) of the Constitution have fully safeguarded high Government and official secrets and disclosure is prohibited in public interest unless the Court is fully satisfied that disclosure will not harm the public interest. Thus, this Court has clearly pointed out that on this aspect of the matter, the rule of protection against seif-incrimination as prevalent in the United Kingdom or U.S.A. has never been accepted India. This is yet, an additional reason why I am not in a position to rely on the American doctrine of candour or the recent decisions of the English courts referred to above.

483. Cross on Evidence (6th Edition) clearly states that documents may be withheld in public interest on account of their contents. In this connection the author observes as follows:

'The judgment shows that the production of a document may be withheld in the public interest either on account of its contents, or else because it belongs to a class which, on ground of public policy, must as a class be withheld from production (e.g. cabinet minutes).

484. Wigmore on Evidence (Third Edition-Vol. VIII) at page 801 summarises the conclusions regarding State secrets and official documents derived from American decisions on the question of privilege thus:

The privilege, when recognized, should therefore be subjected to the following limitation:

(1) Any executive or administrative regulation purporting in general terms to authorize refusal to disclose official records in a particular department when duly requested as evidence in a court of justice should be deemed void.

(2) Any statute declaring in general terms that official records are confidential should be liberally construed to have an implied exception for disclosure when needed in court of justice.

(3) The procedure in such cases should be: A letter of request (like a letter rogatory) from the head of the Court to the head of the Department (accompanying the subpoena to the actual custodian), stating the circumstances of the litigation creating the need for the document followed (in case of refusal) by a reply from the Departmental head stating the circumstances deemed to justify the refusal; and then a ruling by the Court, this ruling to toe appealable and determinative of the privilege.

485.The view of the author, therefore, fully reflects the summary of the decisions given by the American Courts on the question of privilege. It may be noticed that Clause 2 particularly recognises that where official records are declared to be confidential by 9 statute. the statute should be liberally construed to have an implied exception for disclosure when needed in a court of justice. The principle contained in Clause (2) of the aforesaid extracts is clearly enshrined in Sections 123 and 124 of the Evidence Act without the exceptions which have been carved out by American decisions. On the other hand, the position under the Evidence Act is that official or confidential records or documents cannot be disclosed unless the court comes, to the conclusion that the disclosure will not cause any injury to public interest. The American doctrine at candour, as already stated, cannot be applied to the conditions in India in view of our own statute laws containing express provisions contrary to the principles enunciated by the American courts.

486. David Foulkes in his book 'Introduction to Administrative Law' has observed thus:

It laid it down that Crown privilege can be claimed for a document on two alternative grounds: (a) that the disclosure of the contents of a particular document would injure the public interest, for example, by endangering national security or prejudicing good diplomatic relations; (b) that the document falls within a class which must be withheld from production to ensure the proper functioning of the public service.

487. It appears that whereas the English, Australian and our own courts have consistently and without any exception categorically held that military or defence secrets are absolutely privileged and the contents of the documents containing these secrets can never be divulged under any circumstances, the American courts seem to have taken a contrary view and while leaning on the side of non-disclosure even in the case of military secrets they have not excluded the possibility of allowing disclosure under certain circumstances. This is clearly spelt out by the decision of U.S. Supreme Court in United States of America v. Patricia J. Reynolds (1952) 345 US 1. The American courts do not seem to follow the threefold tests laid down by our courts as also the English courts in judging the plea of privilege, viz.,

(1) documents containing military or defence secrets,

(2) the direct conflict between public interest and individual interest; and

(3) the doctrine of expediency regarding affairs of the State and injury to public interest or national interest.

488. In fact, the correct legal position seems to be that whereas mere expediency may not be a ground to claim privilege so as to avoid production of a document which, if produced, may defeat the defence, where the documents consist of highly confidential matters in respect of constitutional functionaries like Chief Justices or High Court Judges, the Law Minister, the President of India; C.B.I, I.B. and such other Departments are concerned, the question of public injury, which may be caused, becomes a decisive factor in upholding the plea of privilege. The court is. however, not powerless to hold its own enquiry in order to test the bona fide of the plea of privilege. One form of such an enquiry may be, as pointed out in the cases referred to above, the inspection of the documents themselves by the court before disclosure. If after inspection the court finds that the plea of privilege is well-grounded and its disclosure will lead to great public injury, it will be justified in upholding the plea of privilege.

489. It is true that recent English decisions have made a slight departure from the consistent and somewhat conservative view taken by them in the earlier cases, but despite this change, the central theme and the contours and parameters within which the plea of privilege can be allowed have not been totally discarded.

490. As far back as 1916 the Court of Appeal in England while dealing with the question of privilege clearly held that the protection of documents from discovery was not only based on the broad principles of State policy or public convenience but extended to public confidential documents of a political or administrative character. In this connection

in Asiatic Petroleum Co. Ltd. v. Anglo-Persian Oil Co. Ltd. (1916) 1 KB 822 at p. 829. Lord Swinfen Eady observed as follows:

Although the instances in which documents have been held to be protected from discovery on the broad principle of State policy and public convenience have usually been cases of public official documents of a political or administrative character, yet the rule is not limited to these documents. The foundation of the rule is that the information cannot be disclosed without injury to the public interest, and not that the documents are confidential or official, which alone is no reason for their non-production.

491. In taking this view the court had relied on an earlier decision in Hennessy v. Wright (1888) 21 QBD 509.

492. In the Corporation of the City of Glasgow v. The Central Land Board 1956 SC (HL) 1, at p. 18 Lord Raddiffe observed thus:

I do not understand that the existence of the power involves that in Scotland, any more than in England, it is open to the Court to dispute with the Minister whether his view that production would be contrary to the public interest, is well founded, or to arrive at a view, contradictory of his, that production would not in fact be at all injurious to that interest.

. . . .

The power reserved to the Court is therefore a power to order production even though the public interest is to some extent affected prejudicially.

493. This decision clearly spells out the proposition that though normally the claim of privilege made by the Minister should be accepted by the Court but at the same time some aspects of public interest may be considered where withholding disclosure of a document may defeat the very claim of the plaintiff. Lord Radcllffe has, however, made it very clear that documents containing matters of high politics, diplomatic relations or such secrets would undoubtedly be privileged. Thus, so far as this case is concerned it fully supports the position taken by the Union of India in claiming the plea of privilege in respect of the documents concerned.

494. In D. v. National Society for the Prevention of Cruelty to Children (1977) 1 All ER 589 it was held that the administration of justice was a fundamental public interest though not an exclusive public interest.

495. Although the facts of this case are quite different from the facts of the present case, yet the case cited above undoubtedly recognised administration of justice as a fundamental' public interest. Once this is so, then by the force of Section 123 of the Act, disclosure cannot be permitted and the Government would be entitled to take the plea of privilege,

496. In none of these cases, the document in respect of which privilege was claimed related to top secrets of high officers involving Government decisions on important policy matters relating to higher judiciary as in the present case. In these circumstances, these cases are not of much assistance to the petitioners.

497. In Science Research Council v. Nasse 1980 AC 1028 a complaint was filed with the Industrial Tribunal alleging discrimination on grounds of sex and marital status. At the hearing a prayer was made for the petitioners for inspection and discovery of certain documents which were in the nature of confidential assessments of each employee. The Tribunal ordered the disclosure and the Appellate tribunal also confirmed it. On appeal to the court of Appeal, a fresh affidavit was filed showing the nature of the confidentiality of the documents. The appellate court held that if the documents were disclosed it would amount to breach of faith and could lead to industrial trouble thus causing injury to public interest. The appellate court, however, set aside the order allowing the plea of privilege and held that the documents were not entitled to privilege. The decision of the appellate court was confirmed by the House of Lords in appeal where it was held that no principle of public interest immunity protected such confidential documents and they were not immune from disclosure on the basis of confidentiality alone. Great reliance has been placed by the petitioners on this aspect of the matter decided by the House of Lords. It is true that the plea of privilege on the ground of confidentiality was overruled but the decision given by the House of Lords cannot be divorced from the facts before them. What was sought to be disclosed were merely confidential reports of the employees concerned. No great constitutional or legal importance was attached to the documents as such or for that matter the documents as we have in the instant case. In this connection, Lord Edmund-Davies observed as follows:

Whether a tribunal or court should decide that they themselves should inspect must always depend on the particular facts and issues, though it is difficult to see how they can ever properly conclude that discovery is "necessary" without

such inspection. But where a court inspection is decided upon, there can be no hard and fast rule as to when it should take dace.

. . . .

The Court of Appeal rightly held that discovery should not have been ordered in either of these two cases without the respective industrial tribunals or the appellate courts first inspecting the withheld documents. That unfortuntely not having been done, it follows that both appeals should be dismissed.

Lord Fraser spoke in the same strain and held that confidentiality was not a separate head of privilege but may be a very material consideration to bear in mind when the question of privilege is raised.

498. Thus, what the House of Lords held was that the element of confidentiality in the documents was not so acute or sensitive as to create any public interest. On the other hand, public interest itself in the circumstances required disclosure. This case, therefore is of no assistance to the petitioners because the facts of the present case are essentially different from the facts of that case. In the instant case, after inspection of the documents it cannot be said that only private interests were involved and that there was no injury to public interest. The disclosure of the confidential notes and correspondence between three very high constitutional functionaries, viz., CJI, Law Minister and the CJ, Delhi High Court containing matters on which no public debate could be allowed were undoubtedly matters of great public interest. On the other hand, the interest of Justice Kumar was a purely individual interest which must yield to public interest. On the face, therefore, of the ratio of this case, the plea of privilege would have to be upheld straightway.

499. In Burmah Oil Co. Ltd. v. Bank of England 1980 AC 1090 the following observations were made by Lord Wilberforce:

It is, in my opinion, necessary for the proper functioning of the public service that the documents in Category A and Category B should be withheld from production. They are all documents falling within the class of documents relating to the formulation of Government policy, Such policy was decided at a very high level, involving as it did matters of major economic importance to the United Kingdom. The documents in question cannot properly be described as routine documents. Those in Category A are all documents passing at a very high level, including communications intended for the guidance and recording the views of the Prime Minister or recording discussions at a very high level.

. . . .

The basis for an immunity claim, then, having been laid, it is next necessary to consider whether there is any other element of public interest telling in favour of production. The interest of the proper and fair administration of justice falls under this description. It is hardly necessary to state that the mere fact that the documents are or may be 'relevant' to the issues, within the extended meaning of relevance in relation to discovery, is not material. The question of privilege or immunity only arises in relation to 'relevant' documents and itself depends on other considerations viz., whether production of these documents (admittedly relevant) is necessary for the due administration of justice.

. . . .

It may well be arguable whether, when one is faced with a claim for immunity from production on 'public interest' grounds, and when the relevant public interest is shown to be of a high, or the highest, level of importance, that fact is of itself conclusive, and nothing which relates to the interest in the administration of justice can prevail against it.

. . . .

A claim for public interest immunity having been made, on manifestly solid grounds, it is necessary for those who seek to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of particular documents. When this is demonstrated, but only then, may the court proceed to a balancing process.

500. It was thus held that the documents should be produced for inspection by the House of Lords. As the said case was not one where without inspection of documents it was possible to decide whether the balance of interest lay for or against disclosure after inspecting the documents the majority of the Lords arrived at a finding of fact that none of the documents contained such, confidential matters as could form the basis of a plea of privilege. Lord Wilberforce,

however, dissented and held that the Minister's certificate would amount to public interest immunity, and the documents could not be inspected.

501. This case also, has absolutely no application to the facts of the present case because this Court after hearing the arguments of the parties on the issue of privilege by an. interim order held that the court was entitled to inspect the documents and after inspecting the documents I am clearly of the view that having regard to the magnitude of the matter, the heavy stakes involved, the disclosure would amount to denigration of not only the judiciary but also the other constitutional functionaries who have figured in the case result in the gravest possible injury to public interest and to the running of public services.

502. In the aforesaid case, Lord Edmund Davies classed the documents into three categories, which may be extracted thus:

Category A

These consist of communications between, to and from ministers (including ministers' personal secretaries acting on behalf of ministers) and minutes and briefs for ministers and memoranda of meetings attended by ministers. All such documents relate to the formulation of the policy of the government..." The minister thereafter sets out various aspects of government policy in relation to the financial difficulties of Burmah.

Category B

These consist of communications between, to and from senior officials of the Department of Energy of the Treasury, and of the bank including memoranda of meetings of and discussions between such offcials and drafts prepared by such officials (including drafts of minutes and briefs comprised in category A), all such communications and drafts relating to the formulation of one or more aspects of the policy described in category A,"

Category C

These consist of memoranda of telephone conversations and meetings between senior representatives of major companies and other businessmen on the one hand and a minister or senior officials of government departments and of the bank on the other and memoranda of meetings of such officials and briefs for ministers and drafts of such briefs, all recording or otherwise referring to commercial or financial information communicated in confidence by such company representatives and businessmen.

After mentioning the categories, Lord Davies observed as follows:

There can be no doubt that the court has power to inspect the documents privately. This much clearly laid down in Conway v. Rimmer 1968 AC 910. I do not consider that existence of such power, in cases responsibly regarded by the court as doubtful, can be treated as itself detrimental to the public interest. Indeed, I am of opinion that it is calculated to promote the public interest, by adding to public confidence in the administration of justice.

503. It is true that the majority opinion was that the plea of privilege should be overruled but although the categories, mentioned above consisted of confidential documents they all related to purely commercial, transactions and did not contain any constitutional colour or any element of affairs of the State. The same cannot be said so far as the documents in the instant case are concerned. These documents are not only of great public importance but are directly concerned with the affairs of the State in that the Council of Ministers while giving advice to the President for not extending the term of Justice Kumar had expressly relied on these documents though it has not, been shown to our satisfaction that these documents, form part of the Memo. of Advice tendered to the President. In such a case, the documents would have been beyond any enquiry under Article 74(2), apart from the question of the application of Sections 123 and 124 of the Evidence Act

504. Another case relied upon by the petitioners was Neilson v. Laugharne (1961) 1 All ER 829. Lord Denning approached the question with the usual ingenuity and observed as follows:

This modern development shows that, on a question of discovery, the court can consider the competing public interests involved. The case is decided by the court folding the balance between the two sides. One of them is asserting that, in

the interest of justice, the documents shoud be disclosed. The other is asserting that, in the public interest, they should not be disclosed, Confidentiality is often to be considered., So is the need for candour and frankness.

Once it is decided that the public interest is in favour of non-disclosure, the decision is regarded as a precedent for later situations of the same kind.

Lord Denning ultimately held that in his opinion the documents were privileged. It may be noted that the documents in respect of which privilege was sought were merely statements before the police. Thus, even though the documents were doubtless confidential, a possible view could be taken that the plea of privilege should not be allowed. In spite of these facts, the majority of the law Lords agreed with Lord. Denning and held that there was a real danger to public interest if disclosure was made. In this connection Lord Oliver observed thus:

Taking all these considerations into account, I think that there is a very real danger that the prospect of disclosur on discovery of material gathered in the course of such ah inquiry will inhibit the proper conduct of the inquiry and thus frustrate the purpose of the legislature in making statutory provision for it. In my Judgement, therefore, the public interest requires that these documents should be protected as a class, and I accordingly concur in the conclusion of Lord Denning M.R.I agree that the appeal, should be dismissed.

505. Thus, although this case makes a slight departure from the view taken by the earlier cases it has not favoured the extreme position which seems to have been taken by the petitioners on the plea of privilege and which has been clearly negatived by the decisions of bur court.

506. Reliance was also placed by Mr. Sorabjee on a book 'Public Law (1980), by I.G. Eagles where at page 275 the author makes the following Observations regarding Cabinet papers:

If the reason, for excluding cabinet or related documents is to safeguard the proper functioning of the higher organs of the state, then that reason is wholly inappropriate where what is charged is the grossly improper functioning of these very organs. The interest of the wider community in getting to the bottom of such charges is so great that it should not be impeded by a mere rule of evidence. Not can the decision to admit or exclude be safely left to those who are themselves charged with misconduct; (nor for that matter can it be left to their political associates or even, their opponents).

507. With due respect to the learned author, the principles have been rather broadly stated and do not fit in either with the democratic set-up of our country or with the spirit of our Constitution. For instance, Cabinet decisions, however Wrong or proper they may be, are undoubtedly secret documents and if any such document forms part of the advice tendered to the President then there is a clear constitutional mandate by virtue of Article 74(2) preventing the court from embarking on any inquiry into these documents. Thus, the question of disclosure cannot arise in such cases and the observations of the author become wholly inapplicable to the situations contemplated by our Constitution and the statutory laws. In these circumstances therefore, I cannot accept the view of the author, extracted above.

508. It would thus be seen that even from English decisions, it is clear that the Court itself should prevent disclosure of. documents whose production will be contrary to public, interest even if no claim is made by a Minister or other high official on his behalf. This was held as we have pointed out, in Sankey's case (21 Australian LR 505) (supra) as also in Conway's case ((1968) AC 910) (supra) where Lord Reid has clearly stated that it is the duty of the Court to prevent disclosure of documents even without the intervention of a Minister, where serious injuries to the national interest is apparent. Thus both the leading cases of England and Australia have not accepted the liberal doctrine of candour expounded by the American authOrs. In the instant case, it is manifest that the Union of India has not taken the plea of privilege merely to hide the truth or to prevent the court from knowing the truth in fact, both the Attorney-General and the Solicitor-General had frankly conceded And voluntarily produced the documents before the court for inspection in order to judge whether the disclosure of the documents would injure the public interest. This shows the bona fide of the stand taken by the Union of India. As, however, my Brother Judges after inspection decided to disclose the documents, the Union of India gracefully accepted the decision. I might mention that this is not one of those cases where a litigant is trying to conceal a document which may destroy his case or scuttle his defence. This seems to be the cardinal principle behind the doctrine of candour adumbrated by the American decisions.

509. I have summarised the opinions of the English, American and Australian courts on the question of privilege. While applying the law to Indian conditions which are essentially different from those prevailing in England, America or Australia, two important factors have to be borne in mind--

(1) That so far as our country is concerned we have chosen to base it on the British pattern with some additions, alterations or innovations to suit our own local, social and economic conditions because our ways of living and thinking, our attitude towards life and its various phases and above all, the mode of governance of the country are very different from and have nothing in common with the United States of America. Whereas in America there is mass education, illiteracy is the common feature of the masses of our country. We are no doubt making fast progress but it will require quite sometime before we become as advanced as the United States of America.

Even though the recently decided English cases may have taken a much broader and a more liberal view, the founding fathers of our Constitution had before them the old view and this Court has consistently followed the English decisions so far as the question of privilege is concerned.

(2) While neither in England, Australia or America there is any codified law laying down the principles and the grounds on which privilege can be claimed, in India we have Sections 123 and 124 of the Evidence Act which govern the conditions under which a plea of privilege can be allowed or disallowed.

Another law which affects the question of privilege is Section 162 of the CrPC which has also to be read in conjunction with Sections 123 and 124 of the Evidence Act.

510. Apart from these two sections there is also a constitutional provision which is enshrined in Article 74(2) under which no enquiry can be made by any Court in respect of the advice tendered by the Council of Ministers to the President. In the instant case, the order impugned has been passed by the President on the advice of the Council of Ministers. Although it has been alleged in the note of arguments that the contents of the documents were part of the material on the basis of which advice was given to the President, it has not been shown to our satisfaction that the correspondence contained in the documents formed part of the actual Memo, of advise sent to the President. If such evidence was produced before us then the matter would have been put beyond controversy because apart from the question of privilege arising under Sections 123 and 124 of the Evidence Act, the enquiry of disclosure would be barred by the constitutional mandate contained in Article 74(2).

511. In view of these circumstances, therefore, before importing the doctrines or the liberal trend of modern cases across the seven seas, we cannot overlook the mandatory provisions of the Evidence Act and the CrPC. Furthermore, while in England and America the democratic system of Government has been existing for more than two or three centuries, our democracy is only three decades old, which is a very small period in the life of a nation and. we have yet to develop our law by a process of adaptation and accommodation, rejection or modification, or by a trial-and-error method. This Court while construing Sections 123 and 124 of the Evidence Act was fully alive to the conditions prevailing in our country and the manner in which the public services were run and the Central Government or the State Governments took important decisions. Any revolutionary decisions so as to expose high confidential matters to public gaze by following a policy of liberal disclosure of documents ignoring the provisions of Sections 123 and 124 of the Act would not only be detrimental to our progress but may cause serious obstruction in the practical running of day-to-day affairs of the Government or for that matter the governance of the country itself.

512. For these reasons, therefore, while I have referred to the foreign decisions I would like to confine my decision mainly to those English cases which apply to our present day conditions and to the principles laid down by our own courts in their leading judgments which have been discussed and analysed in this judgment. While I am prepared to take a liberal view having regard to the fact that we have by our recent decisions widened the horizon of Article 21 so far as the inspection of the documents by the Court is concerned, but if after inspection of the documents the Court is satisfied that the tests laid down by this Court in several cases are not fulfilled then the plea of privilege must be upheld.

513. Thus, after a full and complete analysis of the various factors indicated above, it is established beyond doubt that so far as this Court is concerned it has chosen to follow the principle of English law with suitable adjustments and modifications in determining the plea of privilege under Sections 123 and 124 of the Act. This is, as it should be, because as pointed by Kapoor J. in Sodhi Sukhdev Singh's case MANU/SC/0006/1960 (supra) that since the Evidence Act was enacted during the British rule and we have generally ad-opted the English system in procedural matters, we should not depart from the basic and essential principles of interpretation, as laid down by the English law. I, however, respectfully agree with Subba Rao, J. that while construing Sections 123 and 124 and applying the principles of English law, we must do so against the background of the Socialist State and the egalitarian society which is the goal of our Constitution instead of confining the contours of privilege in a strait-jacket; in suitable cases a liberal view can be taken by this Court without violating the express language or the general spirit of the statutory provisions of the Evidence Act. I might mention that so far no CASE has ever held that Sections 123 and 124 are unconstitutional and this could

not be so because these provisions deal with matters relating to great public interest. Even in the course of arguments before us it has not been suggested that these sections are violative of any of the Articles of the Constitution. Mr. Garg appearing in Tarkunde's case had hinted that the aforesaid sections should be interpreted in the light of Article 21 but he has not categorically contended that the aforesaid sections are violative of any of the provisions of the Constitution.

514. Another important circumstance that has to be taken into consideration is that even after more than three decades of our independence, the Parliament despite so many socio-economic changes all over the world has not thought it advisable or necessary to amend the provisions of the Evidence Act so as to liberalise or widen the scope of the policy of privilege contained in Sections 123 and 124 of the Act by incorporating the principles laid down in the recent English or American cases. This intrinsic circumstance demonstrably proves that the view taken by the Supreme Court over the years is correct and does not call for any amendment of the Evidence Act by the Parliament. On a parity of reasoning, the irresistible conclusion that follows and the natural presumption that arises is that our legislature did not intend to make a departure from the earlier English decisions either by incorporating or adapting the principles of Amercian law on the subject. I might even go to the extent of saying that it will not be unreasonable to presume that the Founding Fathers of the Constitution and the Parliament thereafter having been fully aware of the view taken by the American courts in recent decisions has affirmatively chosen to reject the liberal and somewhat dangerous doctrine of candour. For instance, as discussed above one of the American cases has gone to the extent of holding that even military secrets can be disclosed in suitable cases. Our courts have clearly held that so far as Defence secrets or good neighbourly relations with other countries are concerned, there is complete bar to the disclosure of these matters or documents relating to these matters which are clearly covered by Section 123 or Section 124 of the Act.

515. There is another fact of life which, however unpleasant, cannot be denied and this is that precious little are our masses or litigants concerned with which Judge is appointed or not appointed or which one is continued or not continued. The high sounding concept of independence of judiciary or primacy of one or the other of the Constitutional functionaries or the mode of effective consultation are matters of academic interest in which our masses are least interested. On the other hand, they are mainly concerned with dangerous forces at work and evils reflected in economic-pressures, inflationary tendencies, gruelling poverty, emancipation of women, maintenance of law and order, food and clothing, bread and butter, and above all the serious problem of unemployment,

516. It is only a sizeable section of the intellectuals consisting of the press and the lawyers who have made a prestigious issue of the independence of judiciary. I can fully understand that lawyers or other persons directly connected with the administration of justice may have a grievance however ill-founded that proper selection of Judges or interference with the appointment of Judges strictly according to constitutional provisions may mar the institution of judiciary and therefore they may to some extent be justified in vindicating their rights. But at the same time, however biting or bitter, distasteful and diabolical it may seem to be, the fact remains that the masses in general are not at all concerned with these legal niceties and so far as administration of justice is concerned they merely want that their cases should be decided quickly by Judges who generate confidence. They are least concerned with individual Judges or the mode or manner of their appointment. Carried away by the stormy and emotional debate of the lawyers appearing for the petitioners and their egotistic slogan that independence of judiciary was in danger, this Court ought not to have broken the ageold solid and sacrosanct tradition of upholding the plea of privilege which caused serious injury to the public interest. But lo and behold! the result of the disclosure has revealed widespread dangers and ills, for anybody in the street without appreciating the niceties of law looks upon the judiciary as suspect. Did we disclose the documents to produce such disastrous results? It is difficult to construct an edifice but very easy to demolish the same. But, alas! we have demolished it and caused irreparable damage for which our future generation will never forgive us. Whether I was right in upholding the plea of privilege, or my Brothers in ordering disclosure of documents, only time will tell.

517. Coming to -the practical side of the dangerous consequences of disclosure which might highlight my view that after inspecting the documents, it was not in public interest to order disclosure of the contents of the documents, the following considerations have swayed with me:

(a) appointment of High Court judges are highly confidential matters containing frank and free legal views expressed by the CJ of the High Court, CJI and the Central Government represented by the Law Minister and the Council of Ministers. These authorities have expressed their views in the secret correspondence on the distinct assurance and belief that for the last two centuries such documents have always been treated as secret, confidential and privileged and until to-day no disclosure of such documents has ever been allowed by any Court. Thus, in my opinion, any disclosure of the contents of the documents would be extremely derogatory to the High constitutional position that these Constitutional functionaries enjoy and would, in the long run prove counter-productive and destroy the sacrosanct consultative process as envisaged by the Constitution.

(b) If disclosure is allowed, it will bring into disrepute the judicial institution itself and lead to a continual process, of washing of dirty linen and perpetual mudslinging by allowing the so called wronged persons to make allegations and counter-allegations against the Government and the CJ concerned as was sought to be done in this very case, It is true that even after the contents of the documents are disclosed, the petitioners cannot be allowed to travel beyond the material disclosed by the documents but even that material could be exploited and affect the secrecy of such high constitutional officers and raise a controversy which will ultimately lead to opening a pandora's box which is neither in the interest of the judiciary nor even of the lawyers. I fail to see how in the long run the disclosure benefits the Judge. In the ultimate analysis such a course of action apart from involving the CJI and CJ, Delhi High Court and Law Minister into serious controversy would destroy the reputation of the judge himself howsoever loudly he might proclaim his innocence. Taking the case of the petitioner, Kumar, at the highest and assuming that the petitioner is reinstated and he ultimately gets the satisfaction of his right having been vindicated, can he deny that in view of the serious difference of opinion between the CJ, Delhi High Court under whom he had worked and the CJI, a sizeable section of the people might still believe that the integrity of the Judge was not beyond doubt which may have prompted the CJ under whom he worked not to recommend his case for extension. Even if this impression is carried by a small section of the people, it will be a great slur on the functioning of the Judge. My personal conception of a Judge is that he should be above all criticism and controversy; he should be blameless and spotless, full of virtues and free from Vices like a 'diamond in the sky' like 'Caesor's wife above reproach. It is in my opinion better not to be a Judge at all than to be a controversial Judge.

(c) It is not that for the first time that the term of an Additional Judge has not been extended or a Judge has been dropped. The various schedules given by the respondents show quite a few instances where Addl. Judges were sent back after their period was over without any protest or objection.

(d) Indeed, if a really conscientious judge would have been in the position of petitioner, Kumar, he would have silently walked out of the show in the larger interests of the great and sacrosanct institution which he was serving instead of insisting on disclosure and thereby drawing himself into a serious controversy to vindicate his supposed right. I have already pointed out that it is hot for the first time that the term of an Additional Judge has not been extended: in the past also Judges have been dropped and one of the schedules given by the Solicitor-General is full of such instances. Such Judges never raised any controversy regarding their not being reappointed and got reconciled themselves without any protest or objection perhaps in due deference to the maintenance of the purity of the great institution of justice.

I cannot help commending the conduct of Justice Ismail who actually resigned and chose to quit his office instead of pursuing the matter further in the larger interest of the purity of administration of justice. The life of a judge is that of a hermit and he must inculcate a spirit of self-sacrifice and should take his profession in this holy spirit.

(e) The subsequent events following the disclosure of the documents * which have been fully published by the press and other media clearly show that there has been a serious character assassination of a high constitutional functionary for merely expressing his opinion in a very frank and honest manner and that too behind his back. The contents of confidential notes and letters have been exploited for their personal ends by interested parties. Thus, the apprehension and danger which I had predicted from disclosure has come to be true and hence forward there would be hardly any Head of, a Department, who can function properly or effectively with the sword of damocles hanging over his head. No high authority would now venture to record adverse annual confidential reports on the conduct of his subordinates or express his honest opinion howsoever unsatisfactory the conduct of the subordinate may be.

There is yet another distressing feature of the disclosure of documents. It would appear that the GJ, Delhi High Court was castigated as being dishonest and prejudiced against Justice Kumar for having refused to recommend his extension or reappointment. The same is being openly said in the Press regarding the CJI in respect of his adverse comments on Mufti Bahauddin, Acting Chief Justice of J&K High Court.

While CJ. Delhi has given cogent reasons for not recommending the re-appointment of Justice Kumar in his proposal to the Law Minister (a copy of which was sent to the CJI) which was by a full and frank discussion between CJ. Delhi and CJI. there is nothing to show that the materials or the data on which the CJI formed his opinion against Just-ice Mufti Bahauddin and as he says in his proposal found some substance in the complaints yet all this was done when Justice Bahauddin was neither a party to the present proceedings, nor was he ever heard in his defence and yet he has been publicly condemned, thanks to the disclosure. However, in the instant case, we are not at all concerned with the case of Justice Mufti Bahauddin but I have given this instance to show that if disclosure of confidential documents are liberally allowed by throwing public interest to the winds, what dangerous consequences can follow which may injure innocent constitutional functionaries. In the case of Justice Kumar C.J. Delhi High Court and the CJI have not revealed the source of their information and in my opinion rightly because anyone who gave them the information must have done so in confidence and according to the correspondence, it appears that senior colleagues of the CJ, Delhi High Court and

eminent lawyers had supplied the information to him and similar authorities had given some counter-information to the CJI,

518. Thus, such an awkward and embarrassing situation is bound to develop if disclosures are liberally made as a result of, which serious injury is caused to public interest. The most unfortunate part of the disclosure in this case is that persons who are not before the Court have been involved in serious legal and political controversy which has, in my opinion, caused serious damage to the high judicial institutions of the country, posing a very serious problem to the Central Government and the public services.

519. The Solicitor-General made a feeble attempt to argue before me that since I have dissented from the majority view and upheld the plea of privilege I should not deal with the contents of the documents in my judgment. This argument, which appears to me to be somewhat extraordinary, cannot be accepted because the decision of the majority amounts to the law laid down for the whole country under Article 141 of the Conistitution and is as such binding on me as on others. As a result of the majority decision, the documents disclosed form part of the record and if I shut my eyes to these documents merely because I have dissented from the majority view, it would perilously amount to being subversive of judicial discipline. I have, however, carefully waded through the documents and I do not think that much can be made of the contents and recitals in the documents. These are my reasons for upholding the plea of privilege taken by the Union in the cases of Mr. Kumar and Mr. K.B.N. Singh.

520. A careful perusal of the letters written by the CJ, Delhi High Court to the Government as also to the CJI would reveal that the stand taken by CJ, Delhi has been consistent throughout. He has honestly and frankly taken the stand that in his view as the reputation of Justice Kumar was not above board and his performance was rather slow, he was not prepared to recommend his reappointment after the expiry of his term. He has disclosed in his letter the grounds for coming to this conclusion which were derived partly from knowledge which he got from senior lawyers or senior colleagues and partly from certain facts. After sending the letter he had a full discussion with the CJI on all the points which are contained in the first letter which the CJ, Delhi wrote to the Law Minister. The CJI, however, took the stand that on his inquiry made from the lawyers and Judges of the High Court, he had no reason to doubt the integrity or honesty of Justice Kumar. It is also admitted that the CJ, Delhi had no animus against Justice Kumar and there was no reason why he should have expressed his opinion refusing to recommend his reappointment, without any sufficient reasons or due to enmity. The only argument advanced against the CJ, Delhi was that he had sent a letter to the Law Minister in which he had disclosed some data and details and had requested him to keep them secret, and had also prayed that the letter may not be shown to anybody else as it was meant for him. The argument was that there is no evidence to show that the materials disclosed to the Law Minister were shown to the CJI. It is, however, not disputed that the CJ. Delhi wrote such a letter to the Law Minister after his discussion with the CJI and the possibility that he may have discussed all matters including the materials put in writing to the Law Minister with the CJI cannot be excluded.

521. At any rate, without going into further details as several constitutional functionaries were involved, two facts emerge:

(1) That CJ, Delhi who had undoubtedly a better chance of observing the performance and the functioning of Justice Kumar, was in a position to get first hand knowledge of his reputation, has honestly believed that Kumar's reputation of integrity was doubtful. He has not revealed the sources from which he came to know about the reputation of Justice Kumar. The CJI, however, took a contrary view but he has also not disclosed the names of the lawyers or Judges who had given him a contrary version.

In my opinion both of them did not disclose the names because the Judges or the lawyers concerned must have given the information in confidence and they would have been seriously embarrassed if their names were disclosed.

(2) These views were put before the Central Government and it was open to the President to accept one view or the other. The President chose to accept the view taken by the CJ, Delhi more particularly because he was in a position to have first-hand information both regarding the reputation and working of the Additional Judge.

522. In these circumstances, it cannot be said that the action of the President was tainted by malice or that there was no effective consultation. This aspect of the matter has been elaborately dealt with by my Brothers Bhagwati, Desai and Venkataramiah, JJ with whom I am in general agreement

523. I might just state that even if the documents were not disclosed, the conclusion would have been the same because in the affidavits it was not disputed that the two CJs had taken a contrary view regarding the doubtful reputation of

Justice Kumar, nor was it suggested that CJ, Delhi had any ill-will or animus against Kumar. The disclosure of the documents, however, unfortunately resulted in grave and serious consequences of far-reaching effect on the future of not only the judicial institutions but also almost all the Government departments.

524. While agreeing with Brothers Bhagwati, Desai and Venkataramiah, JJ. regarding the interpretation of Article 224, I would, however, express my short opinion on the subject. Although it is true that by fixing the strength of permanent and Additional Judges of each High Court, the Central Government appears to have created two parallel lines of recruitment so that the appointment of an Additional Judge was a sort of training ground for being appointed as a permanent Judge whenever a permanent vacancy arose. It has already been pointed out by Brother Venkataramiah J. that this procedure was against the very spirit and tenor of Article 224 which is extracted thus:

224. Appointment of additional and acting Judges.--(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be Additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty-two years.

525. If properly read, this Article envisages certain conditions precedent before an appointment under Article 224 can be made and also prescribes the nature and the term of the Judge appointed. In the first place, it requires that an Additional Judge can be appointed only if--

(1) there is any temporary increase in the business of a High Court, for instance, where by virtue of some new temporary law passed, a spate of litigation crops up but that ends with the duration of the Act or with the completion of the temporary reforms, etc., contemplated by the statute. Such an appointment is a kind of an emergency appointment which is to last until the temporary increase or arrears are disposed of,

(2) where by reasons of heavy arrears of work it becomes necessary to appoint an Additional Judge, the appointment is made under Article 224.

526. The Article, therefore, contemplates only a tenure appointment to meet a particular contingency and is not meant to be a permanent feature so as to form a training base for recruiting Judges from the training base to the permanent cadre. This point need not detain us any further in view of the statement made by Mr. Mridul on behalf of the Law Minister that it has now been decided as a matter of policy by the Government not to appoint Additional Judges for a period of less than one year in special cases and two years normally. If this is done in future, then the spirit of the Constitution would be amply fulfilled and the controversy would be set at rest.

527. A more important feature is that the nature of the appointment under Article 224 is a pure tenure appointment for a fixed period and once the period expires, there is no question of extension of that period or reappointment. In other words, once the time for which a Judge has been appointed expires, the appointment of the Judge ceases to exist. That being so, whenever a Judge is sought to be appointed afresh, the constitutional functionary will have to go back to Article 217 even if a Judge is to be appointed under Article 224 and the question of suitability would be the first criterion. As in the case of initial appointment under Article 217, so in the case of a fresh appointment after the period mentioned in Article 224 expires, there is no legal right to be appointed nor does non-appointment give rise to any legal or constitutional infirmity so as to be the subject of a judicial review. It is a different matter that if an Additional Judge is considered for a permanent appointment afresh, the fact that he has acquired some experience would undoubtedly be an important factor to be taken into consideration while judging the suitability of the candidate concerned. At the same time, the constitutional functionaries cannot shut their eyes to the facts which may have come to their knowledge either against the Additional Judge or in his favour.

528. Thus, the position is that even if an Additional Judge is not appointed afresh and somebody else is appointed, there is no question of judicial review nor is there any question of the non-appointment of an Additional Judge afresh casting any reflection or aspersion on the reputation or character of an Additional Judge because he was appointed only for a

particular period and for a particular purpose and is not on probation. Both Brother Desai and Brother Venkataramiah, JJ. have stressed this aspect of the matter in their own way and I agree with their views.

529. While dealing with the facts of Justice Kumar's case, Brother Venkataramiah, J. has observed that although there was full and effective consultation between the CJ, Delhi, CJI and the Law Minister, therefore the lion-appointment of Mr. Kumar is not vitiated by any constitutional infirmity. At one place, however, Brother Venkataramiah has observed as follows:

Perhaps it would have been acceptable if the case was that the Prime Minister was favourably disposed towards Shri S.N. Kumar but the Law Minister had tried to mislead her.

(Emphasis mine)

530. With due respect to my learned Brother I am unable to agree with these observations which cannot be spelt out from the correspondence between the constitutional functionaries mentioned above, In fact, a close and careful perusal of the correspondence between all the constitutional functionaries, (CJ, Delhi, CJI and the Law Minister) would clearly show that the role of the Law Minister has been very fair and just from start to finish. The Law Minister insisted on the materials Before taking a decision against Mr. Kumar. These materials were supplied to the Law Minister by the CJ. Delhi. He had also discussions with the CJI: Even thereafter the Law Minister wanted to plug all loopholes in order to satisfy himself fully before taking a final decision in the matter, and that is why he wrote to the CJ, Delhi to furnish a complete data and better particulars which was done by him (CJ, Delhi), through his letter D/- 7-5-81.

531. It is obvious that the CJ, Delhi expressed his desire that the full material which was supplied to the Law Minister may not be sent to the CJI but that was perhaps because the CJ, Delhi had oral discussions with the CJI in respect of all relevant material. The law Minister also took care to ignore the CBI reports against Mr. Kumar because he wanted to proceed purely on legal and relevant materials before him. This shows the objectivity and the fairness of his attitude in coming to a final decision. Merely because he had advised the Prime, Minister to accept the opinion of the Chief Justice of Delhi, it cannot be said that he tried to mislead the Prime Minister. In my opinion, to suggest even indirectly that the Law Minister attempt-ed to mislead the Prime Minister, in view of the circumstances mentioned above, would be to make a most uncharitable remark against him amounting, to inflicting an 'unkind cut indeed'. My Brother Bhagwati, J. has demonstrably shown that there is not a shred of evidence nor any reasonable basis for holding that there was a conspiracy between CJ, Delhi and Law Minister to oust Mr. Kumar. The allegation of the alleged conspiracy is totally unfounded and smacks of absolute recklessness. Indeed if the Law Minister Wanted to drop Mr. Kumar without any further inquiry he could have used the I. B. Reports--that he completely ignored them, proves his honesty of purpose. Merely because while exercising a constitutional function the Law Minister preferred the opinion of CJ, Delhi to that of CJI, no motive could be imputed to him, particularly when we have rejected the doctrine of primacy of CJI, as dealt with by Desai. J. with whom I fully agree.

532. I entirely agree with the very clear and adroit exposition of the constitutional aspect of the Article 224 by. Brothers Bhagwati and Desai, JJ. as also with the most elaborate, careful and detailed analysis of Kumar's case in the light of the correspondence disclosed. I also agree with the opinion expressed by Brother Venkataramiah, J. but would like to add a few lines to highlight some aspects of the reasons given by Brothers Bhagwati and: Venkataramiah, JJ. which seem to me to be either inconsistent with the stand taken by them or do not accord with my view. Hence, I find myself bound to express my short opinion on these matters only.

533. Brother Bhagwati, J. after carer fully analysing the facts of Kumar's case as spelt out from the correspondence disclosed and the affidavit filed by Mr. Kumar has returned a clear finding that the conduct of CJ, Delhi was throughout honest and bona fide and he had acted as a responsible and honest CJ. I fully agree with this conclusion but Brother Bhagwati, J. appears to have found fault with the CJ, Delhi for expressing his desire to the Law Minister to keep the contents of his letter dated 7-5-81 secret and not to place the same before the CJI. Brother Bhagwati, J, has himself pointed out that CJ, Delhi had given cogent reasons for requesting the Law Minister not to disclose the contents to CJI and yet in his concluding portion while not doubting the bona fide of the CJ, Delhi, he seems to suggest that he (CJ, Delhi) ought to have shown greater courage of conviction so as not to have been cowed down by the apprehension that CJI might feel offended and in this connection observed as follows:

We must of course, observe that in our opinion howsoever strong and cogent might be the three reasons given by him, the Chief Justice of Delhi should never have asked the Law Minister not to place his latter dated 7th May, 1981 before the Chief Justice of India... He should not have bothered whether by his action in putting the facts on record in the letter

dated 7th May, 1981 the Chief Justice of India would be offended and his relations with the Chief Justice of India would be spoilt.

534. Perhaps in making these observations with great respect, Brother Bhagwati, J., did not fully appreciate the substantial and compelling reasons why CJ, Delhi had made a somewhat unusual though fully justifiable request to the Law Minister not to place the letter before the CJI. As the data and material supplied to the Law Minister in the letter dated 7-5-81 had already been supplied to the CJI or at any rate, orally discussed with him, it was not necessary for the Law Minister to have disclosed the contents of the said letter which would be more or less a surplusage and would have naturally embittered the relations between the two high constitutional functionaries (CJ, Delhi and CJI},

535. Secondly, if we put ourselves in the place of CJ, Delhi we would have done the same in the circumstances. Here was a Chief Justice who was only recently made permanent and was to continue as CJ for quite some time and so was the CJI., In these circumstances, it is natural and obvious that CJ, Delhi would not like to join issue with CJI at any stage or at every step which would create difficulties in the smooth running of the High Court,

536. Thirdly, since CJ, Delhi was frank, forthright and firm to stick to his stand despite pressures till the last, disclosure of contents to CJI was wholly unnecessary and, in my opinion, CJ, Delhi rightly thought that there was no use entering in an endless controversy and a consistent legal tug of war with CJI for whom not only he but every Judge has the greatest respect.

537. Finally CJ, Delhi at the time when 'he made the request could hardly imagine or conceive that the majority of our Brother Judges would permit disclosure of the documents leading to a public debate in respect of high official secrets which for the last two centuries-had never been disclosed. CJ, Delhi may have thought that if the matter leaked out, it was likely to be exploited by Mr. Kumar and his friends which would bring his Court to serious disrepute.

538. I feel that in view of the conspectus of the circumstances mentioned above and those detailed by Brother Bhagwati, J., CJ, Delhi was fully justified in requesting the Law Minister not , to reveal the contents of his letter dated 7-5-81 and to let the matter rest where it was. It is true that occasions may arise when a Judge in the discharge of his judicial functions has sometimes to perform an unpleasant duty but where awkward situations can be avoided with tact and wisdom the exercise of power is most laudable and beyond criticism.

539. For these reasons, therefore, I am unable to agree with the observations made by Brother Bhagwati, J, on this aspect of the matter only,

540. As regards the documents pertaining to justice K.B.N. Singh's case which have been disclosed I shall discuss them while dealing with Transferred Case No. 24 of 1981.

Transferred Case No. 24 of 1981:

541. We now propose to deal with the case of D.N. Pandey and others in which Justice K.B.N. Singh, Chief Justice of Patna High Court has now been transposed as petitioner No. 3. All the. connected petitions in respect of the transfer of Justice K.B.N. Singh from Patna to Madras High Court involve common points. The petitioner, Justice K.B.N. Singh was a practising Advocate of the Patna High Court and was appointed a Judge of the said High Court on September 15, 1966 and was made permanent Judge from March 21, 1968. Thereafter, he was appointed Acting Chief Justice of the Patna High Court for a short while and as permanent Chief Justice on July, 6, 1976. He was administered the oath of office on July 19, 1976. Since then, the petitioner continues to be the permanent CJ of Patna High Court.

542. By virtue of a notification dated January 19, 1981, the petitioner was informed that the President, after consultation with the CJI, was pleased to transfer him to Madras High Court as Chief Justice with effect from the date he assumes charge of that office. A similar notification was issued by which Justice M.M.K. Ismail, C.J. Madras High Court was transferred as CJ of the Kerala High Court but as Justice Ismail proceeded on leave and ultimately retired from service the petition which was filed against the order transferring him to Kerala no longer survives. Miss Lily Thomas who appeared on behalf of Justice Ismail, however, confined her arguments only to the question that the petitioner (Justice K.B.N. Singh) should not have been transferred to Madras.

543. If appears that after the notification, Mr. M.G. Ramachandran, Chief Minister of Tamil Nadu took great exception to the appointment of the petitioner as CJ, Madras. High Court mainly on the ground that he was not conversant with

Tamil language and, therefore, he would not be able to function property in the Madras High Court. We are, however, not concerned with these matters at the pre-pent moment.

544. Coming now to the facts which are germane for the purpose of deciding these petitions, the same may be summarised thus. The petitioner was appointed acting Governor of Bihar from 31st January, 1979 to 31st September, 1979, The CJI, who is respondent No. 2 in T. C. 24/81 visited Patna in February, 1980, according to the petitioner, for inaugurating the International Rotary Conference, The petitioner met the CJI in Patna and accompanied him to Nalanda and Rajgir. It was alleged by the petitioner that during his visit to Bihar the Hon'ble CJI did not give him any inkling of his transfer to Madras or for that matter to any other place, It was for the first time on January 5, 1981 that he received a telephone call from the CJI informing him that Justice Ismail was being transferred to Kerala and the petitioner would have to go to Madras. He then asked the CJI why he had decided to send him to Madras to which the CJI replied that it was the Government's policy that had necessitated his transfer from Patna to Madras. The petitioner states that he was quite upset and told the CJI that his mother who lives with him was seriously ill and bed-ridden and was not in a position to leave Patna without the risk of her life and also mentioned other circumstances and dfficulties and requested, that his transfer may not be insisted upon. The CJI is alleged to have told him that he was making a note of these circumstances. Three-four days later the petitioner came to Delhi and called on the CJI and told him of his acute and insurmountable personal difficulties to which reference had been made by him during his telephonic talk with the CJI. The petitioner was with him (CJI) for about 10-15 minutes at his residence but he found the CJI absolutely non-committal in respect of his transfer. The petitioner informed the CJI that he might be given a chance to remove any wrong impression that may have been created in his mind. The CJI, however, did not put any question or material to the petitioner.

545. The petitioner alleges that his transfer was notified without his previous consent nor did he give his consent, nor was he even consulted in any manner about his transfer to Madras. The petitioner further submits that no reasons, grounds or material necessitating or justifying his transfer from Patna to Madras were even disclosed to him or discussed by the President or the Government of India or anyone acting on their behalf or even by the CJI. He also denies that the transfer was necessary in public interest. This matter is a question of law for the Courts to examine. His main grievance was that had he been given a chance to express his opinion he would have pointed out his compelling personal circumstances and difficulties, more particularly the advanced age of his mother who was more than 85 years and was bed-ridden for two years,

546. The petitioner took the plea that he was not conversant with Tamil language, which was the official language of the State of Tamil Nadu, and this would therefore be a serious impediment in his functioning as the Head of judiciary in that State. He further alleged that his transfer was made without any effective consultation between the Government of India and the CJI and that it was based on irrelevant and nonexistent factors which were never disclosed to him. Thereafter, he took some legal pleas regarding the validity of the transfer, which as pure questions of law we have already dealt with while dealing with other cases. Then, he laid great stress on the statement made by CJI at Jaipur on January 19, 1981 that the Judges who were recruited with the understanding that they would not be transferred to other States should not be asked after their appointment to go to other States and according to the petitioner the CJI said that in such transfers the problem of language, education of their children could not be brushed aside, The petitioner seems to suggest that by agreeing or sponsoring his transfer to Madras, the CJI completely overlooked the observations made by him in Jaipur,

547. Another technical objection taken by the petitioner was that the transfer order was bad because no notification had been issued by the President determining the compensatory allowance until a Parliamentary legislation was passed as required by the provisions of Artcile 222. He then made reference to the recommendations of various Chief Justices Conferences held before his appointment. A number of other pleas were taken by the petitioner, but Dr. Shinghvi appearing for him, in view of the delicate and sensitive questions that arose, very rightly decided to argue the case on the convergence rather than divergence of the issues raised by the petitioner in his petition or in his affidavits.

548. As a plea for disclosure of the documents in the nature of correspondence which led to the transfer of the petitioner from Patna to Madras was also prayed for, a counter-affidavit was filed by Shri T.N. Chaturvedi, Home Secretary opposing the disclosure and taking the plea of privilege under Sections 123 and 124 of the Evidence Act. The Court by a majority of 6:1, as in other cases, in this case also overruled the plea of privilege and directed disclosure of the documents concerning the correspondence but omitting the notes and some minutes which fell within the ambit of Article 74(2) of the Constitution. The Hon'ble CJI, who is respondent No. 2, filed his counter-affidavit on 29-9-81, as directed by us, where he denied or rebutted most of the allegations of fact made by the petitioner in his affidavit. The petitioner filed another rejoinder OB 16-10-81 to the counter-affidavit of the CJI.

549. So far as the CJI is concerned, he admitted the fact that he visited Patna in Feb., 1980 but denied that he had gone there only for the purpose of inaugurating the Rotary International Conference. He averred that he visited Patna in the exercise of his official duties particularly in order to meet the Judges and the members of the Bar and had informed the petitioner regarding his visit to Patna on 23-2-1980. According to the CJI, inauguration of the Rotary International Conference was merely as incidental matter which he did during his presence at Patna. He has also stated that even before his visit to Patna he had received a letter from the petitioner enclosing a list of some senior Advocates whom he would like to meet individually but the CJI asked him to add names of five more Advocates.

550. On reaching patna, the CJI met the members of the Bar individually on 24-2-81 and on the next day in the evening he met the members of the Advocates Association in the High Court premises, He also admitted his visits to Nalanda and Rajgir. He further states that during his visit to Patna he did not give the petitioner any inkling about his proposed transfer to Madras because in Feb., 1980 there was no proposal to transfer him anywhere. The proposal of his transfer matured almost one year after.

551. The CJI further states that he did have a talk over the telephone with the petitioner on 5-1-81 and apprised him of the likelihood of his being transferred to Madras and asked him if he had anything to say. The CJI denied that he merely said that the petitioner was being sent to Madras in view of the Government policy but added that apart from the Government policy he had expressly told him that it was proposed to transfer him to Madras because he was an experienced and senior Chief Justice The CJI admits that the petitioner had informed him that his mother was bedridden and not in a position to go to Madras but he did not tell him (CJI) about any other difficulty, The CJI further states that the petitioner had hinted that if his transfer was insisted upon he would prefer to resign. Thereupon, he (CJI) requested him not to act in haste and to give the matter a close thought, He also informed the petitioner that he was making a note of the difficulty expressed by him. He also requested him to come to Delhi and discuss the question of his transfer. The CJI further states that the petitioner met him in Delhi 3-4 days later and was with him for 10-15 minutes and acquainted him (CJI) of his acute and insurmountable personal difficulties in the event of his transfer to Madras. The CJI further admitted that the petitioner was at his residence on 8-1-81 at 7.30 p.m., and during their discussion the question of his mother's advanced age and illness also came up which was the only personal difficulty stressed by him (petitioner). The CJI told him that he was unable to agree with him because there were other dependable persons in the family, including his brother S.B.N. Singh, who could look after his mother, The CJI also states that the petitioner gave him an impression that perhaps some complaints may have been made against him to the CJI which he would like to remove, on which the CJI assured him that he did not believe that his conduct was in any way blameworthy but certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. Other matters were also mentioned by the petitioner to the CJI which have no direct bearing on the Issue.

552. In para 5 of his counter-affidavit the CJI has averred that there was full and effective consultation between him and the President on the question of the transfer of the petitioner from Patna to Madras and that every relevant aspect of that question was discussed by him fully with the President both before and after he proposed the transfer, The other allegations made by the petitioner were denied. The CJI also stated that he was personally aware since Feb., 1980 that his (petitioner's) mother was advanced in age and was not in a good state of health. Admitting the allegation of the petitioner regarding his speech at Jaipur, the CJI mentioned in his affidavit that he had given thoughtful consideration to the personal difficulty narrated by the petitioner during his meeting.

553. Lastly, the CJI mentioned that as the petitioner was one of the senior most High Court CJs, he could function efficiently even despite the language difficulty.

554. The petitioner filed a rejoinder affidavit on 16-10-81 (hereafter referred to as the 'second affidavit') where he reiterated the allegations made in his first affidavit and denied some of the facts mentioned by the CJI. In his second affidavit he stated that the CJI had said that it was the Government's policy to effect transfers in batches of 2 or 3 Judges. This statement is a little inconsistent with his previous statement in his first affidavit where he had mentioned that he was informed by the CJI that it was the Government's policy. In that affidavit he did not say about the transfer in batches of 2 or 3, which seems to have been added in the second affidavit.

554-A. This is a most difficult and delicate situation where two high constitutional functionaries are involved and have given affidavits and counter-affidavits, In a matter of such a serious magnitude, the Court has to make a very careful and cautious approach having regard to the respectability of the persons who have sworn the affidavits, We would, therefore, like to avoid unnecessary details and, as rightly contended by Dr. Singhvi, confine our attention only to the points of convergence without touching the issues of divergence. Before, however, we deal with the admitted facts which emerge from the affidavits concerned, it may be necessary to refer to the well settled law on the subject of

effective consultation which is a necessary concomitant of a valid and constitutional order of transfer passed by the President.

555. Article 222 constitutes a clear mandate that the transfer of a Judge from one High Court to another can be made only in consultation with the CJI. As the connotation of the word 'consultation' has now been well-settled by a long course of decisions of this Court, it is not necessary for us to multiply authorities on this issue. We shall, therefore, refer only to those decisions which lay down complete and objective test for determining what constitutes effective consultation, in a particular case, To begin with, we shall start with Seth's case MANU/SC/0065/1977 which is the only decision directly in point and where the matter was discussed fully covering all shades and aspects of this important question. Before referring to that case a few introductory re-marks may be necessary,

556. We have already indicated above that on an interpretation of Article 222 the proposal for transfer of a Judge (which includes Chief Justice) from one High Court to another may emanate either from the President or from the CJI. Although according to the Memo, which was produced before us, the practice is that the proposal is to emanate from the President through the Law Minister but, as we have already pointed out that the Memo cannot override the provisions of Article 222 being only in the form of a guideline, there is nothing to prevent the proposal emanating from the CJI. In either case, however the process of effective consultation is to be gone through according to the principles laid down and directions given by this Court, In the instant case, the admitted position is that the proposal for transfer of the petitioner for the first time emanated from the CJI by virtue of his letter dated 7-12-80, At that time of the recommendation of the CJI was to transfer the petitioner to Rajasthan which was later changed and by a subsequent letter dated 20-12-80 the CJI proposed that the petitioner be transferred to Madras and Justice Ismail from Madras to Kerala. This is the proposal which is in dispute in the present case.

557. In Seth's case MANU/SC/0065/1977 this Court proceeded on the footing that the proposal had emanated from the President and laid down detailed guidelines and principles which should be followed in order to make consultation effective. It is obvious that where the proposal emanates from the CJI the same principles would apply though in the reverse process. In other words, what the President is required to do under Article 222 if the proposal emanates from him as to be done by the CJI if he is the author of the proposal of transfer. The present CJI in his majority judgment has considered the matter fully and exhaustively and his judgment contains the most brilliant and scientific exposition of the doctrine of consultation. While dwelling on the attributes of effective consultation, Chandrachud, J, (as he then was) observed as follows (at pp. 2346, 2347. 2348).

It casts an absolute obligation on the President to consult the Chief Justice of India before transferring a Judge from one High Court to another. The word "may" in Article 222(1) qualifies the last clause which refers to the transfer of a Judge and not the intervening clause which refers to consultation with the Chief Justice of India, The President may or may not transfer a Judge from one High Court to another. He is not compelled to do so But if he proposes to transfer a Judge, he must consult the Chief Justice of India before transferring the Judge. That is in the nature of a condition precedent to the actual transfer of the Judge. In other words, the transfer of a High Court Judge to another High Court cannot become effective unless the Chief Justice of India is consulted by the President in behalf of the proposed transfer. Indeed, it is euphemistic to talk in terms of effectiveness, because the transfer of a High Court Judge to another High Court is unconstitutional unless, before transferring the Judge, the President consults the Chief Justice of India.

xxx xxx xxx xxx

But there can be no purposeful consideration of a matter, in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken. It must, therefore, follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Article 222(1) therefore, means full and effective, not formal or unproductive consultation.

Thus, deliberation is the quintessence of consultation. That implies that each individual case must be considered separately on the basis of its own facts.

...

The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least a satisfactory solution. In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final derision.

(Emphasis mine).

558. Similarly, Krishna Iyer, J. speaking for himself and one of us (Fazal Ali, J.) described the consultative process thus:

The consultation, in order to fulfil its normative function in Article 222(1), must be a real, substantial and effective consultation based on full and proper material placed before the Chief Justice by the Government. Before giving his opinion the Chief Justice of India would naturally take into consideration all relevant factors and may informally ascertain from the Judge concerned if he has any real personal difficulty or any humanitarian ground on which his transfer may not be directed. Such grounds may be of a wide range including his health or extreme family factOrs. It is not necessary for the Chief Justice to issue formal notice to the Judge concerned but it is sufficient -- although it is not obligatory -- if he ascertains these facts either from the Chief Justice of the High Court or from his own colleagues or through any other means which the Chief Justice thinks safe, fair and reasonable. Where a proposal of transfer of a Judge is made the Government must forward every possible material to the Chief Justice so that he is in a position to give an effective opinion.

559. Bhagwati, J. (one of us) agreed entirely with the observations extracted above.

560. In an earlier Constitution Bench decision of this Court in Chandramouleshwar Prasad v. Patna High Court MANU/SC/0495/1969 while dealing with the intent and purpose of Article 233, the principles of which equally apply to consultation under Article 222, Mitter, J. observed thus at P. 375):

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

(Emphasis mine)

561. This case was followed both by Chandrachud, J. and Krishna Iyer, J. and one of us (Fazal Ali J.) in Sheth's case MANU/SC/0065/1977 where it was held that the observations made in this case constitute the true meaning and content of consultation as envisaged by Article 222(1) of the Constitution.

562. In Chandra Mohan's case AIR 1966 SC 1987 (supra) this Court made the following observations regarding the process and purport of consultation:

That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution wherever the Constitution intended to provide more than one consultant, it has said so: See Articles 124(2) and 217(1). Wherever the Constitution provided for consultation of a single body or individual it said so; see Article 222. Article 124(2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein.

563. Analysing the ratio of the decisions in Sheth's case MANU/SC/0065/1977 and Chandramouleshwar Prasad's case MANU/SC/0495/1969 (supra) the following necessary concomitants of an effective consultation may be stated:

(1) That the consultation contemplated by Article 222 must be full and effective and is an essential ingredient of the exercise of power under Article 222.

(2) That once when the President decides to transfer a Judge, he must consult the CJI before transfer; the consultation before transferring a Judge is, as it were, a condition precedent to the actual transfer of the Judge.

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

(4) The President must make the relevant data and the necessary facts available to the CJI so that he (CJI) may arrive at a proper conclusion. In case any facts are wanting the same should be supplied to the CJI and this is an imperative duty or obligation cast on the President who initiates the proposal.

(5) The fulfilment by the President of his constitutional obligation and performance of his duty by the CJI are parts of the same process and after this process is fully complied with the consultation becomes full and effective and not formal or unproductive.

(6) That sufficient opportunity should be given to the authorities concerned to express their views so as to tender advice as deliberation is the quintessence of consultation.

(7) After the data, facts or materials are placed before the consultee and the consultant, there should be a full and complete application of minds in respect of the subject to enable them to reach a satisfactory conclusion. In other words, the two minds must be able to confer and produce a mutual impact on the identical facts which would constitute both the source and the foundation of the final decision.

(8) The CJI owes a corresponding duty both to the President and to the Judge who is proposed to be transferred to consider every relevant fact before tendering his opinion to the President.

(9) Before giving his opinion the CJI must take into consideration all relevant facts and should informally ascertain from the Judge if he has any personal difficulty or any humanitarian ground on which his transfer is proposed to be made and having done so must forward the same to the President. (These principles were laid down in Sheth's case)

(10) Consultation or deliberation is not complete until the parties make their points of view known to the other or others and discuss and examine the relative merit of their views. If one party makes a proposal to the other who has a counter proposal which is not communicated to the proposer, the direction to give effect to the counter-proposal without anything more will not amount to consultation. This was held in Chandramouleshwar's case MANU/SC/0495/1969 (supra).

564. We shall now state the admitted facts which emerge from the two affidavits of the petitioner and the counter-affidavit of the CJI to show whether the tests mentioned above have been fully satisfied or not. It is clearly established both from the petitioner's affidavit and the counter-affidavit of CJI that during his (CJI) visit to Patna there was absolutely no suggestion or proposal to transfer the petitioner from Patna to Madras. The petitioner categorically states this in para 8 of his first affidavit (filed on 16-9-81). This fact is endorsed and admitted by the CJI in para 2 (e) of his counter-affidavit where he says thus:

it is true that I did not tell him then that he was to be transferred from Patna. That was because in Feb., 1980 there was no proposal to transfer him. He was transferred nearly one year later.

565. Thus, the first fact on which there is no controversy or divergence is that during his visit to Patna in Feb., 1980 the CJI did not give any indication to the petitioner regarding his transfer to Madras as there was no such p roposal.

566. A perusal of the two affidavits would clearly show that there is no averment either by the petitioner or by the CJI that they ever met at any other place between Feb., 1980 and January 5, 1981. It must, therefore, be taken to be established that after his visit in Feb., 1980 the first time CJI had a talk with the petitioner was only on 5-1-1981. In this

connection, averments are to be found in para 8 of petitioner's first affidavit and in para 2 (f) of CJI's counter-affidavit where he states thus:

It is true, as stated by Shri K.B.N. Singh in paragraph 8 of his affidavit, that I conveyed to him on the evening of January 5, 1981 over the telephone that it was proposed to transfer Shri Justice M.M. Ismail to Kerala and that he, Shri K.B.N. Singh, may have to go to Madras.

567. Another conclusive fact which inevitably follows from the aforesaid two averments is that even when the CJI sent the proposal D/- 20-12-80 of the transfer of the petitioner from Patna to Madras and that of Justice Ismail from Madras to Kerala, there was neither any talk or discussion nor any consultation with the petitioner. We have highlighted this important fact because from the observations extracted above one of the essential ingredients emphasised by this Court and even by the CJI himself was that there should be a communication of ideas before the proposal of transfer emanates. We shall elaborate this aspect a little later.

568. According to the petitioner he was told by the CJI on telephone that he was to be sent to Madras in pursuance of a Government policy. The CJI in his counter-affidavit in para 2 (g) stated that he did not merely indicate Government policy but also stated that it was necessary to appoint an experienced and senior CJ in place of Justice Ismail. In the circumstances, therefore, we would prefer the statement of the CJI to that of the petitioner particularly in view of the fact that in his second affidavit the petitioner has introduced an additional fact to the effect that the CJI had told him that it was the Government policy to effect transfers in batches of two or three. This minor contradiction is, however, not of much value because the fact remains that the petitioner was sounded by the CJI for the first time on 5-1-81 over the telephone.

569. The petitioner states that he explained to the CJI that his mother was seriously ill and bed-ridden and was not in a position to be moved and added that if his transfer was insisted upon, he might be compelled to resign. This statement is to be found in para 8 of the petitioner's first affidavit. This fact is admitted by the CJI in para 2 (h) of his counter-affidavit which runs thus:

It is true that Shri K.B.N. Singh told me over the telephone that his mother was bed-ridden and was not in a position to go with him to Madras.

570. The CJI however denies that the petitioner told him of any other personal circumstance by reasons of which he was unable to go to Madras. We will accept this statement of the CJI also in preference to the statement made by the petitioner. The CJI admits that the petitioner had indicated his intention to resign if his transfer was insisted upon but he cautioned him to consider the matter more thoroughly before taking a final decision. On this point also there does not appear to be any controversy as there is a large measure of agreement in the statements contained in the affidavits of the petitioner and the CJI.

571. We then come to the finale of the drama which is the most important factor to determine as to whether or not there was an effective consultation as contemplated by Article 222. Before however we deal with this aspect of the matter we might mention that in the present case the letter dated 7-12-1980 sent by the CJI to the Law Minister clearly shows that it was the CJI who had initiated the proposal unlike in Sheth's case MANU/SC/0065/1977 where the proposal was initiated by the President through the Law Minister. If this was the position then the formalities and the duties that the President had to comply were now to be observed by the CJI, that is to say, it was for the CJI to consult the Judge concerned, consider his difficulties and then come to a final conclusion. Further, it was also for the CJI to have placed the entire facts, data, difficulties and viewpoints mentioned to him by the petitioner, before the President. Even if the CJI was not impressed by the difficulties expressed by the petitioner the materials and data given to him either orally or in writing had to be communicated to the President because the possibility of the President taking a different view cannot be reasonably excluded.

572. According to the averments made by the petitioner in para 8 of his second affidavit, he was not with the CJI for a period of more than 15 minutes. He further denied that apart from his mother's advanced age and illness no other facts were mentioned before the CJI. According to him, he had told the CJI that being the eldest son it was a sacred obligation to keep his mother with him and having regard to the close attachment with her, he could not leave her with any of his brothers or other members of the family which was divided and partitioned. It may be relevant to note that in para 9 of his first affidavit the petitioner merely stated that he told the CJI of his acute and insurmountable personal difficulties without detailing them. He also admits that he was with the CJI at his residence on 8-1-81 for 10-15 minutes. He further mentioned that the CJI might have received complaints against him and he wanted to remove the wrong impression created against him. Para 9 of his first affidavit which contains details of the discussions he had with

the CJI, does not at all mention the further facts which the petitioner has mentioned in para 8 of his second affidavit about the sacred obligation his mother's illness, inability of other members of her family to look after her. In view of this omission we would accept the affidavit of the CJI which is fully corroborated by what the petitioner himself stated in his first affidavit. Although we may not go to the extent of saying that the subsequent statement of the petitioner made in para 8 of his second affidavit was an afterthought but in the circumstances it is sufficient to state that we would prefer to rely on the affidavit of the CJI as the subsequent facts were not indicated in the first affidavit of the petitioner. On the other hand, the CJI in Para 3 of his counter-affidavit replying to the statement of the petitioner that he (CJI) may have received baseless complaints, averred that he tried his best to convince him (petitioner) that he did not believe this his (petitioner's) conduct was blameworthy and left him free to explain any matter which according to him had created dissatisfaction about the working of the High Court. Thereupon the petitioner narrated to him that there were number of persons inspired by communal and other extraneous considerations who tried to influence him (petitioner) administratively or judicially. The CJI however assured him that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. These details, mentioned by the CJI, have not been contradicted or denied by the petitioner and we fully accept what the CJI had said in para 3 of his counter-affidavit.

573. As regards other matters, the CJI does say that other issues were also discussed on the evening of January 8, 1981 but they had no bearing on the matters in issue. In para. 4 of his counter-affidavit the CJI admitted the statement of the petitioner, made in para 10 of his first affidavit, that he did not convey his consent to the proposal of his transfer, but the CJI added that he was consulted about his transfer to Madras. The consultation referred to by the CJI is obviously to the telephonic talk on 5-1-81 and the personal meeting between them on the evening of 8-1-1981.

574. These are the points of convergence on which by and large there does not appear to be any serious controversy and even if there is any, we have preferred to rely on the affidavit of the CJI as in the normal course of business we must, so long as the law permits.

575. The most crucial averment by the CJI which forms the bulwark of the essential ingredient of effective consultation is to be found in para 5 of his counter-affidavit which runs thus:

I deny the statement in paragraph 13 of the affidavit of Shri K.B.N. Singh that his transfer to Madras was made without effective consultation between me and the Government of India. There was full and effective consultation between me and the President of India on the question of Shri K.B.N. Singh's transfer from Patna to Madras as the Chief Justice of the Madras High Court. Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer.... Every relevant circumstance, including the personal difficulty mentioned by Shri K.B.N. Singh was considered by me carefully and objectively before coming to the conclusion that he should be transferred to Madras. I was personally aware since February 1980 that his mother was advanced in age and was not in a good state of health.

576. So far as the first part of the affidavit is concerned that is a pure question of law, viz., whether on the facts effective consultation was proved or not. The CJI categorically states that every relevant aspect of the question was discussed by him fully with the President both before and after he proposed the transfer. It may be noticed that the name of the petitioner figures in the first proposal sent by the CJI to the Law Minister on 7-12-80 wherein he had clearly recommended that the petitioner be transferred as CJ, Rajasthan High Court. This proposal was, therefore, not merely an information but a regular proposal by which the CJI had recommended Justice K.B.N. Singh to be transferred to Rajasthan. We have already pointed out that between February 1980 and January 5, 1981 there is no evidence at all, nor any allegation or averment either in the affidavits of the petitioner or of the CJI to indicate that he had either orally or in writing ascertain-ed the views of the petitioner when he (CJI) by his aforesaid proposal recommended the transfer of Justice K.B.N. Singh to Rajasthan as Chief Justice. It must, therefore, taken to be established that there was no discussion at all nor any consultation between them when for the first time the ball was set in motion through the proposal of recommendation sent by the CJI to the Law Minister on 7-12-80. Even so we may not attach much significance to this fact because this proposal ultimately fell through and was substituted by a later proposal sent on 20-12-80. In his letter dated 20-12-80 the CJI wrote to the Law Minister that in view of the fact that a vacancy would occur in the office of CJ, Madras High Court he proposed that Justice K.B.N. Singh be transferred as CJ, Madras High Court. This is the proposal which is in dispute in the present case. It is common ground that even between 7th and 20th December 1980, there was no talk or consultation between the petitioner and the CJI. The position is that until 5-1-81 the petitioner was not given any idea or inkling about his being transferred to Madras High Court. Admittedly, for the first time the petitioner was informed by the CJI over the telephone on 5-1-81. This was followed by a meeting and detailed discussion by the CJI with the petitioner at the former's residence in Delhi on 8-1-81 at about 8.00 p. m.

577. The fact that before the proposal recommending the transfer of Justice K.B.N. Singh to Rajasthan or to Madras, there was no consultation between the CJI and the petitioner, conclusively proves that one of the first ingredients of the consultative process, viz., consultation by the CJI with the proposed transferee should always be held as a first step towards making the consultation constitutionally effective was not observed. This was held, as extracted above, by CJI in Seth's case MANU/SC/0065/1977 where he has gone to the extent of holding that if there is no such consultation before the transfer, then the transfer becomes unconstitutional. This, therefore, appears to be the first constitutional infirmity in the consultative process as contemplated by Article 222.

578. This now brings us to January 8, 1981 when there was a full discussion between the petitioner and the CJI. We shall accept the statement of the CJI made in his counter-affidavit, in toto that he had discussed the matter threadbare with the petitioner and considered his difficulties. This limb of the consultative process was no doubt fully complied with as required by the Constitution.

579. Then we come to the third aspect of the consultative process. According to the CJI he had met the President and discussed every aspect of the matter, disclosed to him by the petitioner. Unfortunately, the CJI does not disclose the exact constitutional authority with whom he had discussed these matters, although it would have been much better if he had done so and that would have put the entire matter beyond any controversy. On this point, Dr. Singhvi as also Mr. B.C. Ghosh appearing for one of the petitioners vehemently contended that as the CJI was making a statement in an affidavit before a court of law, there was no justification for him to use the word 'President' and he should have mentioned the name of the exact authority with whom he had discussed the matter, failing which this part of the affidavit should be rejected as being vague. Having regard to the very high position that the CJI occupies, his word is entitled to the greatest weight and respect, we would draw all presumptions within the bounds of law in favour of the CJI and presume that by using the word 'President', the CJI obviously tended the constitutional authority, who was being consulted generally before or after the proposals for transfers were made viz., the Law Minister. We will also go even to the extent of holding that perhaps he may have had some discussion with the Law Minister also. What facts he may have revealed and in what way he put forward the point of view of the petitioner we are not able to say, because the affidavit of the CJI is absolutely silent on this point. Giving however the widest possible connotation to the words used by the CJI, viz., 'every relevant aspect of the question', would include all the personal difficulties which were mentioned to him by the petitioner, we are yet laced with another serious difficulty. In Sath's case MANU/SC/0065/1977 the CJI has himself clearly held that deliberation is the quintessence of consultation. Thus, according to the CJI himself even if he had disclosed or placed all the materials before the Law Minister, he ought to have been given sufficient time for deliberation over the matters so as to be able to make up his mind, whether to agree or disagree with the CJI, and to advise the President accordingly. It may b" that the personal difficulties may not have weighed with the CJI but the possibility of the Law Minister being impressed by them cannot be excluded. But as things stood, we find that the Prima Minister had already signed the file relating to transfer on 9-1-81 and it can safely be presumed that the file must have been sent by the Law Minister to the Prime Minister either sometime in the morning of 9th or late at night on 8th. This would leave no time at all to the Law Minister or the Prime Minister to deliberate on the various personal issues raised by the petitioner in his discussion with the CJI. Indeed, if prior to sending the formal proposal recommending the transfer of the petitioner the CJI would have taken the precaution of ascertaining his views there would have been sufficient time for the Law Minister or the President to deliberate.

580. It was strongly urged by the petitioner that from the statement of the Law Minister produced by the Solicitor-General before us it would appear that no minutes were recorded and the CJI had only mentioned to the Law Minister about his proposal to transfer the petitioner. Thus, from these facts it should be inferred that there was no discussion between the CJI and the Law Minister about the personal difficulties of the petitioner. It is true that from the file produced before us no minutes seems to have been recorded about the discussion which the CJI had with the Law Minister either on the 8th night or before that but that by itself would not exclude oral discussions having taken place after the detailed talk the CJI had with the petitioner on the evening of 8th. This, therefore, does not advance the case of the petitioner any further.

581. Applying the ratio of Chandramouleshwar's case MANU/SC/0495/1969 (supra) to the facts of this case, the position may be stated thus--here the CJI made a proposal for transfer of the petitioner to Madras but this proposal was not communicated to the petitioner who may have had a counter-proposal in his mind which also was not communicated to the President who was the person who decided the matter finally.

582. Thus, even though we may not disbelieve every letter and every word contained in the counter-affidavit of CJI and give him the full benefit of all possible legal presumptions, we come to the inescapable conclusion that the constitutional requirements of an effective consultation have not been proved beyond reasonable doubt inasmuch as--

(1) the petitioner was not consulted before the formal proposal recommending him for transfer to Rajasthan and then to Madras, was sent to the Government.

(2) that there is no mention at all in any of the proposals dated 7-12-80 or 20-12-80 regarding any discussion having been held with the petitioner.

(3) that there is nothing to show that the President or the concerned constitutional authority had sufficient time to deliberate over the pros and cons of the transfer particularly in view of the difficulties placed by the petitioner.

(4) the case squarely falls within the ratio laid down in Chandramouleshwar's case MANU/SC/0495/1969 (supra) discussed above which had been approved by the CJI himself and Krishna Iyer J. and one of us (Fazal Ali J) in Seth's case MANU/SC/0065/1977.

583. In view of the circumstances discussed above the consultative process as contemplated by Article 222 is clearly vitiated which renders the order impugned passed by the President constitutionally invalid.

584. We must hasten to add that we have taken the greatest possible care to see that no finding is given or observations made by us which may either directly or indirectly cast any kind of aspersion on the recitals in the counter-affidavit of the CJI nor is there any circumstance proved in this case which may amount to such an aspersion. As already observed by us we have accepted the affidavit of the CJI in toto giving the due respect that it deserves. We have decided this case purely on the constitutional infirmities present in the consultative process and that too on the basis of the observations made and the decision given by the CJI himself in Seth's case.

585. The last point of law that was urged by the petitioner was that the transfer was constitutionally invalid because one of the essential conditions of Article 222 had not been fulfilled in this particular case. It was argued that Article 222(2), which is extracted below, requires a Presidential Order by which the transferee Judge would be entitled to such compensatory allowance as the President may by order fix:

222(2). When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

586. It was contended that this mandatory provision of Article 222(2) has not been complied with. We, however, find absolutely no substance in this argument because while Article 222(2) does require that on transfer from one High Court to another, compensatory allowance may be paid; it does not state that the Presidential order should issue pari passu the order of transfer. Such an order could follow the transfer. Moreover, as the C. J. of Patna High Court who was transferred to Madras High Court petitioner never cared to join his new assignment and before he could do so the writ petitions were filed and proceedings were stayed, there was no occasion for the President to pass the order directing compensatory allowance to be paid to him until the validity of the transfer of the petitioner was finally adjudged by this Court. This is not a case where a Judge or a C. J. having been transferred had joined his new assignment and started working and still no order of compensatory allowance was made by the President.

587. Before finally closing is Chapter we might mention that another reason given by Brother Venkataramiah, J. for upholding the impugned Order was that under Section 114(e) of the Evidence Act there is a presumption that official acts must be deemed to have been actually done, this Court must presume that if there was any infirmity in the consultation the same must have been complied with. With great respect to our learned Brother, we are however unable to agree with this argument. The presumption applies only where there is no challenge to the constitutional validity of an official act Where an act is found to be per se unconstitutional, the question of raising a presumption does not arise because once it is held, as found in this case, that the consultation did not fulfil the constitutional requirements, the order impugned would become void ab initio and non est.

588. We are fortified in our view by a decision of this Court in Collector of Customs, Baroda v. Digvijaysinhji Spinning and Weaving Mills Ltd. MANU/SC/0365/1961. Where Subba Rao J. (as he then was) made the following observations (at p. 1553):

The High Court in effect drew a presumption in favour of the regular performance of an official act. But this presumption is only optional. In a case like this when the validity of an order depends upon the fulfilment of a

condition, the party relying upon, the presumption should at least show that the order on the face of it is regular and is in conformity with the provisions of the statute.

589. An identical view was taken in an earlier case reported in AIR 1943 FC 75. In the instant case in view of our clear finding that the essential ingredients of effective consultation as require ed by Article 222 not being proved, the question of drawing a presumption under Section 114(e) of the Evidence Act does not arise.

590. For the reasons given above we hold that the Order of the President transferring the petitioner, Justice K.B.N. Singh from Patna to Madras is constitutionally invalid and we hereby quash the notification dated 19-1-81 passed by the President.

591. The fact that the Order of transfer in this particular case has been held to be invalid and quashed, will not preclude the Government from making fresh orders of transfers after formulating a general policy of transfers on the lines and the manner indicated by us so that every High Court has a Chief Justice from outside and at the initial stage one-third of the strength of the Judges is recruit-ed from outside the State,

592. Thus, the position is that while I have expressed my separate opinions on Article 222 (T. C. No. 22/81), the Circular and the Policy of Transfer, question of Privilege and Transferred Case No. 24/81 and have made some observations on other questions also but subject to the observations made I would entirely agree with brothers Bhagwati, Desai and Venkataramiah JJ. in respect of Articles 217 and 224, on Primacy with brother Desai, J. and regarding Kumar's case (T. C. No. 20/81) and the question of locus with Brother Bhagwati J.

593. The result is that petitions arising out of transferred cases Nos. 19. 20, 21 and 22 of 1981 are accordingly dismissed. Writ petition No. 274 of 1981, Transferred Case Nos. 2 and 6 of 1981 are accordingly disposed of Special Leave Petition (Civil) No. 1509/81 has already been dismissed as withdrawn before the hearing closed.

594. Petitions arising out of Transferred Case No. 24/81 are allowed but without any order as to costs.

Tulzapurkar, J.

595. On March 18, 1981 Hon'ble Shri P. Shivshankar, Minister for Law, Justice and Company Affairs, Government of India addressed the following Circular letter to the (1) Governor of Punjab and (2) Chief Ministers (by name) (except North-Eastern States):

D. O. No. 66 /10/81-Jus

Minister of Law,
Justice & Company Affairs,
India, New Delhi-110 001.

March 18, 1981

My dear

It has repeatedly been suggested to Government over the years by several bodies and forums including the State Re-organisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. In this context, I would request yon to--

(a) obtain from all the Additional Judges working in the High Court of your State their consent to be appointed as Permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as Permanent Judges; and

(b) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in para 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.

4. I would be grateful if action is initial ed very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court.

With regards,

Yours sincerely,

Sd/-
(P. Shivshankar)

It further appears that prior to as well as after the issuance of the aforesaid Circular letter by the Union Law Minister on March 18, 1981, in several High Courts, including High Courts of Allahabad, Bombay and Delhi, the President of India acting under Article 224 granted short-term extensions for three months, six months or a year to sitting Additional Judges whose initial terms were about to expire but since such short-term extensions became a frequent phenomenon, particularly after the issuance of the aforesaid Circular letter, it created great consternation in the legal and judicial circles in the country. These two actions of the Union Government, namely, the issuance of the Circular letter dated March 18, 1981 and the grant of short-term extensions led to legal action being taken challenging the same which is the subject matter of the instant adjudication.

596. Having regard to their High position as a constitutional functionary all the sitting Additional Judges in various High Courts, though agitated by these two actions of the Union Government understandably felt reluctant to adopt legal steps against the same (barring the exception of Mr. Justice S.N. Kumar who as a party-respondent to the writ petition filed in Delhi High Court has actively supported the challenge to these actions and has also challenged the further action of dropping him out-right that occurred during the pendency of the petition) but the legal profession which was vitally interested in the maintenance of an independent and fearless Judiciary -- with its concomitant power of judicial review -- a basic feature of our Constitution and also a necessary postulate for the legal profession, felt terribly disturbed and thought of taking action challenging the same and the sequel was the filing of four writ petitions one in Allahabad High Court, two in Delhi High Court and one in the Bombay High Court, all of which were transferred to this Court, being Transferred Case No. 19 of 1981 (Shri Gupta's Writ Petition No. 4845/81 in the Allahabad High Court), Transferred Case No. 20 of 1981 (Shri Tarkunde's Writ Petition No. 882/81 in Delhi High Court), Transferred Case No. 21 of 1981 (Shri Kalra's Writ Petn. No. 636/81 in Delhi High Court) and Transferred Case No. 22 of 1981 (Shri Iqbal Chagla's Writ Petition No. 527/81 in the Bombay High Court). Excepting the Transferred Case No. 21 of 1981 where only short-term extensions are challenged, in the other three cases both the actions have been challenged.

597. According to the petitioners both the aforesaid actions of the Union Government forming part of a scheme constitute a direct attack on the independence of the Judiciary, which is a basic feature of our Constitution, and being illegal and unconstitutional are liable to be and deserve to be quashed or struck down. As regards Circular letter it is pointed out that it is in two parts; (i) in relation to sitting Additional Judges in all the States of India (except North-Eastern States) it seeks to obtain their consent in substance to their transfer as Permanent Judges to States other than their own and (ii) in relation to the proposed appointees (either from the Bar or Services) for initial appointment (either as Additional or Permanent Judges) it seeks to obtain their consent for being appointed to any other High Court in the country (meaning other than their home-State High Court); and in this behalf it also seeks from them their choice by naming three High Courts in order of preference to which they would prefer to go; and this is being done with a view to implement the policy of having one-third of the Judges of a High Court, as far as possible, from outside the State in which that High Court is situated on grounds of furthering national integration and combat-ting narrow parochial tendencies, bred by caste, kinship and other local links and affiliations. According to the petitioners this Circular letter seeks to effect, in substance and reality, a mass transfer of sitting Additional Judges as also of the proposed appointees based on a policy decision unilaterally taken by the Law Minister/Union Government and as such violates the

requirements of Article 222(1) of the Constitution as laid down by this Court in Sankalchand Sheth's case, MANU/SC/0065/1977 inasmuch as such mass transfers on alleged grounds of policy are outside its scope and further it reduces the efficacy of the consultation with the Chief Justice of India contemplated therein to a meaningless formality by presenting a transfer proposal to him as a fait accompli, the same being backed by the consent of the concerned Judge or the proposed appointee to his transfer. It is also contended that the Circular letter is illegal as being without authority of law. Thirdly, as far as the sitting Additional Judges are concerned, it is contended that inasmuch as para 3 of the Circular letter makes it clear that even if consent is given and preference is indicated there is no commitment on the part of the Government either to appoint them as Permanent Judges or accept their preference, the said letter contains, by implication, a threat to them that if they do not give their consent they will not be either continued as Additional Judges or confirmed as Permanent Judges; the said statement in para 3, by necessary implication, also contains a threat that the Government would watch their performance in matters to which the Government, Government Bodies and Corporations are parties before them and would appoint them as Permanent Judges only if they were found to toe the Government line and as such it constitutes gross interference with administration of justice and is subversive of judicial independence; moreover, the consent is sought to be obtained under threat, coercion and duress and also in advance and in abstract and the same would be no consent in law. As regards the proposed appointees it introduces an additional qualification for being appointed as Additional or Permanent Judge not warranted by the Constitution. Fourthly, it is contended that the said statement in para 3 of the Circular letter also shows that there was no justification for writing the said letter at all and the same was written mala fide for a collateral purpose, namely, to by-pass Article 222 and confront the Chief Justice of India with a fait accompli when the proposal to transfer such Judge would be forwarded to him; further to exercise the power of appointing Additional Judges not for the purpose for which that power has been conferred but for the purpose of carrying out the so-called "policy" of the Government is also mala fide in the sense that the power is being exercised for a collateral purpose foreign to the purpose indicated in Article 224. Fifthly, the petitioners have contended that the Circular letter, under which absolute power and discretion is claimed to the effect that there is no obligation on the part of the Union Government to continue the sitting Additional Judges after the expiry of their initial term notwithstanding pendency of arrears of work or to make them permanent as and when permanent vacancies become available and to appoint different persons for different periods as Additional Judges in the vacancies of sitting Additional Judges after their initial terms have expired, is a clear abuse of the power conferred by Article 224(1) of the Constitution, because the power being purposive is coupled with a duty to exercise the same when the conditions precedent mentioned in the provision exist and the Circular letter which claims such absolute power is violative of the provisions of Article 224; in any case the course proposed in the said Circular letter in exercise of such absolute power claimed thereunder is contrary to the established constitutional convention and practice (specified later) that has grown over the years in the matter of appointment of Additional Judges and confirming them as Permanent Judges and, therefore, bad in law inasmuch as Article 224(1) has been interpreted and worked having regard to the laid convention and practice. Sixthly, the petitioners have contended that the Circular letter is violative of Article 14 inasmuch as it makes invidious discrimination against those who would be refusing to furnish their consent as they will suffer a disadvantage, while those who would be furnishing their consent will be at an advantage and even within the class of those who would be furnishing their consent it gives to the Government unfettered and unguided power or discretion to pick and choose i.e. select some for being shifted to High Courts other than their home-State High Courts and to retain and appoint others in their home-State High Courts -- which power can be exercised either by way of punishment or by way of favouritism; and in this behalf reliance is placed on the Law Minister's statement made in Parliament in response to a Calling Attention Motion by some Hon'ble Members on 16th April, 1981 to the effect "it is not the intention of the Government to appoint all Additional Judges to outside Courts". Without prejudice to these contentions, it is lastly contended by the petitioners that in the appointment of Additional Judges of one High Court as Permanent Judges of another High Court or in the appointments of the Members of the Bar practising in one High Court at Additional or Permanent Judges of another High Court pursuant to the consent obtained under the said Circular letter, the consultation with the Governor of that other State and particularly with the Chief Justice of that other High Court would be illusory and an empty formality and as such the said Circular letter is violative of the Article 217 of the Constitution. For these reasons the petitioners have prayed for the quashing of the said Circular letter as also of the consent, if any, obtained thereunder, as being illegal, unconstitutional and void and its withdrawal, non-use and non-implementation by the Government.

598. As regards short-term extensions for three months, six months or a year granted to sitting Additional Judges upon the expiry of their initial term, which have become a frequent phenomenon after the issuance of the Circular letter dated March 18, 1981, the petitioners have contended that such short-term extensions are directly subversive of the independence of Judiciary and not contemplated by the Constitution According to the petitioners the power to appoint an Additional Judge "for such period not exceeding two years as the President may specify" in Article 224(1) has invariably been exercised by appointing Additional Judges initially for a period of two years, which has come to be regarded as the 'normal term', that when the said period is about to expire if there is no vacancy of a Permanent Judge in that Court it has been the practice to continue such Judges for a further term of two years and if a permanent vacancy arises to confirm the seniormost among them as a Judge of that High Court. The petitioners have contended that such a constitutional convention and practice has grown over the years and the provisions of Article 224(1) have been worked in accordance with such convention and practice. It is further pointed out that when a member of the Bar is appointed

as an Additional Judge of a High Court an undertaking is usually given by him to the Chief Justice that if and when a Permanent Judgeship of the Court is offered to him he will accept it but if he declines to do to he will not practice before that High Court or any Court or Tribunal subordinate to it; (at any rate, such an undertaking is obtained in the Bombay High Court); the postulate of such undertaking is that an Additional Judge appointed from the Bar should not be allowed to revert to the Bar and, far from being dropped, will be offered a permanent vacancy as and when it arises in that Court. In other words a member of the Bar who accepts the appointment of an Additional Judge has legitimate expectation that he will be confirmed as Permanent Judge of that High Court when a vacancy occurs and in the past he has been confirmed except in the rarest of cases. According to the petitioners the power claimed under Article 224(1) not to continue the Additional Judge, even if temporary increase in the Court's business persists or pendency of arrears justifies such continuance, after the expiry of the initial term and not to make him permanent even if a vacancy of permanent post occurs and to appoint another person as Additional Judge by ignoring the legitimate expectancy of the sitting incumbent whose initial term has expired, apart from involving an unjustified departure from the well recognised and established practice, amounts to breach of faith with the concerned Judge and further to ask such Additional Judge who has given such undertaking to agree in advance to a transfer (or even to accept fresh appointment) to other High Courts as a Permanent Judge also involves similar breach of faith with that Judge; such departure and breach of faith amounts to a clear abuse of power and the purported exercise of the power in that manner would be illegal and void. So also the claim made by the Government that Article 224(1) only fixes the maximum period of two years at a time, that the Article does not limit the discretion of the Government in the matter of the period for which an Additional Judge can be appointed except in regard to the ceiling of two yean, and that the appointment can be for a shorter period and that period is not justiciable is untenable in law and clearly wrong because, apart from involving an unjustified departure from the well recognized and established practice, it introduces an element of insecurity of tenure having serious repercussions on the independence of Judiciary and also undermines people's confidence and faith in it.

599. It may be stated that the petitioners have cited specific instances of Additional Judges having been granted short-term extensions for three months, six months or a year in Allahabad, Bombay and Delhi High Courts and have also cited instances of Additional Judges being dropped in the purported exercise of such absolute power claimed under Article 224(1). Grievance has specifically been made in respect of the individual cases of three Judges of the Delhi High Court, (a) Mr. Justice O.N. Vohra (as he then was), (b) Mr. Justice S.N. Kumar (as he then was) and (c) Mr. Justice S.B. Wad. It is pointed out that these three Judges were initially appointed with effect from 7-3-1979 as Additional Judges in the Delhi High Court for a term of two years but on the expiry of the said initial term each one of them was granted a short-term extension of three months with effect from 7-3-1981 and at the expiry of their said period of three months on 6-6-1981 the first two have been dropped outright and Mr. Justice Wad has been granted an extension for a further period of one year with effect from 7-6-1981. Such short-term extensions for three months granted to all the three after the expiry of their initial term of two years, as also the short-term extension of one year granted to Justice Wad with effect from 7-6-1981 have been challenged as being illegal and unconstitutional and the outright dropping of the first two Judges has been challenged also on the ground of mala fides both legal and factual in Transferred Case No. 20 of 1981; however, relief is claimed only in respect of the dropping of Mr. S.N. Kumar and not of Mr. O.N. Vohra.

600. In the context of their challenge to short-term extensions the petitioners have submitted that Article 216 of the Constitution casts a primary obligation upon the President mandatorily to provide adequate strength of Permanent Judges to cope with the normal business in every High Court so as to ensure its disposal within reasonable time and to review such strength from time to time so that arrears do not accumulate and justice to litigants is not unduly delayed, while the power to appoint Additional Judges under Article 224(1) (a provision substituted in its present form by the Constitution Seventh Amendment Act, 1956) and the exercise thereof are only dependent upon the fulfilment of either of the two conditions mentioned therein, namely, (a) temporary increase in the business of a High Court or (b) arrears of work therein; and it is only upon the fulfilment of either one or the other or both the conditions in a High Court that the President can appoint duly qualified persons to be Additional Judges of that Court for such period not exceeding two years as he may specify, but if the said conditions are not fulfilled and the objective facts unmistakably demonstrate that the increase of business is not of a temporary character but is a permanent increase every year or that the arrears have increased and accumulated to an appreciably disturbing lever with no reasonable prospects of substantially reducing the same over a period of years, the President cannot resort to Article 224(1) but has to increase the permanent strength by making permanent appointments under Article 217. In any case Additional Judges cannot be appointed while keeping permanent posts vacant as is hap-penning at present frequently. The petitioners have further submitted that in view of undisputed data of the regular increase in the normal business of almost all. High Courts and the mounting arrears therein -- a reality being within the knowledge of the President -- the decision to keep a large number of sitting Judges as Additional Judges would be arbitrary and unconstitutional and a clear ease exists for declaring them to be deemed to have become permanent or directing the President to make them permanent by appropriately increasing permanent strength in the concerned High Courts and this Court should pass appropriate orders in this behalf.

601. The contesting respondents (who are mainly the Union of India and the Union Law Minister) through Counter-Affidavits filed by Shri K.C. Kankan, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs, have resisted the writ petitions on several grounds. In the first place it is Contended that the petitioners (barring Shri S.N. Kumar who as party-respondent in Transfer Case No. 20 of 1981 has supported the challenge and sought reliefs) who are legal practitioners have no direct interest in the subject-matter of the writ petitions and cannot be regarded as, the persons aggrieved by the impugned actions of the Government and therefore have no locus standi and as such the petitions are liable to be dismissed: Secondly, it is contended that though Shri S.N. Kumar could be regarded as a person aggrieved by the impugned actions of the Government, he being a sitting Additional Judge from whom consent under the Circular letter was sought and was granted a short-term extension, his tenure having come to an end by efflux of the period for which he was appointed he is no longer concerned with the impugned Circular letter nor with the short-term that bad been granted to him and after he has ceased to be a Judge of the Delhi High Court he does not have any vested or enforceable right against the President or the Union Government in the matter of either continuation us an Additional Judge or appointment as a Permanent Judge and, therefore, his challenge as a party-respondent to the governmental action is not maintainable; in other words, even on the assumption that the Government's actions are not warranted by the constitutional provisions, the invalidity or unconstitutionally thereof does not give any corresponding right to him to sustain the petition; in any event the tenure fixed by the warrant of his appointment as an Additional Judge having expired Shri S.N. Kumar has no enforceable right either to continue as ah Additional Judge or to be appointed as permanent Judge inasmuch at the power to appoint a person a Judge of a High Court is discretionary with the President and such discretion cannot be controlled by judicial review by issuance of a mandamus and he is not entitled to any relief.

602. As regards the impugned Circular letter it is contended that it does not deal with transfer of sitting Additional Judges or of the proposed appointees from one High Court to another nor does it seek to obtain consent for such transfer but in relation to sitting Additional Judges it seeks to obtain their consent for being appointed as a Permanent Judges to another High Court and in relation to the proposed appointees it seeks to obtain their consent for their initial appointment (either as Additional or Permanent) to a High Court other than their home-State High Court and the action proposed to be taken thereunder is for purposes of Article 217 of the Constitution; it is the case of the contesting respondents that when an Additional Judge on the expiry of his initial term or extended term is appointed as a Permanent Judge it is a fresh appointment by warrant under Article 217 and there is no question of any transfer being involved in such a case and obviously in the case of a proposed appointee (either from the Bar or Services) when he is being initially appointed there is no question of any transfer in his base either; in other words, according to the contesting respondents Article 222(1) of the Constitution is not attracted at all and as such here is no question of the Circular letter violating the requirements of the said article, much less there being any intention on the part of the contesting respondents either to by-pass Article 222(1) or to reduce the efficacy of consultation of the Chief Justice of India contemplated therein in any manner. It is emphatically denied that any mass transfers or individual transfers based on any policy decision are being effected under the impugned Circular letter. It is denied that the Circular letter is intended to affect the independence of the judiciary in any manner or that the Circular letter contains any threat of the type suggested or at all to the sitting Additional Judges while seeking their consent. It is also denied that the consent that is sought to be obtained under the Circular letter is being obtained under threat, coercion or duress or that the same is in abstract and it is pointed out that for making fresh appointments of sitting Additional Judges, after the expiry of their term, to another High Court and for making initial appointments of the proposed appointees to a High Court other than their home-State High Court their consent would naturally be required under Article 217 and it is such consent that is being obtained from them under the Circular letter. It is further denied that the statement contained in paragraph 3 of the Circular letter shows that there is no justification for writing the said letter at all or that the same was written mala fide for collateral purposes as suggested or otherwise; it is pointed out that the legal and constitutional position even before the sending of the Circular letter was that there was no commitment on the part of the Government to appoint every Additional Judge as the Permanent Judge and the true purport of para 3 of the said letter is that the furnishing of consent will not change that position and will not now imply a commitment and it was necessary to make the legal and constitutional position clear lest a different impression was created as also to avoid any legal arguments based on the theory of promissory estoppel. According to the con-testing respondents it is for the purpose of implementing the policy of having one-third of the Judges of a High Court from outside that the Circular letter has been issued and it is a preliminary step in the direction of obtaining and collecting data and information from persons who would be willing to get appointed in other High Courts so that such information could be made available to the Chief Justice of India as also to the State authorities and the Chief Justices of the concerned High Courts for effective consultation as envisaged in Article 217 and as such the Circular letter is perfectly legal and within the authority of law. It is denied that the Circular letter confers unbridled or unguided power on the Executive to pick and choose certain Judges for being transferred or shifted to other High Courts; it is pointed out that such a contention is wholly mis-conceived for two reasons, namely, that the letter does not speak of transfers at all but appointments to other High Courts and secondly it cannot arm the Executive with any powers, for whatever powers the Executive has are derived from the provisions of the Constitution and that the Law Minister's statement in the Parliament on 16th April, 1981 has to be understood in the context in which it was made. It is further denied that in appointing Additional Judges of one High Court as Permanent Judges of another High Court or in appointing Members of the Bar practising in one High Court as Additional or

Permanent Judges of another High Court pursuant to the consent given under the Circular letter, the consultation with the Governor of that other State or with the Chief Justice of that other High Court would become illusory or an empty formality because the data and particulars of the person proposed to be appointed collected from other sources can and would be made available to the Governor of that other State as also to the Chief Justice of that other High Court and it is not the requirement of Article 217 that the constitutional functionaries mentioned therein should be aware of such data and particulars of their personal knowledge; in fact, even the Chief Justice of the home-State High Court, it is conceivable, may not have personal knowledge in that behalf and may have to collect the data and particulars from other sources. In other words, it is contended that if the data and particulars of the person proposed to be appointed is collected by a Chief Justice from other sources, his advice does not become illusory or an empty formality and as such the Circular letter can-not be said to be violative of Article 217.

603. As regards short-term extensions for three months, six months, or a year granted to sitting Additional Judges upon the expiry of the initial term and the other submissions made by the petitioners in regard to the President's power under Articles 216, 217 and 224(1) the contesting respondents have relied upon the provisions of these Articles for their true and proper construction; according to them reading Articles 217(1) and 224(1) together the position in law is clear that no Additional Judge has any legal or constitutional right to be continued as an Additional Judge on the expiry of his initial or extended term or to be made a Permanent Judge even if a vacancy occurs in a permanent post in his High Court. Strictly speaking, the tenure of an Additional Judge is fixed by the warrant of his appointment and on the expiry of the period mentioned in the warrant he ceases to be a Judge of the High Court and in either extending him for a further term as an Additional Judge in the same High Court or in making him permanent in the vacancy in a permanent post, a fresh appointment is involved, and the consultative process envisaged in Article 217(1) is attracted; in other words he is in the same position as a proposed appointee for initial appointment and the same position obtains if it is intended to make him a Permanent Judge in some other High Court. It is further contended that the provisions of the concerned Articles being very clear and unambiguous no convention or practice that might have grown in the matter of appointment of Additional Judges and confirming them as Permanent Judges (which is denied) can alter or affect the interpretation of the said provisions. Even an undertaking of the type indicated by the petitioners if obtained from a member of the Bar while appointing him as an Additional Judge cannot affect the true meaning and construction of the concerned provisions. It is further contended that assuming (without admitting) that an Additional Judge of a High Court gives the kind of undertaking mentioned by the petitioners, particularly of the type that is said to be usually obtained from him in the Bombay High Court, no illegality takes places in asking him if he would agree to be appointed as a Permanent Judge in any other High Court, as he shall be so appointed only in pursuance of his consent. It is further contended that if on true construction of these two Articles it is clear that an Additional Judge has no vested legal or constitutional right to be continued or to become permanent then it must be open to the President to appoint different persons, who are fully qualified, to be Additional Judges during different periods for disposing of the arrears, though such appointments will have to be necessarily made in accordance with the constitutional requirements of Article 217. The contesting respondents have contended that the volume of work in a High Court is of relevance in deciding whether Additional Judges should be appointed and the same is of no relevance with regard to a particular person to be appointed. Regarding short-term extensions that were granted it is explained that they become necessary pending completion of inquiries into the complaints that had been received against the concerned Additional Judges and the constitutional functionaries desired to satisfy themselves in that behalf before taking a final view. As regards the individual cases of the three Judges of the Delhi High Court it is pointed out that so far as Justice Wad is concerned he has now been granted a long term of one year with effect from 7-6-1981 and he can have no grievance and at regards the out-right dropping of Shri O.N. Vohra and Shri S.N. Kumar it is denied that the same is illegal or unconstitutional or mala fide either in law or in fact; and it is pointed out that since Shri Vohra is not seeking any relief before the Court the action of dropping him need not be pronounced upon by this Court and so far as Shri S.N. Kumar is concerned, action being proper no relief can be granted to him. It is disputed that this Court can grant the relief by way of declaring the sitting Additional Judges to be deemed to have become permanent or by directing the President to make them permanent by appropriately increasing the permanent strength in the concerned High Courts.

604. As stated at the outset by these writ petitions filed under Article 226 of the Constitution the legality or constitutionality of the two actions of the Union Government, namely, the issuance of the Circular letter dated March 18, 1981 and the grant of short-term extensions to sitting Additional Judges in various High Courts, is being challenged and the first question raised by the contesting respondents relates to the locus standi of the petitioners, who are legal practitioners in Allahabad, Bombay and Delhi High Courts, to maintain their petitions seeking relief against these two impugned actions. In my view the question of locus standi of the petitioners in these cases has become academic inasmuch as admittedly in the writ petition filed by Shri Tarkunde in Delhi High Court (being Writ Petition No. 882/81) Mr. Justice S.N. Kumar (as he then was), impleaded as a party-respondent, has supported the challenge and sought reliefs in respect of these impugned action and as such the challenges made will have to be gone into and decided by this Court. In the case of Dwarkadas Srinivas v. Sholapur Spinning & Weaving Co. Ltd., MANU/SC/0019/1953, the constitutionality of the impugned Ordinance II of 1950 as well as of the Act XXVIII of 1950 which replaced it, whereunder the management of the Mills was taken over and run by the Directors appointed by

the Central Government, was challenged by Shri Dwarkadas Srinivas (plaintiff), a preference share-holder of the Company and he also sought relief by quashing the demand made for calls in respect of unpaid share capital by the nominated Directors; a contention was raised about the locus standi of the plaintiff to maintain the suit on the ground that it was the Company who ought to have filed the suit as it was affected by the impugned Ordinance and the Act. This Court took the view that the contention was of no avail because the Company had been impleaded as a defendant to the suit and its old Directors had made an application to the Court supporting the case of the plaintiff on the ground that the Ordinance and the Act were void as they infringed the Company's fundamental right under Article 31(2) of the Constitution. At page 714 (of SCR) : (at p. 132 of AIR) of the report Justice Mahajan (as he then was), who delivered the main judgment of the Court, observed thus:

I am further of the opinion that the question of the locus standi of the plaintiff to raise the plea that the Ordinance being void against the Company the Directors had no authority to make the call, is really of academic interest in this case because here the company has been impleaded as a defendant. Its old directors have made an application to this Court supporting the case of the plaintiff on the ground that the Ordinance is void as it infringes the Company's fundamental right under Article 31(2).

In view of this legal position the learned Attorney-General for the Union of India made a statement at the Bar that he would not be pressing the contention relating to locus standi of the petitioners. However, Counsel for the Union Law Minister, one of the contesting respondents, argued the contention at great length, by referring to a large number of decided cases English, American and Indian as well as by relying on passages and extracts from treatises of well-known authors, on the ground that in the other three writ petitions none of the concerned sitting Additional Judges bad come forward to support the challenge and the maintainability of these writ petitions will have to be decided by this Court. Since the said contention has been fully and elaborately discussed and dealt with by my brother Bhagwati in his judgment, I propose to deal with it very briefly.

605. Counsel for the Union Law Minister has urged that the petitioners who are legal practitioners have no direct interest in the subject-matter of the writ petitions and cannot be regarded as 'person aggrieved' by the two impugned actions, which really affect, if at all, the sitting Additional Judges, who would be the aggrieved persons and it is not as if they are under any disability to approach the Court for redress, as is shown by the fact that one of them has done so and supported the challenge. It is contended that though as practising lawyers either in their individual capacity or as representing some of the Lawyers Associations the petitioners may be professionally interested in having a fearless and independent Judiciary for proper administration of justice that by itself is not sufficient to give them the 'standing' to prosecute the petitions for the reliefs sought, which really concern the sitting Additional Judges and not the lawyers. It is further submitted that even in 'public interest litigations', (usually called 'public injury cases') though a liberal approach is adopted by the Courts to reach all forms of injustice, the personal injury test is not ruled out but at times the test of 'sufficient connection' or 'special interest' is applied but in the instant case the petitioners neither qualitatively nor quantitatively have sufficient connection or special interest to prosecute the petitions, the result of which would not affect them either directly or even indirectly.

606. Since several decisions cited at the Bar on the question of locus standi show that the attitudes of the Courts in England, United States and this country have not been uniform but have varied from case to case any attempt at laying down a general principle for universal application would be futile. I would, however, prefer to confine my attention to a few decisions of this Court, which, according to me, throw sufficient light on this issue. It may be stated that in two decisions, namely; Adi P. Gandhi's case MANU/SC/0044/1970 and Dabholkar's case MANU/SC/0003/1975, the question of locus standi was considered in the context of the interpretation of the expression "person aggrieved" occurring in Sections 37 and 38 of the Advocates Act of 1961. In the former case, in relation to certain disciplinary proceedings which bad ended in no action being taken against the advocate concerned, the question was whether the Advocate General of the State was an "aggrieved person" within the meaning of Section 37 of the Act for the purpose of preferring an appeal under that section and this Court by majority held that he was not and his appeal was incompetent while the minority took a contrary view. After this decision had been rendered, Sections 37 and 38 (which provided for an appeal to the Bar Council of India and an appeal to the Supreme Court respectively) of the Act were amended by expressly giving the right of appeal to the Advocate General and the Attorney General suggesting by implication a legislative approval and acceptance of the minority view in that case. In the latter case, the errant advocate having succeeded before the Bar Council of India, the State Bar Council preferred an appeal to this Court under Section 38 and the question arose whether the State Bar Council was a 'person aggrieved' within the meaning of Section 38 and a Bench of 7-Judges of this Court held upon a survey of the provisions of the Act and its scheme and purpose that the State Bar Council was a 'person aggrieved'. Krishna Iyer, J. while delivering a concurring judgment quoted with approval Lord Denning's observations in the Attorney General's standing in the well-known case of the Attorney-General of the Gambia v. N'Jie (1961 AC 617), to the following effect:

...The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy-body who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the Attorney-General a sufficient interest for this purpose ? Their Lord-ships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the Judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action.

Thereafter be proceeded to plead for a wider view being taken of locus standi in public interest litigations and derived support for his plea from certain observations of Professor S.A. de Smith and Professor H.W.R. Wade, which he quoted, and then went on to observe thus:

The possible apprehension that widening legal standing with a public connotation may unloose a flood of litigation which may overwhelm the Judges is misplaced because (sic) resort to Court to suppress public mischief is a tribute, to the justice system. In this very case, to grant an exclusionary wind-fall on the respondents is to cripple the Bar Council in its search for justice and insistence on standards.

607. In Municipal Council, Ratlam v. Vardhichand MANU/SC/0171/1980, this Court upheld the right of the residents of a certain locality in Ratlam town to adopt proceedings under Section 133 of the Criminal Procedure Code against the Municipal Council compelling it to provide certain basic amenities like sanitary facilities on the roads, public conveniences for slum dwellers who were using the road for that purpose and to abate nuisance by constructing drain pipes with flow of water to wash the filth and stop the stench. While permitting such legal action ventilating public grievances Krishna Iyer, J. observed thus (at p. 1623 of AIR):

The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us between the Ratlam Municipality and the citizens of a ward, is a path-finder in the field of people's involvement in the justicing process, sans which as Prof. Sikes points out (Melvyn P. Sikes, Administration of Justice), the system may 'crumble under the burden of its own insensitivity'. The key question we have to answer is whether by affirmative action a Court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the coming of age of that branch of public law bearing on community actions and the Court's power to force public bodies under public duties to implement specific plans in response to public grievances.

608. In the Fertilizer Corporation Kara-gar Union's case, MANU/SC/0010/1980 the question for consideration was whether the workers in a factory owned by Government could question the legality and/or validity of the sale of certain plants and equipment of the factory by the management and though the Court ultimately did not interfere because it did not find the sale to be unjust and unfair or mala fide, on the maintainability of the challenge the Court has made certain observations having a bearing on the aspect of the workers' locus standi. Chief Justice Chandrachud at p. 65 (of SCR) : (at p. 350 of AIR) of the Report has observed thus:

But, we feel concerned to point out that the maintainability of a writ petition which is correlated to the existence and violation of a fundamental light is not always to be confused with the locus to bring a proceeding under Article 32. These two matters often mingle and coalesce with the result that it becomes difficult to consider them in watertight compartments. The question whether a person has the locus to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding, be it under Article 226 or under Article 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the Court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations. Public enterprises are owned by the people and those who run them are accountable to the people. The accountability of the public sector to the Parliament is ineffective because the Parliamentary control of public enterprises is "diffuse and haphazard". We are not too sure if we would have refused relief to the workers if we had found that the sale was unjust, unfair or mala fide.

Since the question as regards 'access to justice', particularly under Article 226 of the Constitution, was dealt with by Krishna Iyer, J. at some length, Chief Justice Chandrachud did not consider it necessary to dwell upon that topic. On that aspect Krishna Iyer, J. has at p. 74 (of SCR) : (at p. 355 of AIR) of the Report made the following observations:

public interest litigation is part of the process of participate justice and 'standing' in Civil litigation of that pattern must have liberal reception at the judicial doorsteps. The floodgates argument has been nailed by the Australian Law Reforms Commission:
The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spector which haunts the legal literature, not the court room.' (Prof. K.B. Scott : "Standing in the Supreme Court : A Functional Analysis" (1973) 86.)

Again at p. 77 (of SCR) : (at p. 356 of AIR) of the Report this is what he has observed:

If a citizen is no more than a way-farer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the Court will not be ajar for him. But he belongs to an organization which has special interest in the subject matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered. I, therefore, take the view that the present petition would clearly have been permissible under Article 226.

609. In the instant case the impugned Circular as well as the short-term extensions, according to the petitioners, are directly subversive of judicial independence, which is a basic feature of our Constitution, in the upholding of which not merely the sitting Additional Judges but also the lawyers practising in various High Courts are keenly interested. In fact, in the task of administration of justice the role of Judges and the role of lawyers are complementary to each other and the practising lawyers as a class are an integral part of justicing machinery rendering assistance to the Judges in the discharge of their function of reaching justice to the litigants appearing before the Courts: in other words, the practising lawyers, who are nothing short of partners in the task of administration of justice undertaken by the Judges, are vitally interested in the maintenance of a fearless and an independent Judiciary to ensure fair and fearless justice to the litigants. That being the position, can it be said that the petitioners either in their individual capacity or as representing some of the Lawyers' Associations (as is the case in the Bombay petition) are way-farers, interlopers, officious interveners or busy-bodies without any interest or concern of their own in the subject-matter ? In my view, the petitioners either in their individual capacity or representing Lawyers' Association have not merely sufficient interest but special interest of their own in the subject-matter of the writ petitions and they cannot be told off at the gates and the petitions at their instance are clearly maintainable.

610. The next contention urged on behalf of the contesting respondents has been (sic) though Shri S.N. Kumar could be regarded (sic) a person aggrieved by the two impugned actions of the Government, he being a sitting Additional Judge from whom consent under the Circular letter was sought and was also granted a short-term extension, the issues raised in the case are not justiciable at his instance, much less at the instance of the petitioners. The contention is that Shri Kumar's term having come to an end by efflux of period for which he was appointed be is no longer concerned with the impugned Circular-letter nor with the short-term extension that had been granted to him and after he has ceased to be a Judge of the Delhi High Court he does not have any vested or enforceable right against the President or the Union Government in the matter of cither continuation as an Additional Judge or appointment as a Permanent Judge and, therefore, his challenge to the governmental action is not maintainable. In this behalf Counsel contended that id either extending an Additional Judge for a further term or in making him a Permanent Judge in the vacancy of a permanent post, a fresh appointment is involved by issuance of a fresh warrant under Article 217(1) and the position of an Additional Judge on the expiry of his initial or extended term is exactly the same as that of a proposed candidate for initial appointment in that neither has any enforceable right to be considered for the post, much less to be appointed to it. Counsel pointed out that Article 217(1) confers power upon the President to appoint High Court Judges subject to the consultations mentioned therein but the President has a discretion in the matter which cannot be controlled by judicial review by issuance of a mandamus; in any event, non-appointment of a proposed candidate for initial recruitment or non-continuance of an Additional Judge on the expiry of his term does not give rise to any enforceable obligation against the President/Union Government and in favour of the person who is not appointed or not continued and, therefore, even a breach of the constitutional mandate, such as total lack of consultation or lack of full and effective consultation or consultation getting vitiated by mala fides, merely amounts to a case of complete non sequitur. In other words, Counsel contended that even on the assumption that the Government's actions are not warranted by the constitutional provisions, the invalidity or unconstitutionality thereof does not give any corresponding right to Shri S.N. Kumar to sustain the petition.

611. The aforesaid contention of Counsel for the contesting respondents directly raises two questions : (i) whether the proposed appointees (either from the Bar or services), who are being recommended for their initial appointments, and the sitting Additional Judges, whose casts for their continued appointments either as Additional Judges or as Permanent Judges on the expiry of their initial term are to be decided, stand in the same class or category or is there any difference -- a valid difference between the two and (ii) whether the non-appointment either at the stage of initial recruitment or at the stage of continuance furnishes any actionable wrong for issuance of a mandamus ? In the context of these questions Articles 217(1) and 224(1) will have to be considered. Article 217(1) runs that:

217 (1). Every Judge of a High Court shall be appointed by the President by warrant under this hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years.

Article 224 runs thus:

224.(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

612. It cannot be disputed that Judges of the High Court occupy a high constitutional position and a special machinery is provided for their appointment. For obvious reasons, the post of a High Court Judge is not filled in by inviting applications through advertisements nor by holding test interviews; further, the minimum qualifications for appointment as a Judge (prescribed in Sub-article (2) of Article 217) would be possessed by numerous advocates and by a fair number of service Judges but even so, the special machinery for making appointments is indicated in Article 217(1), obviously designed to recruit persons of great ability, high character and unquestioned integrity to the Bench. All these factors go to show that at the stage of initial recruitment under Article 217(1) no one has a right to be appointed a Judge of the High Court nor the right to be considered for such appointment and, therefore, it does appear that a writ of mandamus at the instance of an aggrieved person would not lie. But at the same, time I am quite sure whether simply because a mandamus directing the President to reconsider the case of a non-appointee may not lie it would be correct to Say that in the case of non-appointment at the stage of initial recruitment the mandate of consultation becomes otiose, superficial or inconsequential, or that a positive breach thereof may not provide any relief whatever to the aggrieved person but since that question does not arise in the instant case I would rather leave it open for decision in an appropriate case and proceed on the basis that a mandamus for reconsideration of his case would not lie as the aggrieved person does not have the right to be considered. But question is whether the sitting Additional Judges, whose continuance either for an extended term or as Permanent Judges is to be determined on the expiry of their initial term, stand in the same position as that of proposed appointees for initial appointment?

613. It is true that, unlike a Permanent Judge whose tenure is fixed by reference to his age, the tenure of an Additional Judge when appointed under Article 224(1) is fixed by the warrant of his appointment and on the expiry of the period mentioned in the warrant he ceases to be a Judge of the High Court. It is also true that his continuance as an Additional Judge for any further term or as a Permanent Judge in the vacancy of a permanent post cannot be thought of unless for continuance as Additional Judge either one or the other or both the pre-conditions mentioned in Article 224(1) obtain in that High Court, and for continuance as a Permanent Judge the normal business of the High Court justifies the filling up of the vacancy in the permanent post. In other words pendency of work must justify such continuance temporary increase in the business of the High Court or arrears of work therein or both for, extension of his term and normal business (current institutions) for making him permanent. The question whether obtaining of the pre-conditions mentioned in Article 224(1) or the pendency of normal business is alone enough for such continuance or any other requirement suitability as adjudged during the consultation under Sub-article (1) of Article 217 is also necessary is a different aspect, which I propose to deal with later and need not be mixed up with the question under consideration at the moment. In other words, granted the pre-conditions in Article 224(1) and also the pendency of the normal business, the question is whether an Additional Judge whose term is about to expire has any enforceable right to be considered (even assuming that suitability is also required to be taken into account at this stage) for his continuance either as an Additional Judge for a further term or as a Permanent Judge if a vacancy in the permanent post is available ?

614. In order to deal, with the aforesaid question, Article 224(1), inserted in our Constitution by the 7th Amendment Act, 1956, will have to be considered in proper perspective having regard to the reasons and purposes for which arid the circumstances in which it came to be enacted. Prior to that, in the Government of India Act, 1915 the provision to appoint Additional Judges to any High Court 'as may be required' by the Governor-General in Council was contained in the proviso (i) to Section 101(2) while in the Government of India Act, 1935 the provision was to be found in Section 222(3) which was almost in similar terms as the present Article except that the power was conferred on the Governor-General acting in his discretion.' When the Constitution was framed the provision (Draft Article 199) was deleted because of the strong plea, made against it by several Members of the Constituent Assembly including eminent authorities in this field like Sir Tej Bahadur Sapru, Shri K.M. Munshi and others, mainly on the ground that Members of the Bar recruited as Additional Judges will revert to the Bar on the expiry of their term and such, reversion to the Bar was manifestly dangerous to the fair administration of justice and opposed to public interest. In 1956 it was felt that the provision for recalling retired, High Court Judges to function on the Bench for short periods (loosely called Ad hoc Judges) was found to be neither adequate nor satisfactory and the same (original Article 224) was deleted and replaced

by "a provision for appointment of Additional Judges to clear off arrears" (vide Statement of Objects and Reasons) and the present Article 224(1) came to be enacted. In other words the existence of a large volume of mounting arrears in several High Courts arid the necessity to clear off the same provided the basis for inserting the provision in the Constitution. That this is the rationale of the provision for appointment of Additional Judges has been clearly indicated by the Madras High Court in Kandasami Pillai v. Muthuvenkatachala (1917) 33 Mad LJ 787 : AIR 1918 Mad 263 wherein the context of the provision contained in the Government of India Act, 1915 that Court held that "the object of the proviso to Section 101(2) of the Government of India Act, 1915, clearly was to provide for occasions when the permanent strength of the High Court is unable to cope with the work of disposal, but the work is not sufficient to justify the appointment of another permanent Judge, by enabling additional Judges to be appointed from time to time for such fixed periods not exceeding two years as may be found necessary; the proviso must therefore be read as meaning that appointments may be made from time to time for such period, not exceeding two years, as may be required from time to time on each occasion when the power is exercised." (vide Head Note in the Report). Thus, the very purpose and raison d'etre of Article 224(1) being the existence of arrears of work and clearance thereof, it stands to reason that sitting Additional Judges who have already been selected and appointed for the very purpose must be considered for continued appointments if the arrears obtain and go on mounting in their High Courts.

615. Secondly, on a comparison of Articles 216 and 224(1), it will appear clear that the former deals with the appointment of Permanent Judges to dispose of the normal business whereas the latter deals with appointment of Additional Judges whenever there is neither a temporary increase in the normal business of a High Court or arrears of work therein. It seems the work in a High Court has been classified into three' categories, namely, (a) Normal business indicated by the current annual institutions (suits, writs and other proceedings), (b) Sudden temporary increase in business over and above the normal institutions, such as riling of hundreds of petitions challenging an enactment, like for instance Money Lenders Act, which will disappear when the validity or otherwise of the enactment is pronounced upon and (c) Arrears of work meaning the normal or ordinary work which the permanent strength has not been able to cope with and dispose of within a reasonable or stated period, say one or two years and has accumulated; and it is clear that Article 216 has to be resorted to for the first category of work and Article 224(1) for the other two categories. But it was not disputed before us that Article 224(1) appears to have been construed and worked by all concerned under some misapprehension in the sense that it has been resorted to even in situations where Article 216 ought to have been resorted; for, since the insertion of Article 224(1) in the Constitution it has been the invariable practice to appoint every Judge (whether from -the Bar or Services) initially as an Additional Judge for two years and then to make him permanent in due course, i. e. as and when a permanent vacancy arises in that High Court. Such a practice, though contrary to the clear intendment of the said two Articles, followed by the President or the Union Government has given rise to a legitimate expectancy on the part of the sitting Additional Judges (whether from the Bar or Services) to be considered for their continuance either for an extended term or for making them permanent on vacancies arising in permanent posts. In fact after following such practice over the years and thus putting all the Additional Judges into the belief that they will be confirmed in normal course it does not behove the appointing authority to say that the sitting Additional Judges have no right to be considered for their continuance either for an extended term or for making them permanent. Clearly, by reason of the said practice though followed under some misapprehension, they have such a right.

616. Thirdly, so far at the sitting Additional Judges recruited under Article 224(1) from the Members of the Bar are concerned, they would be having such legitimate expectancy and the right to be considered for continuance for two additional reasons, namely, (a) a well established constitutional convention or practice has grown over the years since after the insertion of the provision in the matter of appointment of such Additional Judges and confirming them as permanent Judges -- the convention or practice being, that notwithstanding the words "for such period not exceeding two years as the President may specify" occurring in Article 224(1), the appointing authority has invariably exercised the power under that Article by appointing Additional Judges initially for a period of two years, which has come to be regarded as the 'normal term', that when the said period is about to expire if there is no vacancy of a permanent Judge in that Court to continue such Judges for a further term of two years and if a permanent vacancy arises to confirm the seniormost among them as a Judge of that High Court, and (b) the undertaking taken from them at the time of their initial appointment that "if and when a permanent Judgeship of that Court is offered to them they will accept it and not decline the same." It may be stated that so far as the Bombay High Court is concerned further undertaking is obtained by the Chief Justice of that High Court from such Judges to the further effect that "if they decline to accept such permanent Judgeship though offered or in case they resign from the office of Additional Judge even before the question of their confirmation is taken up they will not practice in that High Court or in any Court or Tribunal subordinate to that High Court." It may be pointed out that since 1956 barring very few or exceptional instances the aforesaid convention or practice has almost invariably been loll owed and the same has grown out of two weighty considerations : (i) that it is not in public interest to permit them to revert to the Bar, and (ii) not to loose or fritter away the experience and expertise gained by them in administering justice during their initial term, and as regards the undertaking mentioned-above the same became necessary because at the time of the insertion of Article 224(1) into the Constitution no provision was inserted imposing any ban or prohibition on practice by such Additional Judges after expiry of their

term, as was thought of in 1949 when Draft Articles 199 (dealing with Additional Judges) and 196(b) (dealing with ban on their practice) were considered together and deleted together. It will be pertinent to mention here that during the Parliamentary debates over the relevant Bill which sought to introduce Article 224(1) into the Constitution great anxiety was shown by several Members to see to it that such Additional Judges, when recruited from the Bar were not permitted to revert to the profession on the expiry of their term and a categorical suggestion was put forward that when a Member of the Bar was appointed as an Additional Judge it must be done with a view to make him permanent in due course and if that was not possible an Additional Judgeship should not be offered to a Member of the Bar. In fact in Lok Sabha, Shri Tek Chand, M. P. from Ambala-Simla had opposed the recruitment of any Member of the Bar as an Additional Judge and suggested that such recruitment should be confined to District Judges, while in the Rajya Sabha Shri P.N. Sapru from Uttar Pradesh strongly pleaded that in appointing Additional Judges care should be taken to appoint Members of the Bar who were not likely to revert to the profession on the expiry of their term, that is to say "appoint a man whom you are going to appoint as a Permanent man". These views expressed during the debate on the Bill have been referred to merely to bring out the genesis out of which the aforesaid convention or practice grew and the undertaking commenced to be taken from Members of the Bar. Even as late as on June 29, 1967 in a Note prepared by him Justice K.N. Wanchoo had also stated thus:

When a Member of the Bar is appointed an Additional Judge, it must be with a view to make him permanent in due course. If that is not possible, Additional Judgeship should not be offered to a Member of the Bar. I agree that an undertaking should be taken from Members of the Bar that they will accept a permanent Judgeship when offered to them in due course....(Note quoted in the Shah Commissioner's Interim Report-I Para 7.23 at page 52)

If the genesis of the aforesaid convention or practice as well as the undertaking is nothing but public interest in the sense that public interest is served ; (a) by not permitting them to revert to the Bar on the expiry of their term, and (b) by not losing or frittering away the experience or expertise gained by them in administering justice during their initial term, then it is these very aspects of public interest which form the compelling reasons to consider their cases for their continuance either by extending their term or making them permanent in preference to outsiders or freshers. It is not as if that these two aspects of public interest giving rise to the convention or practice and the undertaking are merely factors to be taken into account while deciding upon their continuance but along with the disability emanating from the undertaking these aspects confer upon them a legitimate expectancy and the enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for such continuance in that High Court.

617. There has been no answer from the side of the contesting respondents and in fact it was not disputed by Counsel on their behalf that the practice to appoint every Judge (whether from Bar or Services) initially as an Additional Judge for two years and then to make him permanent in due course without considering the question as to which one of the two Articles was attracted has been followed by the appointing authority and therefore, it is clear that on this ground alone it can be held that the sitting Additional Judges have an enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for their continuance either by extending their term or making them permanent until this practice is changed and a proper practice is introduced which can be done only after having made a complete and correct assessment about the requisite strengths of Permanent as well as Additional Judges for every High Court depending upon statistical data to be collected throwing light on 'normal business,' 'temporary increase' and 'arrears of work' after fixing rate of disposal per Judge per year and defining what should be termed as main cases, miscellaneous cases or interlocutory cases etc.

618. As regards the constitutional convention or practice and the undertaking which have been pressed into service in relation to Bar recruits as Additional Judges for basing their right to be considered for their continuance on the expiry of their initial term, the learned Attorney-General appearing for the Union of India raised a twofold contention. Regarding the former he urged that a constitutional convention or practice, howsoever wholesome, cannot affect, alter or control the plain meaning of Article 224(1) which according to him gives absolute power and complete discretion to the President in the matter of continuance of sitting Additional Judges on the expiry of their initial term, the pendency of arrears being relevant only for deciding whether or not Additional Judges should be appointed and not relevant with regard to a particular person to be appointed. As regards the undertaking he pointed out that the usual undertaking obtained from a Member of the Bar in all High Courts -- and for that matter even the additional undertaking that is being obtained in the Bombay High Court if properly read will show that it merely creates a binding obligation on the concerned Member of the Bar but does not create any obligation or commitment on the part of the appointing authority to make the offer of permanent judgeship to him. It is difficult to accept either of these contentions of the learned Attorney General. It was not disputed before us that constitutional conventions and practices have importance under unwritten as well as written Constitutions and the position that conventions have a role to play in interpreting Articles of a Constitution is clear from several decided cases. In U.N.R. Rao v. Smt. Indira Gandhi MANU/SC/0059/1971 Chief Justice Sikri observed thus : "It was said that we must interpret Article 75(3) according to its own terms regardless of

the conventions that prevail in the United Kingdom. If the words of an Article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with a Cabinet. In trying to understand one may well keep in mind the convention prevalent at the time the Constitution was framed." In State of Rajasthan v. Union of India MANU/SC/0370/1977 also the importance of a constitutional convention or practice by way of crystallising the otherwise vague and loose content of a power to be found in certain article has been emphasized. In the State of West Bengal v. Nripendra Nath Bagchi MANU/SC/0310/1965 the entire interpretation of the concept of "vesting of control" over District Courts and Courts subordinate thereto in the High Court was animated by conventions and practices having regard to the history, object and purpose that lay behind the group of relevant articles, the principal purpose being, the securing of the independence of the subordinate judiciary. It is true that no constitutional convention or, practice can affect, alter or control the operation of any Article if its meaning is quite plain and clear but here Article 224(1) merely provides for situations when Additional Judges from duly qualified persons could be appointed to a High Court and at the highest reading the Article with Section 14 of the General Clauses Act it can be said that the power conferred by that Article may be exercised from time to time as occasion requires but on the question as to whether when the occasion arises to make appointment on expiry of the term of a sitting Additional Judge whether he should be continued or a fresher or outsider could be appointed by ignoring the erstwhile incumbent even when arrears continue to obtain in that High Court the Article is silent and not at all clear and hence the principle invoked by the learned Attorney General will not apply. On the other hand, it will be proper to invoke in such a situation the other well settled principle that in construing a constitutional provision the implications which arise from the structure of the Constitution itself or from its scheme may legitimately be made and looking at Article 224(1) from this angle a wholesome constitutional convention or practice that has grown because of such implications will have to be borne in mind especially when it serves to safeguard one of the basic features which is the cardinal faith underlying our Constitution, namely, independence of the judiciary. In other words a limitation on the otherwise absolute power and discretion contained in Article 224(1) is required to be read into it because of the clear implication arising from the said cardinal faith which forms a fundamental pillar supporting the basic structure of the Constitution, as otherwise the exercise of the power in the absolute manner as suggest-ed will be destructive of the same. That it is not sound approach to embark upon 'a strict literal reach' of any constitutional provision in order to determine its true ambit and effect is strikingly illustrated in the case of Article 368 which came up for consideration before this Court in Kesavananda Bharti's case MANU/SC/0445/1973 where this Court held that the basic or essential features of the Constitution do act as fetters or limitations on the otherwise vide amending power contained in that Article. In Australia limitations on the law-making powers of the Parliament of the Federal Common-wealth over the States were read into the concerned provisions of the Constitution because of implications arising from the very Federal nature of the Constitution : (vide The Lord Mayor Councillors and Citizens of the City of Melbourne v. The Common Wealth (1947) 74 CLR 31 and the State of Victoria v. Commonwealth of Australia 122 CLR 353. As regards the undertakings of the types mentioned above, it is true that strictly and legally speaking these undertakings only create a binding obligation on the concerned Member of the Bar and not on the appointing authority but it cannot be forgotten that when such undertakings were thought of, the postulate underlying the same was that there was no question of the appointing authority not making the offer of permanent judgeship to the concerned Member of the Bar but that such an offer would be made and upon the same being made the sitting Additional Judge recruited from the Bar should not decline to accept it and revert to the Bar. I am therefore clearly of the view that the aforesaid convention or practice and the undertaking serve the cause of public interest in two respects as indicated above and those two aspects of public interest confer upon these sitting Additional Judges recruited from the Bar a legitimate expectancy and the enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for continuance in that High Court either by way of extending their term or making them permanent in preference to freshers or outsiders and it is impossible to construe Article 224(1) as conferring upon the appointing authority absolute power and complete discretion in the matter of appointment of Additional Judges to a High Court as suggested and the suggested construction has to be rejected. In view of the above discussion it is clear that there is a valid classification between proposed appointees for initial recruitment and the sitting Additional Judges whose cases for their continuance after the expiry of their initial term are to be decided and the two are not in the (same position.

619. The next question hotly debated at the Bar has been whether while exercising the power under Article 224(1) of the Constitution at the time of determining whether the sitting Additional Judges should be continued either by way of extending their term or by way of making them permanent it is open to the President (Appointing Authority) to resort to the consultative process under Article 217(1) on she aspect of suitability again or the exercise of the power should be strictly governed by the consideration as to whether the preconditions mentioned in Article 224(1) obtain in the concerned High Court and pendency of work justifies the filling up of the permanent vacancies or not? Counsel for the petitioners have contended that while deciding upon the continuance of the sitting Additional Judges of a High Court, who have already been selected and appointed as such, the consultative process mentioned in Article 217(1) is not attracted for the purpose of considering suitability again, the same having been gone through once and for all at the stage of their initial recruitment and the appointing authority has merely to see whether one or the other or both the pre-conditions obtain or not and on being satisfied about their existence it must continue the sitting Additional Judges for a further term and if vacancies in the permanent posts are available to make them permanent in that High Court on being

satisfied that pendency of normal business justifies the same. In support of this contention reliance has been placed on the fact that for all purposes the sitting Additional Judges of a High Court are in no way different from its permanent Judges as regards (a) qualification for the appointment; (b) salary and other service conditions; (c) criteria for their selection; (d) their position, jurisdiction, powers and privileges; (e) oath of office to be taken by them and (f) the grounds and procedure for their removal and it has been pointed out that Additional Judges are not on probation and cannot be regarded or dealt with as probationers. Principally, the bringing in of the consultative process under Article 217(1) on the point of suitability again at the stage of deciding upon their continuance is objected to on three grounds : (a) it amounts to making their continuance dependent upon the evaluation of their capacity, character, integrity and fitness as emerging from their work, performance and behaviour during their initial term and runs counter to the well-settled position that they are not on probation, (b) if in that process they are dropped because of suspected misbehaviour or reported lack of integrity, it would, in substance and reality, mean their removal merely on the basis of reports, rumours and gossip jeopardising their security and independence without resorting to the regular process of removal laid down in Article 124(4) and (5) read with Article 218 and the Judges (Inquiry) Act No. 51 of 1961, and (c) it is bound to affect the quality or character of justice administered by them during their initial term or at any rate towards the end of their term because human nature being what it is their work, performance and behaviour will be guided by the anxiety to keep themselves on the right side of the Chief Justice of the High Court, the Chief Justice of India and the appointing authority and every litigant will be entitled to complain that as against the State he has been denied equal protection of the laws and equality before law; in other words, violation of Articles 14 and 21 is involved and in this behalf reliance has been placed on Krishna Gopal v. P.C. Sethi MANU/SC/0249/1973 and In Re The Special Courts Bill, 1978, MANU/SC/0039/1978.

620. On the other hand Counsel for the contesting respondents have urged that since in either granting an extension to these Additional Judges on the expiry of their initial term or in making them permanent a fresh appointment is involved the consultative process covering suitability under Article 217(1) is clearly attracted; even otherwise, going through the consultative process at this stage is both necessary and desirable inasmuch as an erroneous appointment of an unsuitable person produces irreparable damage to the faith of the community in the administration of justice Causing serious injury to public interest though failure to appoint a deserving person is not likely to inflict such irreparable injury and therefore it is but proper that at the time of their reappointment these sitting Additional Judges should pass the test of suitability (i. e. capacity, character, integrity and fitness) under Article 217(1) and it is unthinkable that if all the constitutional consulting functionaries are of the agreed view and the appointing authority shares the same view that by reason of what has happened in the meantime as erstwhile Additional Judge is no longer fit to be appointed he should nonetheless be appointed. Counsel for the contesting respondents refuted each one of the grounds urged by the petitioners in support of their objection to bringing in the consultative process inclusive of suitability again at the stage of reappointment of the sitting Additional Stages. Regarding the aspect of probation, Counsel accepted the position that Additional Judges are not and cannot be said to be on probation but according to him what is meant by that is that, unlike a probationer who is liable to be removed during his probationary period if he is found unfit or unsuitable and who is confirmed only upon satisfactory completion of the probationary period, the sitting Additional Judges, not being on probation, have an indefeasible tenure though for short periods fixed in their warrants of appointment and during the fixed tenure they can be removed only by following their regular process laid down in the Constitution and Judges (Inquiry) Act, 1968; any further appointment is always the result of a fresh consideration and fresh consultation with the consulting functionaries mentioned in Article 217(1). To suggest that they should be re-appointed as a 'matter of course, if the pre-conditions of Article 224(1) subsist or pendency of work justifies their confirmation and then take steps for their removal under Article 124(4) and (5) read with Article 218 and Judges (Inquiry) Act, 1968 would be manifestly unsound, if not absurd. Counsel disputed that if as a result of the consultative process undertaken they are dropped it amounts to their removal because, according to him, it becomes a case of non-appointment after their initial term has expired. Counsel strenuously disputed that bringing in the process of consultation under Article 217(1) inclusive of suitability again at the stage of re-appointment would affect the quality or character of justice administered by them during their initial term or towards the end of their term as suggested by the petitioners and no question of any violation of Article 14 or 21 is involved and the two decisions relied upon by Counsel for the petitioners do not support that contention.

621. I have already come to the conclusion that there is a valid classification between the proposed appointees for initial recruitment and the sitting Additional Judges whose cases for their continuance on the expiry of their initial term are to be decided and have further held that unlike the former the latter have a legitimate expectancy and an enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority and to be considered for their continuance either as Additional Judges or as Permanent Judges in their High Court. From this conclusion certain consequences logically ensue. First, if the sitting Additional Judges have this enforceable right to be considered for their continuance, it must follow that the eventual non-continuance, if any, can become a justiciable issue open to judicial review, if such non-continuance is based oh extraneous or non-germane considerations or is mala fide in law or in fact, and in that sense it will not be a case of non-appointment as is the case qua the proposed appointees at the stage of their initial recruitment. Secondly, it also follows that in substance and reality in extending their tern or making them

permanent in their High Court no 'fresh appointment' in the sense of initial or fresh recruitment is involved, except for the formality of issuing a fresh warrant of appointment and taking a fresh oath. If that be the correct position then all the submissions made on behalf of the contesting respondent on the basis that granting them extension or making them permanent involves a 'fresh appointment' must be rejected and logically speaking the consultative process in so far as suit-ability under Article 217(1) is concerned is not attracted at all.

622. Even so, in view of the aspects of public interest that have been pressed into service, the question may be considered as to whether, when their continuance on the expiry of their initial term is being determined, the test of suitability under the consultative process of Article 217(1) should be invoked or gone through afresh ? The question thus posed assumes great significance but is ticklish and defines easy solution in view of the cogent and almost convincing rival submissions made on either side as summarized above but the answer to the same will have to be found only on objective considerations. At the outset it may be stated that it was not disputed before us that sitting Additional Judges are not on probation and cannot be regarded or dealt with as probationers. Question is what is the implication of admitting the position that "an Additional Judge is not a Judge on probation" as has been done by Shri Kankan in his counter-affidavit dated July 22, 1981 (filed in the Transfer Case No. 20 of 1961) ? It is true as has been pointed out by the learned Attorney General that they are not probationers in the sense that they have an indefeasible tenure though for the periods fixed in their warrants of appointment and that during such fixed tenure, like the Permanent Judges, they can be removed only by following the regular process for it as indicated in the Constitution and the Judges (Inquiry) Act, 1968 but in the context of their having an enforceable right not to be dropped illegally and to be considered for their continuance, will it be possible to confine the concept of probation to these two aspects mentioned by hum ? Does it mean that for deciding upon their continuance they should be treated as on probation ? The learned Attorney-General did not mince words when he contended that they should pass the test of suitability again at the time of deciding upon their continuance because he asserted that what has happened in the meantime during their short tenure (meaning their work, performance and behaviour as throwing light on their capacity, character, integrity and fitness) should be taken into consideration. It cannot he disputed that aspects like slow disposal, unsatisfactory performance, inefficiency, incompetency, suspected misbehaviour and/or reported lack of integrity all converge on suitability and therefore all these will have to be taken into consideration as suggested by him. However, the full implication of the admission made on behalf of the contesting respondents is that Additional Judges are not appointed to try out their fitness pending their further continuance either as Additional Judges or as permanent Judges; they are appointed, having passed the suitability test at the initial stage, to dispose cases instituted in the High Court in accordance with their Oath "without fear or favour, affection or ill-will" from the very; first day of their assuming office, though the occasion to appoint them arises because of a sudden increase in the work of High Court or arrears of work therein; in fact appoint-merit of Additional Judges on probation would be destructive of judicial independence. If, therefore, the Additional Judges are not on probation in any sense of the term, how can their continuance either as Additional Judges or Permanent Judges be made to depend upon the evaluation or assessment of their suitability as emerging from their work, performance and behaviour during their initial term ? Clearly the answer would be in the negative. On this reasoning aspects like low disposal, unsatisfactory performance, inefficiency and incompetency get easily ruled out but the real problem that requires to be faced is what should happen when aspects like suspected misbehaviour and/or reported lack of integrity on their part during their short tenure come to the fore ? This is the knottiest problem that has engaged my long and anxious consideration. Baldly put, the question is : Should an Additional Judge whose misbehaviour or lack of integrity has come to the fore be continued as an Additional Judge or confirmed as a Permanent Judge ? The answer at the first impulse and rightly would be in the negative but the question requires deeper consideration. If the misbehaviour or lack of integrity is glaringly self-evident the question of his continuance obviously cannot arise and in all probabilities will not engage the attention of the appointing authority, for, the concerned Judge in such a situation would himself resign but when we talk of misbehaviour or lack of integrity on the part of an Additional Judge having come to the fore, by and large the instances are of suspected misbehaviour and/or reported lack of integrity albeit based on opinions expressed in responsible and respectable quarters and the serious question that arises is whether in such cases the concerned Additional Judge should be dropped merely on opinion material or concrete facts and material in regard to allegations of misbehaviour and/or lack of integrity should be insisted upon ? In my view since the question relates to the continuance of a high constitutional functionary like the Additional Judge of High Court it would be jeopardising his security and judicial independence if action is taken on the basis of merely opinion material. Moreover, no machinery having legal sanction behind it for holding an inquiry -- disciplinary or otherwise against the concerned Judge on allegations of misbehaviour and/or lack of integrity obtains in the Constitution or any law made by the Parliament, save and except the regular process of removal indicated in Article 124(4) and (5) read with Article 218 and the Judges (Inquiry) Act, 1968. Therefore, the important question that arises in such cases of suspected misbehaviour and/or reported lack of integrity is who will decide and how whether the concerned Judge has in fact indulged in any misbehaviour or act of corruption? In the absence of satisfactory machinery possessing legal sanction to reach a positive conclusion on the alleged misbehaviour or an act of corruption the decision to drop him shall have been arrived at merely on she basis of opinions, reports, rumours or gossip and apart from being unfair and unjust to him such a course will amount to striking at the root of judicial independence. The other alternative, namely, to continue him as an Additional Judge for another term or to make him permanent if a vacancy is available and then take action for his removal under the regular process indicated in Article 124(4) and (5)

read with Article 218 and Judges (Inquiry) Act, 1968 may sound absurd but most hold to be inevitable if judicial independence, a cardinal faith of our Constitution, is to be preserved and safeguarded. Not to have a corrupt Judge or a Judge who has misbehaved is unquestionably in public interest but at the same time preserving judicial independence is of the highest public interest. It is a question of choosing lesser evil and the inevitable course has to be adopted not for the protection of the corrupt or dishonest Judge but for protecting several other honest, conscientious and bard-working Judges by preserving their independence; it is a price winch the Society has to pay to avoid the greater evil that will ensue if judicial independence is sacrificed. Considering the question from the angle of public interest, therefore, I am clearly of the view that while considering the question of continuance of the sitting Additional Judges on the expiry of their initial term either as Additional Judges or as Permanent Judges the test of suitability contemplated within the consultative process under Article 217(1) should not be invoked -- at least until such time as proper machinery possessing legal sanction is provided for enabling a proper inquiry against an alleged errant Judge less cumbersome than the near impeachment process contemplated by Article 124(4) and (5) of the Constitution.

623. However, the third ground of objection to bringing in the consultative process covering suitability under Article 217(1) at the stage of deciding upon their continuance does not impress me much. It is difficult to accept the contention that bringing in the suitability test under Article 217(1) at that stage is bound to affect the quality or character of justice administered by the sitting Additional Judges daring their initial term or towards the end of their term. In fact, so far on every occasion the consultative process inclusive of the suitability test under Article 217(1) has been resorted to white considering the question of granting extension to the Additional Judges or mating them permanent on the expiry of their initial term and no one has suggested that because of this their work, performance or behaviour was or has been guided by the anxiety to keep themselves on the right side of the Chief Justice of the High Court, the Chief Justice of India or the Appointing Authority. Instances are not wanting when within the first few days of mar assuming office they have delivered judgments dissenting from their Chief Justice as also of having rendered decisions un-palatabte to the Executive when their term was about to expire. If the basic assumption made while putting forward the argument is not well founded then there will be no question of any violation of Articles 14 and 21 being involved. The two decisions on which reliance has been placed also do not support the contention urged on behalf of the petitioners. In the former decision (P.C. Sethi's case MANU/SC/0249/1973 (supra) though the Chief Justice's order transferring the election petition from a Permanent Judge and allocating it to an Ad hoc Judge appointed under Article 224-A was set aside on the facts of the case, this Court at p. 215 (of SCR) : (at p. 215 of AIR) of the report observed thus:

It seems indeed desirable that election petitions should, ordinarity, if possible, be entrusted for trial to a permanent Judge of the High Court, even though we find that additional or acting judges or those requested under Article 224-A of the Constitution to sit and act as judges of the High Court, if assigned for the purpose by the Chief Justice, are legally competent to hear those matters." If anything the observation suggests is that there is nothing illegal or improper if Additional or Acting or Ad hoc Judges hear and dispose of elections petitions though in that particular case because of 'special facts and circumstances' obtaining therein the Chief Justice's order was interfered with. In the Other case (In re The Special Courts Bill, 1978) MANU/SC/0039/1978 (supra), Clause 7 of the Special Courts Bill provided that Special Courts were to be presided over either by a silling Judge of a High Court or by a person who had held the office of a Judge of a High Court to be nominated by the Central Government in consultation with the Chief Justice of India and this Court pointed out a couple of infirmities in that Clause, namely, a retired Judge of the High Court unlike a sitting Judge did not enjoy security of tenure and would be holding his office as a Judge of the Special Court during the pleasure of the Government and it was conceivable that such a Judge presiding over the Special Court, if he displayed strength and independence might be frowned upon by the Government and there was nothing to prevent the Government from terminating his appointment as and when it liked. It was further pointed out that though his appointment was required to be made in consultation with the Chief Justice of India there was nothing in the Bill to show that his termination will also require similar consultation and even if it were assumed that such consultation would be made even for his termination the process of consultation, with its own limitations, would be a poor consolation to an accused whose life and honour was at stake. It is true that these infirmities in Clause 7 of the Bill were pointed out by this Court to emphasize the aspect that appointing a retired High Court Judge as a Judge of the Special Court Who is to be nominated by the Central Government to try a special class of cases may not inspire confidence not only in the accused but in the entire community. It is also true that on these infirmities being pointed out the then Central Government accepted the suggestion of the Court that only a sitting Judge of a High Court would be appointed to preside over a Special Court and that such appointment will be made with the concurrence of the Chief Justice of India. However, all these observations and views that emerge from the opinion or advice which this Court gave to the President in a reference under Article 143(1) of the Constitution, on which Counsel for the petitioners placed great reliance, must be understood in the context of the Special Courts Bill which had been drafted by the then Central Government for the purpose of trial of special type of offences allegedly committed by persons holding high public or political offices in the country in the peculiar circumstances that obtained during the last Emergency and for some period prior thereto, under which a special expeditious procedure for trial other than the normal procedure contained in the Criminal Procedure Code had been prescribed and those observations and views, therefore, would be inapplicable to the issue raised before us, for parity of reasoning, in the absence of parity of situation, is of no avail.

However, for the reasons indicated earlier, in my view, at the time of deciding upon the continuance of the sitting Additional Judges on the expiry of their initial term the consultative process should be confined only to see whether the pre-conditions mentioned in Article 224(1) exist or not or whether pendency of work justifies their confirmation or not and the test of suitability contemplated within the consultative process under Article 217(1) cannot and should not be resorted to at all.

624. The next question that requires consideration is whether in the consultative process contemplated by Article 217(1) is any primacy intended to be given to the views or advice to be tendered by the Chief Justice of India in the matter of appointment of a High Court Judge or whether from amongst the three consulting functionaries the President (appointing authority) is entitled to choose or prefer the views or advice of anyone to those of the other or others ? It may be stated that this question really arises only in regard to the views or advice tendered on the suitability aspect and not on the aspect touching the existence of the pre-conditions of Article 224(1) or pendency of work justifying confirmation, because the former aspect is a matter of subjective assessment while the latter depends on objective facts over which no difference is likely to arise. I would also like to observe that the aforesaid question cannot at all arise in view of my conclusion that the test of suitability falling within the consultative process under Article 217(1) cannot and should not be resorted to, while deciding upon the continuance of sitting Additional Judges. Obviously the question cannot arise in cases of non-appointments qua proposed appointees at the time of their initial recruitment, for such non-appointments are cases of non sequitur. My conclusion thus completely obviates the dilemma posed in the question. However, I shall be considering this question on the assumption that I am wrong in my view that the test of suitability is not attracted and should not be invoked at the time of deciding upon the continuance of the sitting Additional Judges. The question of primacy obviously has to be considered by keeping in mind the object or purpose of providing for such consultation which was explained by Dr. Ambedkar in the Constituent Assembly thus:

There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two different ways in which this matter it governed in other countries.... (Here follows a reference to the practices obtaining in Great Britain and the United States).... The Draft Article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in The matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex-hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.

With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and an the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that, that is also a dangerous proposition.

(Vide Constituent Assembly Debates 1949, Vol. 8, page 258)

(Emphasis supplied.)

In other words the object of providing for such consultation clearly is that the same should act as a controlling or limiting factor on the discretion vested in the President while performing his executive function of making appointment of High Court Judges and neither the President nor the Chief Justice should have a power to veto a proposal Further, this question will have also to be considered in the light of what this Court has said about the almost binding character of the resultant advice flowing from the consultative process. In Sankalchand Sheth's case MANU/SC/0065/1977 (supra) dealing with the efficacy of consultation with the Chief Justice of India under Article 222(1) Krishna Iyer, J. at p. 502 (of SCR) : (at p. 2384 of AIR) of the report, observed:

It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India.... Of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly.

In Samsher Singh's case MANU/SC/0073/1974 the Court was dealing with consultation with the High Court under Article 234 read with Article 235 and in that behalf Krishna Iyer, J. at p. 873 (of SCR) : (at p. 2228 of AIR) of the report has observed:

In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if be departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order.

625. Keeping both the above aspects in mind one has to consider the question of primacy and in order to consider the same it will be necessary to set out Article 217(1) which runs thus:

217(1). Every Judge of the High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office in the case of an Additional or Acting Judge as provided in Article 224 and in any other case until he attains the age of 62 years.

On the question as to whether any primacy is intended to be accorded to the views or advice that would be tendered by the Chief Justice of India during the consultative process over the views or advice of the other two consulting functionaries (Governor of the State and the Chief Justice of the High Court) or whether all the three consulting functionaries are of co-ordinate authority so as to accord equal efficacy to each one's views or advice, the Article is clearly silent and simply because the expression 'consultation' has been used, it does not mean that the President has absolute authority or discretion in the matter because as explained by Dr. Ambedkar consultation has been provided with the object of limiting the authority or discretion of the President. Question is whether when the three functionaries differ in their views or advice has not the President a choice to prefer the views or advice of one of the three ? Counsel for contesting respondents contended that the President must have the right to make a choice as no one functionary has been given any primacy and in support Counsel strongly relied upon the fact that during the constituent assembly debates a specific amendment was moved by Mr. B. Pocker Sahib from Madras to the original Draft Article 193(1) (which was in identical terms as the present Article in so far as is material) to the effect that every Judge should be appointed by the President "on the recommendation of the High Court concerned, after consultation with the Governor of the State concerned and with the concurrence of the Chief Justice of India clearly seeking to give higher importance or status to the Chief Justice of India in the matter (vide Constituent Assembly Debates 1949, Vol. VIII page 658) but the said amendment was rejected and the Draft Article became the present Article 217(1). It was urged that the rejection of the amendment is a clear pointer indicating that the Constituent Assembly wanted to give co-ordinate authority to each one of the three consulting functionaries and no primacy was intended to be given to the views or advice of any particular functionary.

626. In the first place in the very nature of things it is difficult to accept the submission that all the three consulting functionaries under Article 217(1) must be regarded as of co-ordinate authority for the simple reasons that on aspects like capacity, character, merit, efficiency and fitness which converge on the suitability of the person proposed for appointment the Governor of the State will be least informed and will have nothing to say whereas the Thief Justice of the High Court and Chief Justice of India, being best informed, are well equipped to express their views and tender advice; further it is an accepted position which has been alluded to by the Law Commission in its 14th Report, that it is because of the financial aspect (salary and emoluments of a High Court Judge being charged on the Consolidated Fund of the State) and information about the antecedents, local affiliations and like other matters, capable of objective proof, concerning the proposed appointee which the State Executive would be possessing, that consultation with the Governor has been provided for. It is, therefore, difficult to regard the Governor of the State as being of co-ordinate authority with the other two consulting functionaries especially on the aspect of suitability which is the primary thing in the matter of making appointment of High Court Judges. Secondly, in my view, Mr. Pocker Saheb's rejected amendment has nothing to do with the primacy question at all because it was concerned with the effort at complete exclusion of the executive interference in the matter of appointment of the High Court Judges. If the amendment had been accepted the result would have been that the appointment shall have been made with the initiation of the proposal by the Chief Justice of the High Court, the consultation with the State Executive being retained because of the financial aspect and information regarding antecedents, etc. and only upon the concurrence of the Chief Justice of India, which, in other words, means the Chief Justice of India would have had the power to veto any proposal. In my view, conferring a power of veto on the Chief Justice of India is entirely different from the primacy being given to his views or advice over and above the views or advice of the other consulting functionaries, as a limiting factor on the President's discretion. Dr. Ambedkar also understood the proposed amendment of Mr. Pocker Sahib in this manner and pleaded for its rejection on the ground that it sought to confer a power of veto on the Chief Justice of India which he thought was

undesirable. The rejection of the amendment, therefore, has no bearing whatsoever on the question of primacy with which the Court is concerned at the moment Thirdly, once it is realised that the scope and ambit of full and effective consultation requires that all the material facts and records concerning the proposed candidate must be made available to both these consulting functionaries by placing the same before each during the consultative process and that each consulting functionary must consider the same or identical material and exchange each one's views thereon with the other there is no merit left in the argument that the Chief Justice of the High Court has a closer opportunity to assess the suitability of the proposed appointee; surely it is not a case of watching the demeanour of a witness so as to put the assessment of the Chief Justice of the High Court on any higher footing. Having regard to these aspects, particularly the last one, one will have to consider whether any primacy could be and should be given to the views and advice tendered by the Chief Justice of India to the President in the matter of appointing High Court Judges. I must confess that the Article does not expressly suggest that any primacy is to be accorded to his advice during the consultative process undertaken in Article 217(1) but, in my view, the scheme of consultative process contemplated by that Article envisages consideration of identical facts and materials bearing on the suitability of the candidate by both the consulting functionaries, namely, the Chief Justice of the High Court and the Chief Justice of India, as also an exchange of their views on such material, and thereafter placing of the entire material together with each one's views thereon and the tendering of the advice or final recommendation by the Chief Justice of India to the President whose decision should be guided by such advice or final recommendation so tendered. If such be the scheme envisaged by Article 217(1) -- and I am of the opinion it does envisage such a scheme, then clearly by implication primacy is intended to be given to the advice that would be tendered by the Chief Justice of India to the President. In any event, I would suggest that evolving such a scheme regarding the consultative process under Article 217(1) would be in fitness of things as primacy shall have been given to the advice or final recommendation to be tendered by the Chief Justice of India who happens to occupy the highest constitutional position as the head of the Indian Judiciary. It may be noted that giving primacy to the advice of the Chief Justice of India in the matter of appointment of High Court Judges is not to give power to veto any proposal as was contemplated by Mr. Pocker Saheb's amendment nor would giving such primacy to his advice mean that the Chief Justice of India would be enjoying unfettered arbitrary powers, for, if his advice has proceeded on extraneous or non-germane considerations the same shall be subject to the judicial review just as the President's final decision is so subject if he were to disregard the advice of the Chief Justice of India unless the same is justified for cogent and convincing reasons. But the point I would like to emphasise is that construing Article 217(1) as envisaging the scheme of the nature indicated above would go a long way in preserving judicial independence rather than not according primacy to Chief Justice of India's advice and permitting the President to act as an arbiter between the divergent views of the two high constitutional functionaries and leaving him to prefer the views of one to the other.

627. Having considered the question of primacy as aforesaid, I would like to make a couple of observations on the basis that the suitability test is required to be passed by the sitting Additional Judges over again at the time of deciding upon their continuance either as Additional Judges or as Permanent Judges. The consultative process even on this occasion must be full, complete and effective as is the case with the consultative process that is required to be gone through under Article 222(1) when the question of transfer of a Judge from one High Court to another High Court is considered. Further, the procedure to be followed at the time of undertaking such consultative process must also ensure fair play qua the concerned sitting Additional Judge. In other words, though the principle of natural justice in its full vigour is not contemplated, the sitting Additional Judge should not receive a raw deal at the hands of the consulting functionaries and either one or the other or if necessary both should hear him, especially if any adverse material is weighing in their minds against him, just as in the case under Article 222(1) the personal difficulties and other grounds of objections of the proposed transferee are considered by the consulting functionary. In other words, in my view the scope and ambit of the consultative process under Articles 217(1) and 222(1) we and must be the same,

628. I shall next deal with the question of short-term extensions which have been challenged by the petitioners as being directly subversive of the independence of Judiciary and, therefore, not contemplated by the Constitution. The contesting respondents in that respect have placed strong reliance upon the provision contained in Article 224(1) to suggest that such short-term extensions are contemplated and fall within the power conferred upon the appointing authority under that Article. It is true that Article 224(1) confers power on the President to appoint duly qualified persons to be Additional Judges of a High Court if the preconditions mentioned therein exist "for such period not exceeding two years as he may specify". Relying on the phrase "for such period not exceeding two years as he may specify" occurring in the Article, the contesting respondents have claimed that that phrase only fixes the maximum period of two years at a time, that the Article does not limit the discretion of the appointing authority in the matter of the period for which an Additional Judge can be appointed except in regard to the ceiling of two years and that the appointment can be for a shorter period which period is not justiciable and what has been urged is that the period must of necessity get correlated to the continued existence of the pre-conditions relating to the volume of work for which the appointments are to be made. Such a literal construction is difficult to accept because no provision of the Constitution can be interpreted in a manner which will be in conflict with any of the basic features of the Constitution and the cardinal principle of independence of Judiciary is one such basic feature; therefore, the construction to be put on the phrase in the Article must be consistent with the said principle. It cannot be disputed that security of tenure ensures

judicial independence and tenures for short-terms like three months, six months or nine months bring in insecurity directly impinging on judicial independence and also tend to shake the faith of the community in the administration of justice and, therefore, would be unconstitutional. Moreover, granting short-term extensions for periods like three months, six months, or nine months 'pending inquiry into the complaints' said to nave been received against some of the sitting Additional Judges, as has been admitted by Shri Kankan in his counter-affidavit on behalf of the contesting respondents, would be clearly outside the contemplation of the Constitution for no machinery having legal sanction behind it has been provided for either in the Constitution or any other law authorising such inquiry or investigation into the complaints against sitting Additional Judges and the practice of giving short-term extensions on such ground must be deprecated and regarded as unconstitutional. I have already held that the suitability test is not attracted while deciding upon the continuance of the sitting Additional Judges but assuming that it is required to be gone through the process must be completed well in advance of the date of expiry of their initial term or if for any reason it cannot be so completed the concerned Additional Judge must be given extension for at least one year. In this behalf I would again like to refer to the constitutional convention or practice that has grown over the years, notwithstanding the phrase "for such period not exceeding two years as he may specify" occurring in Article 224(1), which is to appoint Additional Judges initially for a period of two years, which has come to be regarded as the 'normal term' and on the expiry of this term to continue them for a further period of two years and so on till they are confirmed as Permanent Judges, subject, of course, to the pre-conditions continuing to obtain in that High Court and it has been pointed out that Article 224(1) has been work-ed in that manner over the years. In any case no extension for less than a year should ever be granted irrespective of whether volume of work justifies it or not simply with a view to give the Judge concerned fixity of tenure for that period. Further, it is extremely desirable and necessary that orders granting extensions to sitting Additional Judges or making them permanent are issued and intimated to the concerned Judges and not merely to the Constitutional authorities as was suggested during the vacation hearing, well in advance of the date of expiry of their term and not at the eleventh hour keeping them on tenter-hooks till the last moment. After all the sitting Additional 'Judges are high Constitutional functionaries possessing the same position, powers and privileges as the Permanent Judges, and deserve due consideration and respectful treatment at the bands of the appointing authority.

629. Apropos their challenge to short-term extensions the petitioners have contended that Article 216 of the Constitution casts a primary obligation upon the President mandatorily to provide adequate permanent strength to every High Court to cope with its normal business so as to ensure its disposal within reasonable time and to review such strength from time to time so that arrears do not accumulate and justice to litigants is not unduly delayed, while the power to appoint Additional Judges under Article 224(1) is only to meet, (a) temporary increase in the business of the High Court or (b) arrears of work therein, and the complaint is that the appointing authority or the Union Government has failed to discharge its mandatory obligation under Article 216 and has gone on appointing Additional Judges even when a substantial increase in the normal business is there in almost every High Court justifying the reviewing of the permanent strength of those High Courts. The contention has been that the objective facts obtaining in many High Courts unmistakably demonstrate that the increase of business is not of a temporary character but is a permanent increase every year and that the arrears have increased and accumulated to an appreciably disturbing level with no reasonable prospects of substantially reducing the same over a period of years and, therefore, the President cannot resort to Article 224(1) but has to increase the permanent strength by making permanent appointments under Article 217 read with Article 216. In any case it is urged that Additional Judges cannot be appointed while keeping permanent post vacant as is happening at present frequently. The submission of the petitioners therefore has been that in view of such reality, obtaining in various High Courts the action on the part of the appointing authority in keeping a, large number of sitting Additional Judges as Additional Judges would be arbitrary and unconstitutional and clear case exists for declaring them to be deemed to have become permanent or for directing the President to make them permanent by appropriately increasing the permanent strength in the concerned High Courts and it will be within the powers of this Court to pass appropriate orders or give necessary directions in this behalf. In support of these submissions statements containing statistical materials pertaining to Bombay High Court and Delhi High Court were relied upon and on the question of Courts' power to grant appropriate reliefs reliance was placed upon two decisions of this Court, namely, Shewpujanrai Indrasanrai Ltd. v. The Collector of Customs MANU/SC/0056/1958 and Y. Mahaboob Sheriff v. Mysore State Transport Authority MANU/SC/0189/1959.

630. On the other hand, Counsel for the contesting respondents denied that the appointing authority has failed to discharge its obligation to provide adequate permanent strength in the High Courts. It was not disputed that the volume of work in almost every High Court has increased tremendously and heavy arrears have accumulated and are ever mounting but it is pointed out that whenever any Chief Justice of any High Court had asked for an increase either in the permanent strength or in the strength of Additional Judges such request was always considered and responded to satisfactorily. On the question of liquidating arrears it has been pointed out that the problem is not merely related to the strength of either permanent or Additional Judges obtaining in High Court but depends on numerous other factors and several suggestions in the direction of finding a solution to that problem have been under active consideration of the Union Government Counsel, however, strenuously disputed that in this area appertaining to executive function of the appointing authority and/or the Union Government this Court can grant relief by way of declaring the sitting Additional

Judges to be deemed to have become permanent or by directing the President to make them permanent by appropriately increasing the permanent strength in the concerned High Courts as has been prayed for by the petitioners.

631. On a consideration of two relevant Articles, namely, 216 and 224(1) it seems to me quite clear that Article 216 unquestionably casts a mandatory obligation on the President (appointing authority) to provide adequate strength of permanent Judges in every High Court to cope with and dispose of its normal business and further to review periodically such permanent strength. The word "shall" and the further words "such other Judges as the President may from time to time deem it necessary to appoint" occurring in the Article are a clear pointer in that direction. Article 224(1) as has been stated earlier, confers power on the President to appoint Additional Judges only to meet the situation arising from (a) temporary increase in the business of the High Court, or (b) arrears of work therein. In other words if the increase in the work or business of the High Court is not of a temporary character but a permanent increase every year resort will have to be made to Article 216 and not to Article 224(1). Further, I would also like to observe that ordinarily it will not be proper to appoint an Additional Judge in a High Court while keeping a permanent post vacant or unfilled. But beyond making these observations which should guide the exercise of the power both under Article 216 and Article 224(1) by the appointing authority I am satisfied that it will not be proper for this Court to give the directions or reliefs sought by, the petitioners for the reasons which I shall presently indicate. In the first place it cannot be disputed that appointing Judges to a High Court either as permanent Judges or Additional Judges is purely an executive function entrusted by the Constitution to the appointing authority and it will not be proper for this Court to usurp that function to itself or issue any directions in that behalf unless forced by glaringly compelling circumstances. Secondly, no direction or relief us sought is possible unless a full, complete and correct assessment about the requisite strengths of Permanent as well as Additional Judges of every High Court as on a particular date is made available to the Court Thirdly such assessment about the requisite strengths for every High Court must depend on statistical data to be collected throwing light on 'normal business', 'temporary increase', and 'arrears of work' in each High Court after fixing the rate of disposal per Judge per year and defining what should be regarded as 'main cases', 'miscellaneous cases' or 'interlocutory cases' etc.; the norm in regard to such matters being a variable criterion requiring refixation depending on facts, circumstances and situation as and when they develop. It would, therefore, be extremely difficult for this Court to issue directions or grant reliefs of the nature sought by the petitioners. Moreover, relief by way of declaring the sitting Additional Judges to be deemed to have be-come permanent is sought on the footing that the President should be deemed or taken to have done what he ought to have done in the circumstances of the case but it will be difficult to accept the position that when the President has appointed a duly qualified person as an Additional Judge for two years he should be deemed to have appointed him as the Permanent Judge under Article 216. Though no particular Article is not referred to in the warrant of appointment reference in the warrant to the fact that the person has been appointed "an Additional Judge" and the mentioning of the short-period therein will clearly negative any intention on the part of the President to appoint him a permanent Judge, notwithstanding the duty having arisen in the circumstances of the case to make a permanent appointment. For these reasons I do not think that this Court should issue the directions or reliefs sought by the petitioners in this behalf and it is hoped that the observations made above will guide the future course of action of the appointing authority.

632. The next question on which a great deal of argument was advanced at the Bar by Counsel for the petitioners is whether before effecting a transfer of a Judge from one High Court to another his 'consent' to such transfer should be obtained or not, that is to say, whether the words "with his consent" should be read into Article 222(1) of the Constitution or because a transfer involves a 'fresh appointment'. Article 222(1) runs thus:

The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to another.

It must be observed that this question was considered and decided by this Court in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) in the negative by a majority of 3 : 2 but according to Counsel for the petitioners the majority view requires reconsideration and since these cases were heard by a larger Bench of seven Judges he addressed the Court elaborately on the point. Before dealing with the various aspects of the contention urged by the Counsel for the petitioners in this behalf it will be desirable to set-out in brief the background in which that question arose for consideration and in what manner the same was dealt with in that case both by the Gujarat High Court at the initial stage and by this Court in appeal. During the last Emergency a mass transfer of Permanent Judges from one High Court to another was attempted in the name of national integration and in May, 1976 it had been proposed to transfer 56 Judges of the various High Courts and as the first instalment 16 Judges, including Chief Justices, were in fact transferred. Justice Sankalchand Sheth, one of the transferees, was shifted from Gujarat High Court to the High Court of Andhra Pradesh. He filed a writ petition in the Gujarat High Court against the Union of India and Chief Justice A.N. Ray challenging the order of transfer as void and inoperative, inter alia on grounds of promissory estoppel, no effective consultation, and want of consent on his part which should be read into Article 222(1). The Union of India in its affidavit in reply supported the impugned order, inter alia, on the ground that the power of the President to transfer a Judge was absolute save and except that he had to consult the Chief Justice of India and as this had been done the

transfer was valid; that there was no question of promissory estoppel and that no consent was required. No reasons were given for the transfer but the policy of transfer was justified on the ground of national integration. No affidavit in reply was filed by the Chief Justice of India who was the 2nd respondent to the petition. The matter was beard by a Full Bench of Gujarat High Court which unanimously rejected the petitioner's plea of promissory estoppel. By a majority, consisting of Mehta and D.A. Desai, JJ. the Full Bench rejected the petitioner's contention that 'consent' must be read into Article 222(1) and also the contention that as a transfer of a Judge involves fresh appointment such appointment could not be made without the Judge's consent. A.D. Desai, J. however, in a minority view, upheld the petitioner's contention as regards 'consent' on both the grounds, that is to say, he held that 'consent' must be read into Article 222(1) and that since a transfer of a Judge involves a fresh appointment it could only be done with the Judge's consent. However, all the three Judges unanimously held that the order of transfer was void as it had been made without the requisite consultation with the Chief Justice of India as contemplated by Article 222(1) on its true interpretation. Feeling aggrieved by this judgment of the Gujarat High Court the Union of India preferred an appeal to this Court under Certificate granted by the High Court, which was heard by a Constitution Bench of five Judges of this Court. On a statement being made by the learned Attorney-General for the Union of India to the effect that on the facts and circumstances of the case on record the then Government did not consider that there was any justification for transferring Justice Sheth from Gujarat High Court and proposed to transfer him back to that High Court, Counsel for Justice Sheth stated that his client was prepared to withdraw his writ petition with the leave of the Court. Though the appeal got settled as above to the satisfaction of Justice Sheth, the Constitution Bench desired to consider important issues arising in the case which related to the aspect of judicial independence involved in transfer of High Court Judges and after hearing arguments from Counsel on either side delivered its judgment expressing its views on the issues involved. It may be stated that the plea of promissory estoppel was not pressed and was not considered by this Court. On the aspect of 'consent' of the Judge concerned qua Article 222(1) the Bench was divided in its opinion, the majority of the Court (Chandrachud, Krishna Iyer and Fazal Ali, JJ.) upon a consideration of the wording of the Article itself in the context of the scheme, other provisions and all relevant aspects held that as a matter of construction 'consent' could not be read into Article 222(1) and further that consent of the Judge who was transferred was not necessary as transfer involved no fresh appointment; the majority further held that the power to transfer could not be exercised by way of punishment but could be exercised only in public interest and after consultation with the Chief Justice of India and that public interest and consultation with the Chief Justice of India were sufficient safeguards against the abuse of power under Article 222(1) and with these built-in-safeguards it was unnecessary to read 'consent' in that Article. Bhagwati, J. upheld both the contentions of the original petitioner, namely that as a matter of construction 'consent' should be read into Article 222(1) and secondly consent of the concerned Judge who was transferred was necessary as a transfer involved a fresh appointment. Untwalia, J. held that although consent could not be read into Article 222(1) as a matter of construction, such consent was necessary because the transfer of a Judge involved a fresh appointment.

633. It may be stated that before arriving at the aforesaid conclusions the Judges have expressed their considered views on several aspects concerning the power of transfer vested in the President under Article 222(1) in the context of the concept of independence of judiciary to which a brief reference will be appropriate. In the first place all the Judges have emphasised the fact that the framers of our Constitution had taken the utmost pains to secure the independence of the Judges of the Supreme Court and the High Courts and in that behalf several provisions in the Constitution were referred to -- a position which was not disputed by the Attorney-General for the Union of India. Further, all the Judges rejected the claim made on behalf of the Union Government that the power conferred on the President under Article 222(1) was absolute or that if he were to "consult" the Chief Justice of India there was an end of the matter and the order of transfer could not be questioned. The Court held that the power of transfer conferred on the President under Article 222(1) was subject to two built-in-safeguards : (i) that it must be exercised in public interest alone and not in order to punish a Judge or to make him toe the Government line and (ii) that it must be exercised after full, complete and effective consultation with the Chief Justice of India; in other words an order of transfer would become a justiciable issue and be liable to be quashed or set aside if (a) it was not in public interest or (b) it was passed without full, complete and effective consultation or (c) if the opinion or advice of the Chief Justice of India was ignored or brushed aside without cogent reasons. On the scope and efficacy of consultation contemplated under Article 222(1) two learned Judges Chandrachud, J. and Krishna Iyer, J. dealt with those aspects at some length and the other learned Judges have substantially expressed their agreement with their views on the point The effect of the observations on the scope of consultation can be briefly stated thus : Consultation with the Chief Justice is obligatory and a condition precedent to the exercise of that power by the President; such consultation must be a real, substantial and effective consultation and in order that it should be so, all relevant facts in support of the proposed action of transfer must be placed before the Chief Justice and all his doubts and queries must be adequately answered; the consultation casts an obligation and a duty on the Chief Justice to elicit information not merely from the President and the Judge concerned but from such quarters as he thinks fit on all relevant aspects healing on the desirability, advisability and necessity of the proposed transfer including factors personal to the Judge concerned such as his health, extreme family factors involving dislocation etc. so as to leave him no pounds to complain of arbitrariness or unfairplay. On the efficacy of the resultant advice tendered by the Chief Justice, Krishna Iyer, J. observed at p. 502 (of SCR) : (at p. 2384 of AIR 1977 SC) of the Report thus:

Secondly, although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Article 222 cannot be exercised whimsically or arbitrarily.

Again after quoting passage from the Judgment in Chandramouleshwar's case MANU/SC/0495/1969 and after referring to his own judgment in Samsher Singh's case MANU/SC/0073/1974 (supra) in which he struck the same chord, he observed thus (at p. 2384):

It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India.

The learned Judge has further gone on to observe thus (at p. 2385):

The dangers of arbitrary action or unsavory exercise has been minimised by strait-jacketing of the power of transfer. Likewise, the high legal risk of invalidation of the Presidential order made in the teeth of the Chief Justice's objection, runs in an added institutional protection. For, it is reasonable for the Court, before which a Judge's transfer is challenged, to take a skeptic view and treat it as suspect if the Chief Justice's advice has been ignored.

634. It may also be stated that according to Chandrachud, J. just as the safeguard of public interest kept transfers by way of punishment outside the purview of Article 222(1) the safeguard of effective consultation also indicated that policy transfers on a wholesale basis were also outside the scope of that Article. As regards the plea of national integration on the basis of which the transfers of 16 permanent Judges were sought to be justified, Chandrachud, J. expressed the view that it was a moot point whether it would be necessary to transfer Judges from one High Court to another in the interest of national integration but since it was a policy matter the Court was not concerned with it directly but suggested that considering the great inconvenience, hardship and possibly a slur which a transfer from one High Court to another High Court involves, the better view would be to leave the Judges untouched and take other measures to achieve that purpose, and further added that if at all oh mature and objective appraisal of the situation it was still felt that there should be a fair sprinkling in the High Court judiciary of persons belonging to other States, that object could be more easily and effectively attained by making appointments of outsiders initially but he categorically observed that the record of the case before the Court did not bear out the claim that any of the 16 High Court Judges had been transferred in order to further the cause of national integration and the true position was far from it. On the question of non-consensual transfers being within the Article Krishna Iyer, J. summed up the position thus (at p. 2383 of AIR 1977 SC):

Logamachy may confuse, philosophy may illumine, teleology may shed interpretative sheen. We have considered the design, the source, the impact and the engineering aspects of Article 222. At the end of the journey we feel clearly that the power of non-consentaneous transfer does exist. Salutary safeguards to ensure judicial independence with concern for the All India character of the superior Courts in the context of the paramount need of national unity and integrity and mindful of the advantages of Inter-State cross-fertilization and avoidance of provincial perviciousness were all in the calculations of the framers of the Constitution. A power is best felt by its aware pretence and tare exercises.

635. Counsel for the petitioners principally urged two grounds before us which according to him necessitate a reconsideration of the majority view in Sankalchand Sheth's case MANU/SC/0065/1977 about non-consensual transfers being within the purview of Article 222(1) which I propose to discuss one after the other. In the first place according to Counsel one of the principal reasons why the majority felt that there was no need to read the words "with his consent" into Article 222(1) was that the power to transfer thereunder could not be exercised by way of punishing a High Court Judge, which aspect was exclusively governed by Article 218 read with Article 124(4) and (5), but had to be exercised only in public interest and after effective consultation with the Chief Justice of India and that public interest and such consultation were sufficient safeguards against the abuse of power under that Article but the safeguard of public interest so as to prevent the exercise of the power by way of punishment will be found to be illusory if the examples of transfers in public interest as have been given by Chandrachud, J. in his judgment are care-fully scrutinised; for, according to Counsel the illustrative cases of transfers in public interest as given by the learned Judge on analysis will be found to involve misbehaviour mentioned in Article 124(4) and therefore in those illustrative cases though the transfers may appear to be in public interest in one sense they would be really by way of punishment and as such there is a contradiction at the heart of the judgment. Reliance in this behalf was placed on the following passage occurring in the judgment of Chandrachud, J. at p. 446 (of SCR) : (at p. 2341 of AIR):

Experience shows that there are cases, though fortunately they are few and far between, in which the exigencies of administration necessitate the transfer of a Judge from one High Court to another. The factions local atmosphere sometimes demands the drafting of a Judge or Chief Justice from an-other High Court and on the rarest occasions which can be counted on the fingers of s hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites. The voice of compassion is heard depending upon who articulates it though transfers in such cases are preeminently in public interest, it will be impossible to achieve that purpose if a Judge can-not be transferred without his consent. His personal interest may lie in continuing in a Court where his private interest will be served best, whereas, public interest may require that his moorings ought to be severed to act as a reminder that "the place of justice is hallowed place.

It is pointed out that in the cases mentioned above, if the veil of the language of judicial courtesy was lifted, it will appear clear that the power of transfer that would be used would be to punish a Judge for misbehaviour, for which, as the judgment points out, action has to be taken only under Article 218 read with Article 124(4) and (5). For instance, a transfer brought about by "the factious local atmosphere" put in plain language means that a Judge or Chief Justice is failing to administer justice impartially by favouring or disfavouring a faction; similarly, where a transfer is effected in order "to withdraw a Judge from a circle of favourites and non-favourites" it would be a clear case of the Judge being guilty of gross misbehaviour in clear violation of his judicial oath. It is, therefore, urged that though in such cases, the transfers may apparently be in public interest they are really by way of punishment and as such the safeguard of public interest is of no avail. In fact, according to Counsel transfers of such Judges would run counter to public interest as these Judges should not be inflicted on other High Courts to vitiate the atmosphere there. Counsel further urged that if regard be had to the ordinary dictionary meaning of the word 'punishment' it is clear that punishment means; "pain, damage or loss inflicted" (without any retributive or judicial character) and in this sense every transfer of a High Court Judge from one High Court to another without his consent would amount to punishment since it inflicts on him personal injury, loss or damage in the sense of uprooting him from his moorings, his being required to have two establishments, suffering a dislocation in family affairs, etc., apart from the slur involved in being so transferred. It is further pointed out that the main safeguard is of public interest and the safeguard of effective consultation is secondary arising out of and in furtherance of the main safeguard and as such if the principal safeguard fails the secondary safeguard, which is in furtherance of it, would also fail. If, therefore, both the safeguards, the principal as well as the secondary, become illusory and if punishment is involved in every transfer without consent then one of the principal reasons suggested by the majority fop not reading consent into the Article must disappear and there would be the need to read 'consent' into the Article so as to obviate the element of punishment.

636. It is difficult to accept the aforesaid line of argument as necessitating the reconsideration of the majority view in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) for the reasons which I shall presently indicate.

637. But before dealing with the contention I would like to observe that I am in agreement with Counsel for the petitioners that the illustrative cases given in the passage quoted above are in substance where Judges could be said to be guilty of misbehaviour falling under Article 124(4) and that their transfer to other High Courts, apart from being by way of punishment, would amount to doing great dis-service to public interest. In this context I would like to emphasize that the safeguard of public interest read into Article 222(1) is not intended for protecting any black-sheep in the judiciary but for protecting the numerous honest, conscientious hard-working Judges and I have always been of the confirmed view that no corrupt or dishonest Judge, and nor a Judge, who contrary to his oath of office, indulges in any kind of favouritism while discharging his duties -- who could be likened to a rotten egg, should be tolerated in the judicial basket and he deserves to be dealt with under Article 218 read with Article 124(4) and (5) but not by transferring him to another High Court, for, such a transfer would be contrary to public interest. That is why I would reiterate that a transfer by way of punishment for misbehaviour is clearly outside the purview of Article 222(1) and similarly, any transfer with an oblique motive or for an oblique purpose, such as for not toeing the line of the Executive or for rendering decisions unpalatable to the Executive or for having for some reason or the other fallen from the grace of the Executive, would also be outside its purview and liable to be struck down, if oblique motive or purpose is established.

638. Turning to the contention, it must, in the first place be pointed out that the mere fact that the illustrative cases of transfers given by Chandrachud, J. in his judgment as being in public interest are in substance and reality cases of transfers by way of punishment does not mean that there can be no cases of transfers purely in public interest without any element of punishment being involved. Cases of transfers in public interest pure and simple without involving any element of punishment are conceivable with the result that the safeguard of public interest dwelt at length in the judgment cannot be said to be illusory or otiose. When Article 222, as inserted anew by Drafting Committee in the Revised Draft Constitution prepared on Nov. 3, 1949, was discussed in the Constituent Assembly on Nov. 16, 1949. Dr. B.R. Ambedkar indicated the purpose of inserting the provision in the Revised Draft and gave at least two instances of transfers which would purely be in public interest. This is what he said:

The Drafting Committee felt that since all the High Courts so far as the appointment of Judges is concerned form now a Central subject it was desirable to treat all the Judges of the High Courts throughout India as forming one single cadre like the I. C. S. and that they should be liable to be transferred from one High Court to another. If such power was not reserved to the Centre the administration of justice might become a very difficult matter. It might be necessary that one Judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talent which may not be locally available. Secondly, it might be desirable to import a new Chief Justice to a High Court because it might be desirable to have a man unaffected by local politics or local jealousies. We thought, therefore, that the power to transfer should be placed in the hands of the Central Government.

We also took into account the fact that this power of transfer of Judges from one High Court to another may be abused. A Provincial Government might like to transfer a particular Judge from its High Court because that Judge had become very inconvenient to the Provincial Government by the particular attitude that he had taken with regard to certain judicial matters or that he had made a nuisance of himself by giving decisions which the Provincial Government did not like. We have taken care that in effecting these transfers no such considerations ought to prevail. Transfers ought to take place only on the ground of convenience of general administration. Consequently, we have introduced a provision that such transfers shall take place in consultation with the Chief Justice of India who can be trusted to advice the Government in a manner which is not affected by local or personal prejudices. (vide : Constituent Assembly Debates Vol. 11 p. 580).

It is thus clear that transfers under Article 222(1) have to be made only in public interest the ground being convenience of the general administration and the two instances given by Dr. Ambedkar (vide : the underlined portion in first para) would clearly fall within the ambit of this ground and such transfers would be purely in public interest without any element of punishment being involved therein. Yet another instance of a transfer which could be said to be purely in public interest would be where the same is effected for remedying unsatisfactory working conditions obtaining in a High Court for reasons beyond the control of the Judge concerned and for which he is not responsible in any manner; similarly, if a particular Judge by reason of his nature and temperament is unable to get along with the Chief Justice or any of his colleagues in a High Court his transfer would be in public interest and not by way of punishment in the sense in which that expression is to be understood in the context of the power to transfer under the Article. In such cases the power to transfer a Judge from one High Court to another without his consent would be appropriate and justified. Coming to the aspect of punishment put forward by Counsel for the petitioners it must be observed that when it is said that the power of transfer under Article 222(1) cannot be and should not be exercised by way of punishment what is intended to be conveyed is that the Judge concerned should not be transferred for misbehaviour falling under Article 124(4) or with oblique motive or for oblique purpose indicated above, which alone would be by way of punishment in the correct sense of that expression in the context of the power as contained in the Article and not that he should not be subjected to the kind of punishment which is inherent in the transfer. In my view, there is a clear distinction between the punishment involved in making the transfer for misbehaviour or out of oblique motive and the punishment which is inherent in the order of transfer in the sense of infliction of personal injury, loss or damage arising out of his moorings being severed, be being required to have two establishments or his suffering a dislocation in his family affairs, etc. Further, it is not as if this latter aspect of punishment which is inherent in an order of transfer is being totally ignored before passing the order of transfer, for, precisely these very aspects concerning the Judge proposed to be transferred are required to be taken into consideration and given due weight by the Chief Justice of India during the consultative process which he is required to undertake for observing the second safeguard of full and effective consultation. It is, therefore, not possible to accept the contention that the two safeguards of public interest and effective consultation subject to which the power of transfer is to be exercised are either illusory or unreal and if they afford real protection to the Judge concerned against the abuse of power as suggested in the majority view there would be no need to read consent into Article 222(1).

639. The other ground which necessitates the reconsideration of the majority view, according to the Counsel for the petitioners, is that while rejecting the contention of the original petitioner that a transfer of a Judge from one High Court to another involves "a fresh appointment" and, therefore, his consent to the transfer would be necessary, both Chandrachud, J. and Krishna Iyer, J. have proceeded on the basis that the Government of India Act 1935 did not contain any provision for the transfer of a Judge and contrasted Section 220(2), Proviso (c) of that Act with Article 217(1)(c) of the Constitution and took the view while enacting the latter provision the framers of the Constitution had made a distinction between 'appointment' and 'transfer' by using these two expressions in contradistinction with one another while providing that "the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or his being transferred by the President to another High Court within the territory of India" (see : Article 217(1)(c)). In other words), by contrasting the provision contained in Section 220(2), Proviso (c) of the Government of India Act 1935 with Article 217(1)(c) of the Constitution both the learned Judges took the view that the expression 'appointment' in the first part of the latter provision meant 'fresh appointment' while the expression 'transfer' used in the latter part did not mean fresh appointment and for taking such a view and that the two expressions had not been interchangeably used reliance was placed on the supposed absence of any provision for a transfer of a

Judge in the Government of India Act, 1935. But Counsel has submitted that Government of India Act, 1935 did contain a provision for the transfer of a Judge and in that behalf reliance was placed upon the fact that Proviso (c) to Section 220(2) was introduced with retrospective effect from April 1, 1937 by Section 2 of the India (Miscellaneous Provisions) Act, 1944 enacted by the British Parliament and it was pointed out that though the actual Proviso (c) used the word 'appointment', the Marginal Note of Section 2 ran thus : "Judges to vacate office on transfer" and even during the discussion that took place on the Bill, Earl of Munster addressing the House of Lords and the Secretary of State for India Mr. Amery addressing the House of Commons while explaining the provision that was being inserted with retrospective effect stated that the said provision was being made providing for vacating the office of a Judge on his transfer to another High Court or to the Federal Court. In other words, what has been urged by counsel for the petitioners is that the Marginal Note to Section 2 of the India (Miscellaneous Provisions) Act, 1944 as well as the debates in the House of Lords and House of Commons clearly indicate that Proviso (c) which was added with retrospective effect to Section 220(2) of the Government of India Act, 1935 really dealt with transfer of a High Court Judge when be was either appointed to another High Court or to the Federal Court that is to say, the expression 'appointment' has been used really to connote a transfer, suggesting an interchangeable use of the two expressions by the British Parliament and, therefore, the basis adopted by the learned Judges for drawing a distinction between 'appointment' and 'transfer' would disappear and, therefore, the conclusion arrived at would not be correct. Counsel fairly stated that Reports of British Parliamentary Proceedings compiled by Hansard were not available to him when Sankalchand Sheth's case MANU/SC/0065/1977 (supra) was argued by him before this Court but have since been made available now and he was making his submission before us. There may be some force in the submission but in my view the submission is not adequate to necessitate a reconsideration of the majority view for two reasons. In the first place the assumed basis (which is now found to be wrong) for making the distinction between 'appointment' and 'transfer' in Article 217(1)(c) was merely used for refuting an argument of the original petitioner that since in Section 220(2), Proviso (c) of the Government of India Act, 1935 appointments to Federal Court were clubbed with the appointments "to another High Court" and since the Judge's consent was necessary in both the cases the Court should read the corresponding provision of the Constitution to Article 217(1)(c) to mean that a process of the transfer of a Judge from one High Court to another involves a fresh appointment and in that connection it was said that the Government of India Act, 1935 did not contain any provision for a transfer of a Judge. Secondly, apart from that reason, several other reasons have been indicated in the judgment why a transfer of a Judge does not involve a fresh appointment, such as non-issuance of a fresh warrant of appointment, no consultation as contemplated under Article 217 taking place but only of the kind contemplated by Article 222(1), etc. The first reason does smack of formality but the second cannot be regarded as unsubstantial, for the nature of the two consultations is different and the fact that only that kind of consultation contemplated under Article 222(1) takes place emphasises the position that it is not a fresh appointment. In view of this position the second ground on which the reconsideration of the majority view is sought is of no avail.

640. Having regard to the aforesaid discussion, in my view, no case could be said to have been made out for reconsidering the decision of the majority in Sankalchand Sheth's case (supra), according to which non-consensual transfers are within the purview of Article 222(1). The other submissions in support of the contention that 'consent' should be read into that Article as a matter of construction or that consent of the concerned Judge is necessary as a transfer involves fresh appointment, which were reiterated in brief before us, have all been dealt with and answered by the learned Judges who pronounced the majority view in Sankalchand Sheth's case (supra). I am, therefore, in agreement with the majority view that non-consensual transfers are within the purview of Article 222(1).

641. Before parting with the decision in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) I would like to refer to certain observations made by Chandrachud, J. in connection with policy transfers as I feel that they need some clarification and apropos those observations I would like to deal with and make my observations with regard to the two policies which appear to have been accepted in principle, though not fully formulated and formally declared by the Union Government in connection with the transfer of High Court Judges. In Sankalchand Sheth's case (supra) a view has been expressed by Chandrachud, J. that the safeguard of effective consultation suggests that policy transfers on wholesale basis are outside the purview of Article 222(1) and in this behalf the pertinent observations made by him are as follows:

Thus, deliberation is the quintessence of consultation. That implies that each individual case must be considered separately on the basis of its own facts. Policy transfers on a wholesale basis which leave no scope for considering the facts of each particular case and which are influenced by one sided governmental considerations are out-side the contemplation of our Constitution." (vide p. 454 (of SCR) : (at p. 2347 of AIR)). The last sentence in these observations is likely to create a wrong impression that if large number of transfers are made pursuant to a general policy these would be outside the purview of Article 222(1) of the Constitution but that is not what is really intended to be conveyed. The emphasis clearly is on wholesale transfers without considering each individual case on its own merits being outside the purview of Article 222(1) and more so when such, wholesale or mass transfers are influenced by one-sided governmental considerations which would be outside the purview of the Article. In other words, it is clear that

even if a transfer is effected pursuant to a general policy adopted by the Government the same must satisfy requirements of Article 222(1), that is to say, it must be in public interest and made after full and effective, consultation. Ordinarily no general policy will be adopted unless it clearly serves some public interest and hence when a transfer is stated to be pursuant to such general policy it will be a difficult task for the Judge concerned to establish that it has been made for extraneous considerations but all the same a transfer based on a general policy will have to satisfy the requirements of Article 222(1) and if extraneous considerations are established the same will have to be struck down.

642. In this context I would like to refer to one aspect which was debated at the Bar, whether before any such general policy is adopted by the Government any consultation with the Chief Justice of India is necessary or questions of policy are exclusively to be decided by the Government ? It is true that Article 222(1) merely refers to consultation of the Chief Justice of India on specific/individual proposals for transfer as and when these are made and nothing is mentioned therein as regards consultation with him on points such as whether and if so what policy or policies should be adopted for effecting transfer of Judges from one High Court to another. It is also true that ordinarily policy matters would be decided upon by the Government But propriety requires and perhaps smooth working thereof may necessitate consultation with the Chief Justice who is the highest administrative head of the country's Judiciary especially as the policy or policies to be adopted are in relation to transfer of High Court Judges. But, as stated earlier, even after a general policy in the matter of transfers of High Court Judges is framed and adopted whenever a transfer is to be made in pursuance of such policy the proposal, before it culminates into an order, will have to satisfy the requirements of Article 222(1).

643. Coming to the two policies which the Union of India seems to have accepted in principle though not fully formulated by fixing the mechanism or modality of procedure, it may be stated that one such policy is to have one-third of the Puisne Judges in a High Court from outside the State -- a policy which has been referred to in the Circular dated March 18, 1981 and the other is the policy to have Chief Justices of all the High Courts from outside -- a policy that became the subject-matter of debate in Shri K.B.N. Singh's case. Without going into the merits or demerits of either of them and without going into the question whether there are proper or justifiable grounds for adopting either of them, that is to say, whether either of them serves any public interest or not, I would like to deal with a couple of aspects touching these policies which I feel it is necessary to clarify at this stage. It was suggested at one stage during the arguments that individual selective transfers are prone to be punitive in character but once a general policy is adopted there will be no scope for raising a contention that the transfer made in pursuance thereof is a punitive transfer. In fact, the argument went to the length of equating individual selective transfers with punitive transfers and policy transfers as being always above board. Such an extreme contention is difficult to accept. It will not be correct to say that a policy transfer, that is to, say, a transfer based on or made in pursuance of a general policy would necessarily be non-punitive in character nor would it be correct to say that every selective transfer is necessarily punitive. Taking the policy of having one-third-Puisne Judges in a High Court from outside, it will be clear that in the absence of any mechanism or modality of procedure giving guidelines as to how that one-third complement will be chosen for implementing it, such a policy would obviously be fraught with the danger or vice of discrimination; further, if a vacancy arises in that complement of that High Court then filling it up in the absence of proper guidelines would again be arbitrary. Similarly, even the policy of having the Chief Justices of all the High Courts from outside stands the risk of being abused by the Executive in the absence of proper guidelines being provided in the matter of regulating which Chief Justice shall be posted in what particular High Court; this assumes significance in federal polity like ours. It is thus clear that a policy transfer without fixing the requisite mechanism or modality of procedure which ensures complete insulation against the Executive interference could be a punitive transfer in the sense of having been effected with some oblique motive. Even with proper mechanism or modality of procedure a transfer can be made for extraneous considerations and will be liable to be struck down if it is so established. But admittedly no mechanism or modality of procedure of any kind has been fixed or decided upon so far and, therefore, how can it be asserted that every policy transfer made in pursuance of either of these two policies would necessarily be above board? In other words, merely adopting a general policy, which is or may be broadly supportable for reasons of public interest, would not be sufficient to insulate transfers of High Court Judges against Executive interference unless adequate mechanism or modality of procedure in that behalf is also fixed and followed in practice. Conversely, a selective transfer in an appropriate case for strictly objective reasons and in public interest of general administration could be non-punitive. In other words, each case of transfer, whether based on a policy or a selective transfer, will have to be judged on the facts and circumstances of its own for deciding whether it is punitive in character in the sense of having been effected with some oblique motive or not.

644. Coming to the impugned Circular letter dated March 18, 1981 it is clear that the petitioners on the one hand and the con-testing respondents on the other are at great variance with each other on the true nature, content and effect thereof; whereas according to the petitioners the Circular letter seeks to effect, in substance and reality, a mass transfer of sitting Additional Judges as also of the proposed appointees based on a policy decision unilaterally taken by the Law Minister and/or the Union Government and in that behalf seeks to obtain their consent under threat, coercion and

duress, according to the contesting respondents no such transfers are intended at all but the Circular letter merely seeks to obtain consent from sitting Additional Judges for their appointment as Permanent Judges of other High Courts on the expiry of their initial term or extended term and consent from the proposed appointees for their initial or first appointment to High Courts other than their home-State High Courts and the action proposed to be taken thereunder is for the purposes of Article 217 of the Constitution and no threat, coercion or duress is involved in obtaining such consent. The impugned Circular letter has already been set out verbatim at the commencement of this judgment and a careful analysis of the contents thereof brings out the following seven aspects very clearly : In the first place the action proposed in para 2 thereof (of obtaining consent) is being taken with a view to implement a policy suggested by several bodies and forums "to have one-third of the Judges of a High Court, as far as possible, from outside the State in which that High Court is situated" for "furthering national integration and combating narrow parochial tendencies bred by caste, kinship and other local links and affiliation"; secondly, the letter records that as no start could somehow be made in the past in that direction the feeling was strong, growing and justified that some effective steps should be taken very early in that behalf; thirdly, para 2, which specifies the action to be taken, is in two parts; (i) in relation to sitting Additional Judges in all the States of India (except North-eastern States), it seeks to obtain their consent "to be appointed" as Permanent Judges to High Courts in States other than their own and (ii) In relation to the proposed appointees (either from the Bar or services) for initial appointment (either as Additional or Permanent Judges) it seeks to obtain their consent for being "appointed to" in any other High Court in the country (meaning other than their home-State High Court); fourthly, in this behalf it also seeks from them their choice by naming three High Courts in order of preference to which they would prefer to go; fifthly, the sitting Additional Judges and the proposed appointees from whom such consent and preferences are sought are to be told clearly that furnishing of the consent or the indication of a preference does not imply any commitment on the part of the Government either in regard to their appointment or to accommodation in accordance with the preferences given; sixthly, the letter strikes a note of urgency and requests the addressees thereof to initiate action very early and after obtaining the written consent and preferences from the persons concerned to forward the same to the Law Minister within a fortnight of the receipt of the letter; lastly, the Circular letter has been addressed by the Law Minister to the Governor of Punjab and all Chief Ministers of the States (except North-eastern States) requesting them to obtain such consent and preferences from all Additional Judges as well as the proposed appointees, with merely a copy of the letter being sent to each of the Chief Justices of the concerned High Courts.

645. Counsel for the contesting respondents pointed out that when an Additional Judge is appointed under Article 224(1) his tenure is fixed by the warrant of his appointment and on the expiry of the period mentioned in the warrant he ceases to be a Judge of the High Court and he has no vested right either to be continued or to be made permanent and in either extending him for a further term as an Additional Judge or in making him permanent in the vacancy of a permanent post, a fresh appointment is involved by issuance of a fresh warrant under Article 217(1) and as such there is no question of any transfer being involved in such a case, while in the case of a proposed appointee (either from the Bar or services) when he is being initially appointed obviously there is no question of any transfer in his case either and it is from such persons that consent is being sought under para 2 of the Circular letter and the same is for 'a fresh appointment' in the case of the former and 'an initial appointment' in the case of the latter under Article 217(1) of the Constitution. Counsel further pointed out that para 2 of the Circular letter uses the expression "to be appointed" in the case of sitting Additional Judges as also in the case of proposed appointees and the word "transfer" has hot been used at all and as such counsel contended that the Circular letter does not deal with the topic of transfer of Judges at all. Reliance in this behalf is also placed on the Law Minister's statement in Parliament made on 16th April, 1981 in response to the Calling Attention Motion by Shri Rashid Masood and other M. Ps. and the answers given by him to the questions put to him by several Members during the discussion that followed, wherein he clarified the position that consent from sitting Additional Judges was sought under the Circular letter for their fresh appointments under Article 217 and not for their transfers and Article 222 was not attracted at all. It was further contended that para 3 of the Circular letter merely clarified the legal and constitutional position that obtained even before the sending of the letter that there will be no commitment on the part of the Government either in regard to the appointment or in regard to the accommodation in accordance with preference given and that such clarification of the legal position was necessary lest a wrong impression was created that furnishing of consent or indication of preference would imply such a commitment as also to avoid any legal arguments based on the theory of promissory estoppel and no threat, coercion or duress could be inferred from the contents of para 3 of the Circular letter. The question is whether this is the true nature and effect of the Circular letter.

646. It is true that according to its dictionary meaning the word 'transfer' means 'removal from one place or position to another', but it is not such physical shifting of a person from one place to another with which the Court is concerned in the case; the Court is concerned with the concept of transfer contemplated in Article 222(1) of the Constitution which says : "The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to another High Court". This clearly refers to the transfer of a person, who is already a Judge of a High Court. As stated earlier, para 2 of the Circular letter refers to two categories of persons, namely, sitting Additional Judges and the proposed appointees (either from the Bar or services) and it would be clear that in the case of the latter who are being

initially appointed Judges, either as Additional or Permanent, to some High Court there would be no question of any transfer in their case as contemplated in Article 222(1). It is difficult to accept the petitioners contention that in regard to these proposed appointees recommended for their initial appointment the Circular letter seeks to obtain their consent for their transfer, though in being appointed to other High Courts they would within the dictionary meaning of that expression be shifted and perhaps uprooted from their usual place of work, namely, their home-State High Courts. The question really is whether in the case of the former category, namely, sitting Additional Judges whose consent is sought for 'being appointed' to High Courts other than their own High Courts a transfer is involved and whether the Circular letter in substance and reality effects their transfers as contended by the petitioners. In the earlier part of this judgment it has been pointed out that a valid classification subsists between proposed appointees who are being recommended for their initial appointments and sitting Additional Judges whose initial or extended term is about to expire. In the case of the former they have no right to be considered for the post of a High Court Judge nor have they, even after being recommended on completion of the consultative process by the three constitutional functionaries mentioned in Article 217(1), any right to be appointed and, therefore, have no remedy against their non-appointment but in the case of the latter the position is entirely different. It is true that under Article 224(1) read with Article 217(1) the tenure of an Additional Judge fixed by his warrant of appointment comes to an end at the expiry of the period mentioned in the warrant and he ceases to be a Judge of the High Court, but for reasons already discussed in the earlier part of this judgment he has a legitimate expectancy and an enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for being continued as Additional Judge or made permanent in that High Court. The convention or practice and the undertaking taken from the member of the Bar at the time of his initial appointment make it clear that he has such enforceable right to be considered for being continued or made permanent in that very High Court. That is how Article 224(1) has All along been understood and worked. He is not in the same position as a proposed candidate for initial appointment. In substance and reality in extending his term or making him permanent in that High Court no "fresh appointment" is involved, except for the formality of issuing a fresh warrant of appointment and taking a fresh oath. If in the case of such sitting Additional Judge his consent is sought for being 'appointed to' another High Court it is virtually and in substance seeking his consent for his transfer from his own High Court to another High Court falling within the concept of transfer contemplated in Article 222(1). It is true that para 2 of the Circular letter uses the expression "to be appointed" but it is not the nomenclature or label used that would be decisive of the matter but one has to look to the substance and looked at the Circular from this angle it is clear that in so far as sitting Additional Judges are concerned their content is sought for transferring them from their own High Court to other High Courts and the attempt in substance is to transfer them under the guise of making fresh appointment on the expiry of their initial or extended term. Further, considered in the light of the historical background, there appears to be some force in the petitioners' contention that the Circular letter is another attempt on the part of the Union Government this time to effect mass transfers of sitting Additional Judges, the previous attempt to effect mass transfers of Permanent Judges during the last Emergency having failed. (One such transfer was successfully challenged and all the transferred Judges, except those who were unwilling, were repatriated to their own High Courts.) This Court in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) has laid down the safeguard of public interest and the stringent condition of full and effective consultation with the Chief Justice of India which are required to be observed be-fore the power of transfer under Article 222(1) can be exercised and the Circular letter appears to be an attempt to circumvent the safeguard and the stringent condition by resorting to transfers of sitting Additional Judges under the garb of making fresh appointments on the expiry of their initial or extended term.

647. Reliance on the Law Minister's statement made in Parliament on 16th April, 1981 clarifying the position that consent from sitting Additional Judges is being sought under the Circular letter for their fresh 'appointment' and not for their transfers and the Article 222 was not attracted at all will be of no avail in view of the conclusion reached above that it is not a case of fresh appointment but in substance their consent is being sought for their transfer. This apart, the fact that the Circular letter was intended to effect transfers of sitting Additional Judges becomes amply clear from what transpired during the debate that followed the Calling Attention Motion of Shri Rashid Masood and other M. Ps. and particularly from admissions made by the Law Minister himself under stress of questions in the nature of cross-examination put to him by Members of Parliament. It will be pertinent to mention that the subject matter of the Calling Attention Motion moved by Shri Rashid Masood and other Members as a matter of urgent public importance is captioned in the relevant proceedings of Lok Sabha Debates as "Circular letter to Chief Ministers of States about the consent from Additional Judges for transfer to other High Courts". This clearly suggests that even Members of Parliament regarded the Circular letter as dealing with the topic of obtaining consent from sitting Additional Judges for their transfer from their own High Courts to other High Courts but apart from what several Members of Parliament felt about it, even the Law Minister, while asserting that the Circular letter dealt with the subject of fresh appointments of sitting Additional Judges on the expiry of their initial term or extended term and not their transfer and the consent thereunder was merely sought for making their fresh appointments under Article 217(1), explained the genesis and reasons which prompted him to issue the Circular and in that behalf stated that the various complaints were pouring in about prejudiced attitudes bred by kinship and other local links and affiliations etc., that political links had also been mentioned in certain cases and various State authorities had expressed their reservations about the continuance of some Additional Judges and it was felt that in some cases of this kind if Additional Judges could be made permanent in other High Courts there could be no valid objections to such appointments as their service would then be outside the local

setting in which they had the roots. Such a statement on the part of the Law Minister by way of explaining the genesis and reasons for the issuance of the Circular letter undoubtedly lends considerable force and support to the petitioners' contention that furthering national integration and combat-ting parochial trends' is merely a garb used and the real intention is to transfer such sitting Additional Judges who have become Unpalatable to the State authorities because of alleged political links obviously not to their liking; or whom the concerned State authorities have come to regard as black-sheep from their point of view. At one stage during the debate when the facts, that the Law Commission in its 80th Report had made a distinction between initial appointees and the sitting Additional Judges in the context of their recommendation of having one third of the Judges of the High Court from outside and that it had suggested that their recommendation should be implemented in the case of the former, were brought to the notice of Law Minister this is how the Law Minister reacted:

May be that according to him (Hon'ble Member who brought the aforesaid facts to his notice) the Additional Judges would not come within the purview of the initial appointment. Then I would put it in a different form. I have given the reason as to why we have to ask for the Additional Judges (consent) also. Things being what they are. I would like to ask the Hon'ble Member, when complaints come where it is not possible to convincingly prove, then, what should be done with such Additional Judges ? Are they to be dropped ? I take a safer approach, namely, if they are appointed elsewhere, then this allegation which persists could be avoided.

This statement clearly suggests that in regard to sitting Additional Judges against whom complaints are received but it is not possible to convincingly prove them the Law Minister dearly contemplated the shifting of such Judges elsewhere so as to avoid allegations being persisted against them and presumably for doing so an opportunity presents itself when their term is about to expire. Then follow two important sets of question and answer which put the matter beyond doubt that even the Law Minister admitted in terms that what is being done under the Circular is a transfer of Additional Judges. The following are the questions and answers:

SHRI SATISH AGGARWAL: "Excuse me, Mr. Law Minister. You have stated a particular situation, where there is evidence but not sufficient, what should be done : a transfer can be made. It is only applicable in cases which are ad hoc. But what about cases when complaints are there with regard to those who are permanent Judges ? That does not solve the problem. You are applying your stick only to those who nave finished a two or three years period.

SHRI P. SHIV SHANKAR: "I have never said 'ad hoc'. Where the additional Judges are there, each complaint will have to be considered on its own merit and a decision could be either to drop a person based on evidence or to see if he could be transferred.

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SHRI BAPUSAHEB PARULEKAR : "You have stated: 'I may add the it is not the intention of the Government to appoint all Additional Judges from outside the State'. What is the criteria ? You can victimise any person if this is the policy of the Government. Is it not ?

SHRI P. SHIV SHANKAR: "I can assure my friend, it is not a question of victimisation. As I said each case will be considered on its own merit. It is not the intention that everyone should be transferred. That is all. (Interruptions). Perhaps he is going back to the same ground on the question of sporadic transfer of Chief Justice and Judges and so on. The position is very simple. Supposing there is any material bearing on a particular case, that would be considered on its own merit. It is not the intention that everyone should be transferred. I think I have covered all the points raised.

It is significant that though in the first set of question and answer both the Hon'ble Member and the Law Minister have used the expression 'transfer' in the context of what is being done to the Additional Judges on receipt of complaints against them and evidence in respect thereof is not sufficient, in the second set the Hon'ble Member specifically used the expression 'to appoint' in the context of Additional Judges intended to be brought from outside but even then the Law Minister in his reply stated that "it is not the intention that everyone should be transferred". This shows that under the stress of questions truth has come out that the Circular is intended to effect transfers of sitting Additional Judges from their own High Court to another High Court in respect of whom complaints have been received but evidence in support is insufficient and that will be done at the time of expiry of their initial or extended term. The reference to other portions of the Law Minister's statement and answers given by him on the Floor of the House has been made with a view to ascertain the real intention behind the issuance of this Circular letter because it is the Law Minister alone, and not a Deputy Secretary in his department, who can depose about it and the Law Minister in spite of being impleaded eo nomine a party to the proceedings has chosen not to file his own affidavit in the case.

648. On the question whether the consent sought thereunder from the sitting Additional Judges a induced by threat, coercion or duress or not, regard will have to be had to four or five aspects about the Circular letter that emerge clearly on the record. In the first place instead of seeking their consent through the Chief Justices of the concerned High Courts, which would have been in keeping with decorum and dignity of the high office held by them, the Circular letter in utter impropriety requests the Executive Head (the Governor of Punjab and all Chief Ministers of the States) "to obtain from all the Additional Judges...their consent to be appointed as Permanent Judges in any other High Court" together with their order of preferences, which smacks of demonstrating the power of the Executive over the Judiciary. Secondly, the tenor of the letters in executive arrogance presumes that the consent sought will be forthcoming from all the sitting Additional Judges inasmuch as the possibility of consent not forthcoming from some or any of them has not been considered or dealt with in the letter. Thirdly, para 3 of the letter, by necessary implication, contains a threat to the Additional Judges that they would not be continued as Additional Judges or confirmed as Permanent Judges and may be dropped unless they furnish their consent inasmuch as without more it merely states that furnishing of consent as well as indication of the preferences does not imply any commitment on the part of the Government either in regard to their appointment or accommodation in accordance with the preferences given; such misgiving which naturally arises from this kind of a statement ought to have been removed by clearly indicating the consequences of non-furnishing of the consent. It ought to have been stated clearly and categorically that non-furnishing of the consent will not be held against any Additional Judge and will not come in his way of being continued or being made permanent and further that furnishing of consent by an Additional Judge will not enable him to steal a march over those who have either not furnished or refused to furnish their consent in the matter of making them permanent. Both these things were vital and ought to have been stated in order to remove all misgivings and omission to do so clearly leads to the inference that the statement in para 3 of the letter, by implication, contains a threat to the Additional Judge of the type indicated above. The explanation given on behalf of the contesting respondents that para 3 was by way of merely clarifying the legal and constitutional position obtaining in the matter even before the sending of the Circular letter, namely, that there was no commitment on the part of the Government to appoint every Additional Judge as a Permanent Judge and that it was necessary to make the legal and constitutional position clear lest a different impression was created as also to avoid any legal argument based on the theory of promissory estoppel is hardly convincing; for, if para 3 was inserted only with a view to clarify the legal and constitutional position it was all the more necessary to state the consequences of non-furnishing of the consent in the manner indicated above to remove all misgivings. Fourthly, the Circular letter is obviously intended to have adverse impact on the sitting Additional Judges' right on the expiry of their initial term or extended term, -- it being merely a right to be considered for being continued or made permanent. Fifthly, the timing of the Circular is significant in considering its effect and impact on the sitting Additional Judges; the Circular letter has been issued by the Law Minister on March 18, 1981 at about the time when politicians and persons occupying high positions had been indulging in a campaign of denigrating the higher Judiciary, treating every Court decision adverse to Government as a deliberate and motivated attack on the Executive. A Chief Minister of a prominent State had described it as the "Dictatorship of the Court" while a Cabinet Minister in the Central Government had bracketed the Judiciary with the opposition parties and had been complaining that they were not cooperating with the Government; the highest Executive Head at the Centre had prior to March 18, 1981 publicly stated : "The former Janta Regime had made a lot of appointments in the Judiciary on political basis...that a dilemma faced by the ruling party was whether these persons appointed on political basis in Judicial Services should be allowed to continue and if they are continued how can we expect justice from them ? What is their credibility ?" It is true that in this behalf the petitioners have relied upon extracts from Newspaper reports of such statements and utterances but when these have been made part of their pleadings by the petitioners (vide para 2 of Shri Tarkunde's petition and para 43 (O) of Shri Gupta's petition) a duty is cast on the contesting respondents to deal with the same in reply and from the counter-affidavits filed in reply by Shri Kankan on their behalf it will appear clear that there is no denial that such statements and utterances were made by the persons concerned. In reply to para 2 of Shri Tarkunde's petition, Shri Kankan has merely averred that "the views stated to have been expressed by the Chief Minister of a State and a Cabinet Minister would have been their personal views and do not and could not have conveyed the policy of the Government", while there is no specific reply to para 43 (O) of Shri Gupta's petition at all but an omnibus general submission in regard to para 43 (H) to para 43 (Q) has been made by Shri Kankan by stating thus: "with regard to paras 43 (H) to 43 (Q) I submit that these paras are full of surmises and conjectures". From this state of pleadings it will appear clear that there is no denial that the concerned Chief Minister and the Cabinet Minister and the highest Executive Head at the Centre had made the several statements and utterances attributed to them as quoted from the extracts of the Newspaper reports and at the highest Shri Kankan desired to suggest that these statements and utterances were their personal views and not of the Government It cannot be disputed that such statements and utterances from persons occupying high positions in the Government help create an atmosphere of fear-psychosis for the not-so-sterner stuff in the judiciary; secondly, even taking the assertion of Shri Kankan that these statements and utterances represented their personal views at its face value (which it is difficult to do) one cannot be sure when these personal views imperceptibly or un-obstrusively become the views of the Government and form the basis of a Government policy, as has happened here, for, the Circular letter does reflect partly some of the views contained in these statements and utterances. The question is what impact the Circular letter will create on the minds of the sitting Additional Judges whose terms would be coming to an end on the expiry of the periods specified in their warrants in the light of the atmosphere of fear-psychosis created by such statements and utterances made by persons occupying high positions in the Government ? The answer is too obvious to be stated.

Reading it as a whole and in the light of the aspects discussed above, the Circular letter clearly exudes an odor of executive dominance and arrogance intended to have coercive effect on the minds of the tilting Additional Judges by implying a threat to them that if they do not furnish their consent to be shifted elsewhere they will not be continued nor made permanent but would be dropped. The Circular letter, therefore, which seeks to obtain the consent of the sitting Additional Judges to their transfers from their own High Court to another High Court induced by threat, coercion or duress clearly amounts to Executive interference with the Judiciary and impinges on its independence and as such is illegal, unconstitutional and void and the consent if any either already obtained thereunder or that may be obtained, would be equally void.

649. Once the conclusion is reached that the Circular letter seeks to effect in substance and reality transfers of sitting Additional Judges from their own High Courts to other High Courts on the expiry of their initial term or extended term and the consent sought from them thereunder is for such transfer and not for their 'fresh appointment' as Permanent Judges) does not involve a the challenge to the same as being violative of Article 222(1) of the Constitution becomes quite apparent. It was sought to be urged at one stage that if on true construction of Article 224(1) the sitting Additional Judges during their tenure are outside the pale of transfer under Article 222(1) then the question of the impugned Circular being violative of Article 222(1) does not arise. It is difficult to accept this contention because even assuming that Article 224(1) is construed in the manner suggested the Circular aims at transferring the sitting Additional Judges not during their tenure but just on the expiry of their term and if their continuance as permanent Judges (and not as Additional Judges because the Circular talks of appointing them as permanent Judges of other High Courts, fresh appointment as held above, the question of challenge to the Circular as being violative of Article 222(1) very much survives. In Sankalchand Sheth's case MANU/SC/0065/1977 (supra) this Court took the view that full and effective consultation by the President with the Chief Justice of India under Article 222(1) of the Constitution implies that each individual case must be considered separately on the basis of its own facts and "policy transfers on a wholesale basis which leave no scope for considering each particular case and which are influenced by one sided Governmental considerations are outside the contemplation of our Constitution" (vide observations of Chandrachud, J. as he then was, at p. 454 (of SCR) : (at pp. 2347, 2348 of AIR) of the Report). The transfers of sitting Additional Judges contemplated by the Circular (for which their consent is sought thereunder) are based on the policy to have one third of the Judges of a High Court from outside without each individual case being considered on its own facts and merits and therefore such transfers based on policy accepted or adopted by the Law Minister and/or the Union Government would be outside the purview of Article 222(1). In any case, -- and this is important -- it cannot be disputed that by procuring the consent of the sitting Additional Judges for their transfers from their own High Court to another before undertaking any consultation with the Chief Justice of India clearly reduces the full and effective consultation contemplated under that Article to a mere formality, if not to a mockery, for, it is obvious that such consultation and the advice which Chief Justice will be tendering following upon such consultation will not be of any use or avail as the consent to such transfer shall have already been procured from the concerned Additional Judges. The consultation and the resultant advice of the Chief Justice will be robbed of its real efficacy in face of such pre-obtained consent. The Circular which has such effect is clearly violative of Article 222(1); in fact it will have to be regarded at having been issued mala fide for a collateral purpose namely to by-pass Article 222(1) and confront the Chief Justice of India with fait accompli when the proposal to transfer such Additional Judge would be forwarded to him and at such the same is illegal and unconstitutional and deserves to be struck down.

650. The next challenge to the impugned Circular letter based on Article 14 also teems to be well founded and the same is irrespective of whether the Circular letter deals with transfers of Additional Judges or their fresh appointments and the initial appointments of the proposed appointees. Briefly stated the contention is that in regard to the sitting Additional Judges it makes an invidious distinction between those who would be furnishing their consent and those who would not be doing so or would be refusing to furnish their consent inasmuch as the former would be at an advantage while the latter will suffer a disadvantage and even within the class of those who would be furnishing their consent it gives to the Government unfettered and un-guided power or discretion to pick and choose, that is, to select some for being shifted to High Courts other than their own while retain and appoint others in their own High Courts which power can be exercised either by way of punishment or by way of favouritism. It is further pointed but that the Circular letter will encourage an ignominous face amongst self-seeking Judges to look to the Government for appointment at Permanent Judges out of turn or select places which are centres of power. Counsel further contended that even in regard to the proposed appointees (either from the Bar or Services) recommended for their initial appointments, though no question whatsoever may arise in case of non-appointment, discrimination is bound to result in the case of those who are appointed and who have furnished their consent inasmuch as from amongst such consenting appointees the Government has unfettered and unguided power to select some for being appointed to other High Courts and to appoint others to their home-State High Courts. Thus discrimination is writ large on the face of the Circular letter and the seeds of destruction of judicial independence are inherent therein.

651. Dealing with the case of sitting Additional Judges first, it cannot be disputed that the Circular letter intends to confer advantage to those who would be furnishing their content and make those who would not be giving their consent

or would be refusing to give their consent suffer a disadvantage. This petition emerges very clearly from what hat been stated by Shri Kankan in para 6 of his counter-affidavit filed in reply to Shri Iqbal Chagla's petition. This is what he has categorically asserted : "It is not, however, the intention of the letter that a permanent or further appointment will be denied to a Judge only on the ground that he has not given his consent; in fact, a further appointment to an Additional Judge has recently been given even though he bad not given his consent.... By no stretch of construction op from the facts and circumstances existing can it be sought to be inferred that failure to give consent would necessarily involve an Additional Judge ceasing to be a Judge." The first sentence clearly meant that the ground that an Additional Judge has not given his consent could along with other grounds be the basis of denying to him a permanent or a further appointment and this is put beyond doubt by the last sentence where it is stated that failure to give consent would not necessarily involve the dropping of an Additional Judge which means failure to give consent may involve the dropping of such Additional Judge. In other words, there is no doubt that failure to furnish consent under the Circular letter is bound to put the concerned Additional Judge to disadvantage of not being extended or not being made permanent or of being dropped altogether and correspondingly it confers some advantage on those who would be furnishing their consent That the Circular letter was not a preliminary step in the direction of collecting data and information from sitting Additional Judges which could be placed before the Chief Justice of India when the consultation process under Article 217(1) would be gone into, as has been now stated by Shri Kankan for the contesting respondents, but was and is intended to be acted upon forthwith by conferring an advantage on those who would be furnishing their consent is clearly borne out by the stand taken by Shri Kankan on behalf of the contesting respondents at the stage of the appeal preferred by them against the interim relief granted by the learned single Judge in Shri Iqbal Chagla's writ petition; by the interim relief granted by the learned single Judge the contesting respondents were restrained by an injunction from implementing the Circular letter or from acting in any manner upon the consent if obtained from any person following on or arising from the said Circular letter and while challenging this order of interim relief as being erroneous and ought not to have been made at least on the ground of balance of convenience, Shri Kankan in para 3 of his affidavit dt. 23rd Apr., 1981 (filed in the Bombay High Court) asserted that the balance of convenience lay in refusing to grant an injunction rather than to grant one because it was claimed that persons who would be willing to give their consent to be appointed as Judges in High Courts other than their own should not be deprived of the chance of such appointment merely by reason of the petitioners' having moved the Hon'ble Court questioning the validity of the Circular and that it would be against the public interest to delay or hold up appointment of persons as Judges to other High Courts by reason of pendency of the writ petition. It is thus clear that the contesting respondents were and are interested in forthwith acting upon the consent that would be obtained from the sitting Additional Judges under the Circular letter by giving them a chance in the matter of their appointments as Permanent Judges in preference to those who would not be furnishing their consent. The Circular letter thus makes invidious discrimination against those sitting Additional Judges who would not be furnishing their consent at they will suffer a disadvantage, while those who would be furnishing their consent will be at an advantage.

652. Secondly, the Circular letter seems to confer unfettered and unguided power on the Government to indulge in picking and choosing even within the class of those Additional Judges who shall have furnished their consent in the sense it will be up to the Government to select some from that class for being shifted to High Courts other than their own and to retain and appoint others in their own High Courts. In this behalf reliance has been placed upon the statement made by the Law Minister on the floor of the Parliament on April 16, 1981 to the effect that it is not the intention of the Government to appoint all Additional Judges to outside High Courts. This statement clearly suggests that the Government will be indulging in picking and choosing while appointing some Additional Judges to outside High Courts and retaining and appointing others in their own High Courts and in the absence of any guidelines the power can be exercised arbitrarily, either by way of punishment or by way of favouritism as pointed out by the petitioners.

653. As regards the proposed appointees (either from the Bar or service) recommended for their initial appointments, there will be no question of discrimination in the case of those who have cot been appointed at all but in the case of consenting appointees discrimination is bound to arise because of unfettered and unguided power or discretion vesting in the Government to pick and choose from amongst the consenting appointees, for, in their case also it will be up to the Government to decide and select some for being appointed to High Court other than their home-State High Courts and appoint the others in their home-State High Courts. Having regard to the aforesaid position it is abundantly clear that invidious discrimination is writ large on the face of the Circular letter and the same is clearly violative of Article 14 and as such unconstitutional and liable to be struck down.

654. In the result the impugned Circular letter, in my view, deserves to be struck down for the aforesaid three reasons.

655. Coming to the specific individual case of Shri S.N. Kumar (respondent No. 3 in Transfer Case No. 20 of 1981) it may be stated that the gravamen of the challenge it directed against the President's action in dropping him outright on the expiry of his extended short term on June 6, 1981, i.e. during the pendency of the case before this Court and the

action is challenged by the petitioners as well as by Shri S.N. Kumar as being violative of Article 224(1) as also Article 217(1) and hence illegal, unconstitutional and void. Principally, it is contended that the decision of the appointing authority not to continue but to drop him is vitiated by legal mala fides inasmuch as assuming that the case is governed by Article 217(1) there Has been no full or effective consultation between the President and the other constitutional functionaries particularly the Chief Justice of India as contemplated by that Article and therefore the said decision must be regarded as void and non est. The contesting respondents have joined issue by asserting that there was full and effective consultation as required by Article 217(1).

656. At the outset it may be stated that the petitioners bad pleaded (vide para 11 (w) of Shri Tarkunde's petition) that the Chief Justice of Delhi High Court and the Chief Justice of India had recommended extension to three Judges (including Shri S.N. Kumar) for the full period of two years but there was a half-hearted and vague denial thereof by Shri Kankan in his Counter-Affidavit dated July 22, 1981 who merely stated that the aforesaid statement that both the Chief Justices had recommended extension to the concerned three Judges for two years was untrue and incorrect, without specifying whether, if not both, any one had done so and if so who had recommended it, and further if the recommendation was not for all the three Judges it was for whom and if not for two yean for what period ? A vague denial like this meant no denial at all. Shri S.N. Kumar in his Counter-Affidavit dated July 17, 1981 had also asserted that the Chief Justice of Delhi High Court had told him and a number of his colleagues that he (Chief Justice) had recommended the extension to the concerned three Judges (including himself), to which there was a reply from Shri V.N. Chaturvedi, Secretary (Justice) Government of India, in his Affidavit dated Aug. 25, 1981 to the effect that in the nature of things the Chief Justice of Delhi High Court could not have told Shri S.N. Kumar that he had made a recommendation in his (Shri S.N. Kumar's) favour and Shri Chaturvedi further averred categorically : "I state that as a matter of fact there was real and effective consultation with the two Chief Justices and the President preferred the views of the Chief Justice of Delhi High Court which were not favourable for a further appointment of S.N. Kumar". By implication it became obvious that there was complete divergence between the two Chief Justices in their views on the point of Shri S.N. Kumar's continuance and that the Chief Justice of India had made a recommendation favourable to Shri S.N. Kumar. In such state of pleadings a question naturally arose whether this divergence has arisen on a consideration of the same or identical material by both the Chief Justices or otherwise ? Meanwhile, a Newspaper Report appearing in the issue of Hindustan Times of July 10, 1981 under the caption "Govt. overruled Chandrachud's views", not merely stated that, though the Chief Justice of India had dismissed the allegations against Shri S.N. Kumar as "unsubstantiated" and had recommended his confirmation, the Government had placed greater reliance on the views of the Chief Justice of Delhi High Court but went further and asserted, the reporter claiming to have had a look into the files, that certain correspondence between the Chief Justice of Delhi High Court and Union Law Minister had been marked for "Law Minister's eyes" suggesting thereby that the same was meant for being kept away from the Chief Justice of India. On the aforesaid Newspaper Report being made a part of his pleading by Shri Tarkunde by annexing a copy thereof to his Rejoinder Affidavit dated August 3, 1981, Counsel for the petitioners repeatedly sought information from the learned Attorney General appearing for the Union of India on the point whether any part of the correspondence between the Chief Justice of Delhi High Court and the Union Law Minister had been kept away from the Chief Justice of India as, if that were true, it would directly vitiate the consultation contemplated by Article 217(1) but instead of making any statement furnishing the correct information on the point the learned Attorney General claimed privilege even in regard to such information. It was in these circumstances that this Court on Oct. 16, 1981 directed disclosure of relevant documents contained in the file relating to Shri S.N. Kumar concerning his short-term extension and eventual non-continuance for the purpose of ascertaining whether there has or has not been full, complete and effective consultation between the appointing authority on the one hand and the constitutional functionaries on the other, particularly the Chief Justice of India. On the question of privilege claimed by the contesting respondents in respect of the relevant files and documents my learned brother Bhagwati has dealt with and discussed the issue elaborately and exhaustively after referring to all the relevant authorities cited at the Bar and since I am agreeing with his view on the, point I am not dilating on it at all. I adopt all that he has stated on the issue in his judgment. The position needs to be made perfectly clear that the disclosure has been ordered by the Court only for the limited purpose mentioned above and not for deciding upon the merits or demerits of the grounds on which each of the Chief Justices made his own recommendation nor is the Court concerned with the truth or otherwise of the facts or materials on the basis of which each one acted. After the disclosure was made Counsel for Shri S.N. Kumar was understandably anxious to address the Court on the merits and demerits of the grounds which prompted the two Chief Justices to make their divergent recommendations and desired to vindicate his client's honour and fair name before the Bar of this Court but we prevented him from doing so by categorically telling him that it was not the function of this Court to go into the merits or demerits of the grounds on truth or falsity of the material and that the disclosure had a limited purpose and if upon the scrutiny of the disclosed material the Court came to the conclusion that there was no full or effective consultation with the Chief Justice of India the appointing authority's decision dropping his client may have to be quashed and the matter may have to be sent back to the appointing authority for fresh consideration and passing appropriate orders after undertaking the requisite consultation under Article 217(1) again and in that process fair-play will require that his client gets full opportunity to have his say in vindication of his honour and fair name. The main question, therefore, that arises for our consideration is whether it could be said on a perusal of disclosed documents that full and effective consultation as contemplated by Article 217(1) between the President on the one hand and the

Constitutional functionaries on the other, particularly the Chief Justice of India, had preceded the impugned action of dropping Shri S.N. Kumar outright. It is clear that if the answer is in the affirmative the impugned action will have to be upheld, but if it is in the negative the same will have to be regarded as vitiated by legal mala fides and will have to be struck down.

657. Having regard to the decisions of this Court in Chandramouleshwar Prasad's case MANU/SC/0495/1969 (supra) and Sankalchand Sheth's case MANU/SC/0065/1977 (supra) it can now be regarded as well settled that consultation implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct OF at least a satisfactory solution and that in order that the two minds may be able to confer and produce a mutual impact it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision. It is equally well settled that consultation or deliberation is not complete or effective before the parties thereto make their respective points of views known to the other or others and discuss and examine the relative merits of their views. In the latter decision Chandrachud, J. (as he then was) has (at p. 453 of SCR) : (at p. 2347 of AIR)) of the Report observed:

It must therefore follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which, he can offer to the President the benefit of his considered opinion.... The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other.

Again, Krishna Iyer, J. (for himself, Bhagwati and Fazal Ali, JJ.) has (at p. 495 of SCR) : (at p. 2379 of AIR) of the Report observed thus:

We consult a physician or a lawyer, an engineer or an architect and thereby we mean not casual but serious, deliberate seeking of informed advice, competent guidance and considered opinion. Necessarily all the materials in the possession of one who consults must be unreservedly placed before the consultee. Further, a reasonable opportunity for getting information, taking other steps and getting prepared for tendering effective and meaningful advice must be given to him. The consultant, in turn, must take the matter seriously since the subject is of grave importance. The parties affected are high-level functionaries and the impact of erroneous judgment can be calamitous.

(Emphasis supplied.)

It is in the light of these well settled principles concerning consultation that the disclosed material will have to be scrutinised for deciding whether in the instant case there has been full and effective consultation between the President and the Chief Justice of India in the matter of the impugned decision that was taken in regard to Shri S.N. Kumar.

658. In all 13 documents comprising correspondence between the Chief Justice of Delhi High Court and the Union Law Minister, between the Chief Justice of India and the Union Law Minister and between the Chief Justice of Delhi High Court and the Chief Justice of India and some notings made by the Union Law Minister have been disclosed. A perusal of this material clearly shows that, though initially the non-recommendation of extension to Shri S.N. Kumar was thought of on four grounds: (a) his behaviour in Court, (b) his slow disposal, (c) his doubtful integrity based on unverified and uninvestigated complaints and (d) adverse IB reports, ultimately the decision to drop him, according to the Union Law Minister's noting dated May 27, 1981, was based on and confined to the aspect concerning his 'reputation and integrity' and the correspondence clearly shows that the two Chief Justices held exactly divergent and opposite views regarding the said ground on which the final decision was based. The correspondence and notings bring out the following facts very clearly: (a) the Delhi Chief Justice's view regarding Shri S.N. Kumar's integrity was based on (i) serious complaints (both oral and in writing) received by him against Shri S.N. Kumar, including some received from the Union Law Minister himself and (ii) doubts expressed by some responsible Members of the Bar and some of his colleagues about his integrity; and while admitting that he had no investigating agency to find out whether the complaints were genuine or not, he informed the Union Law Minister that he could not recommend Shri S.N. Kumar's continuance as in his view "reputation for integrity was just as important as the person actually being above board"; (b) the Chief Justice of India felt that the material mentioned by the Delhi Chief Justice for doubting Shri S.N. Kumar's integrity was too vague and his independent inquiries from the Members of the Bar and the Bench of the Delhi High Court showed that Shri S.N. Kumar was a man of unquestioned integrity and justified a favourable recommendation for his continuance; (c) the Chief Justice of India by his letter of the March 14, 1981 had requested the Delhi Chief Justice to furnish him with "further details" and "concrete facts" in regard to the allegations against Shri S.N. Kumar and the Union Law Minister also, in view of the insistence of the Chief Justice of India, had by his letter of Apr. 15, 1981 called for such "concrete material" with his comments thereon from the Delhi Chief Justice so that the basis on which

he had formed his view about Shri S.N. Kumar's reputation for Integrity would be available to Government; (d) no "further details or concrete facts or material" at desired by the Chief Justice of India were furnished to him by the Delhi Chief Justice but the Delhi Chief Justice sent a lengthy letter of five pages dated May 7, 1981 to the Union Law Minister marked "Secret -- fan personal attention only" which contained "further details and concrete materials" including references to specific cases (with suits numbers and titles) wherein according to him Shri S.N. Kumar's integrity had been doubted; and (e) the Delhi Chief Justice had, both before and after the issuance of the aforesaid letter, during his discussions with the Law Minister requested the latter that his letters marked as above may be kept secret for his personal attention only, that is to say, these may be avoided from being brought to the notice of the Chief Justice of India and he also explained to him the reasons for the same and the Law Minister's notings show that he responded to that request; in fact, by his letter of May 29, 1981 addressed to the Delhi Chief Justice, which happens to be last letter in the file, the Union Law Minister has placed on record the fact that, as per the request of the Delhi Chief Justice, letters marked "Secret for personal attention only", including the letter of May 7, 1981, had been kept confidential from the Chief Justice of India and had not been shown to him. In other words, it is abundantly clear from the correspondence and notings that "further details" or "concrete facts of material" regarding Shri S.N. Kumar's integrity, though specifically asked for by the Chief Justice of India, were not furnished to him and the letter dated May 7, 1981 which contained such further details and concrete facts or materials was deliberately kept out of his way.

659. Counsel for the contesting respondents, however, pointed out that after the Chief Justice of India had sent his letter of March 14, 1981 to the Delhi Chief Justice calling for "further details" and "concrete facts", the two Chief Justices had a meeting on March 26, 1981 and an oral discussion had taken place between the two, and counsel contended that during this oral discussion the Delhi Chief Justice must have given these "further details" and "concrete facts or materials" to the Chief Justice of India and such inference becomes probable from the fact that long before the letter dated May 7, 1981 was disclosed under this Court's order dated October 16, 1981, Shri S.N. Kumar has in his counter-affidavit dated July 17, 1981 made a reference among others to three suits being Summary Suits Nos. 1408/79, 1409/79 and 1417/79 which happen to be the very three suits wherein, according to Delhi Chief Justice, his integrity had become questionable and presumably he got particulars of these suits from the Chief Justice of India when the Chief Justice of India had a lengthy discussion with him about his work and other general matters. True, there was a meeting and oral discussion between the two on March 26, 1981 but it is impossible to accept the aforesaid contention of the Counsel that in the oral discussion "further details" and "concrete facts or material" must have been disclosed to the Chief Justice of India for three reasons. First, what transpired between them during the said discussion has been referred to and recorded by the Chief Justice of India in his letter of May 22, 1981 addressed to the Union Law Minister and this is what be has said in that letter: 'The Chief Justice (meaning Delhi Chief Justice) met me on March 26, 1981, when he told me that Justice S.N. Kumar was very slow in his disposal and, that he doubted his integrity because even after Justice S.N. Kumar's allocation of work changed from the Original Side to the Appellate Side he still continued to hear the part-heard cases on the Original Side". As regards the latter aspect the Chief Justice of India had all along maintained that that conduct on Shri Kumar's part by itself could not be regarded as blame-worthy in view of long standing practice obtaining in that behalf in Delhi High Court, and without more from that alone no inference of corruption or lack of integrity could be drawn. In other words, details of the complaints received against Shri S.N. Kumar or particulars of specific cases wherein Shri Kumar's integrity had become suspect were not mentioned to the Chief Justice of India otherwise the Chief Justice of India would have referred to this aspect while recording what transpired between them. The Delhi Chief Justice's letter to the Chief Justice of India on March 28, 1981, immediately following upon the meeting and oral discussion is of no use because beyond stating that he had an opportunity "to discuss this delicate matter with you" and further stating that as regards the complaints about Justice S.N. Kumar's integrity and general conduct "the matter has already been discussed between us" no further details are recorded as to what transpired between them during their meeting. Even in his letter of even date (March 28, 1981) addressed to the Union Law Minister the Delhi Chief Justice merely records baldly thus-- "I have since had an opportunity to discuss the entire matter in detail, with the Chief Justice of India" without mentioning what was discussed. Therefore, the only record of what was discussed between them is to be found in the letter of May 22, 1981 written by the Chief Justice of India to the Union Law Minister and as stated earlier this record of what transpired between mem in the meeting does not show that "further details" and "concrete facts and materials" in relation to complaints about lack of integrity of Shri S.N. Kumar were disclosed or discussed by the Delhi Chief Justice with the Chief Justice of India. Secondly, if during the oral discussion "further details" and "concrete facts or materials" which find a place in the letter of May 7, 1981 had been disclosed, discussed or placed before the Chief Justice of India it was simply pointiest for the Delhi Chief Justice to mark his letter dated May 7, 1981 'Secret --for personal attention only* and further to request Has Union Law Minister to keep it away from the Chief Justice of India and for the Union Law Minister to comply with such request Admittedly the letter was kept confidential from him and was not shown to him. The very fact that this letter dated May 7, 1981 was kept away from him at the insistence of the Delhi Chief Justice clearly shows that "further details" and "concrete facts or materials" asked for by the Chief Justice of India were not placed before him. Thirdly, just as the Chief Justice of India during his discussion with Shri S.N. Kumar put to him and got his explanation regarding aspects like his behaviour in Court, his slow disposal, his dealing with Original Side part-heard matters notwithstanding change in his assignment from the Original Side to Appellate Side etc., he would have also put to him and got his explanation about the "further details" and "concrete facts or materials" in regard to the allegations against

his integrity, had he (the Chief Justice of India) known such "further details" and "concrete facts or materials" and this has not happened. The reliance on Shri S.N. Kumar's counter-affidavit dated July 17, 1981. wherein a reference has been made by him to the three Summary Suits Nos. 1408, 1409 and 1417 of 1979 is of no avail, for, if his counter-affidavit in that behalf is carefully scrutinised it will appear clear that he has made a reference to these three suits along with six or seven other suits and all in connection with explaining the charge of impropriety on his part in taking up these part-heard matters even after his assignment had been changed from the Original Side to the Appellate Side and he explained it on the basis of a long standing practice obtaining in that behalf in Delhi High Court. He has not referred to these suits by way of explaining the allegations of corruption or behaviour raising doubt about his integrity. Any one who goes through the disclosed material carefully cannot fail to come to the conclusion that vital material in the shape of "further details" and "concrete facts" was deliberately kept away from the Chief Justice of India. The contention has, therefore, to be rejected.

660. If the reasons, which prompted the Delhi Chief Justice to keep away his communication of May 7, 1981 containing vital material in the shape of "further details" and "concrete facts" from the Chief Justice of India, are scrutinised and these have been Mentioned in the Law Minister's noting of May 19, 1981 and his letter of May 29, 1981 -- it will appear clear that apart from being vague they show a lack of proper perception on his part of the true nature of the obligations cast on him under the Constitution. In substance the sum total of his reasons comes to this: (i) that he did not want to be embarrassed by the likely disclosure of the contents of his communication dated May 7, 1981 to Shri S.N. Kumar as had happened in the case of his earlier communication dated 19th Feb., 1981 to the Chief Justice of India and (ii) that as he could not desist from expressing without fear or favour what he felt about certain matters (iii) relation to Shri S.N. Kumar, he communicated all that he wanted to say about him to the Union Law Minister through his letter of May 7, 1981 but at the same time because he was particular that his relations with Chief Justice of India should not be spoiled he desired that the contents of that communication should not be shown or made known to the Chief Justice of India. As regards (i), all that can be said is that it is surprising how he expected the Chief Justice of India not to put to Shri S.N. Kumar and seek his explanation on whatever he had come to know against him from any source including the Delhi Chief Justice: in fact, before supplying any material to the Union Law Minister he himself ought to have apprised Shri S.N. Kumar of all the material and all that he had heard about him and held discussion with him to ascertain his version thereon and then conveyed both sides of the picture to the other functionaries. As regards (ii), it must be first observed that full and effective consultation as contemplated by Article 217(1) required of him to place all relevant and material facts about Shri S.N. Kumar before the Chief Justice of India even at the cost of spoiling of his relations with the Chief Justice of India if it came to that and secondly, it was an unreal as well as erroneous apprehension on his part that a full disclosure of facts and material about Shri S.N. Kumar accompanied by his frank and honest opinion thereon would have spoiled his relations with the Chief Justice of India; in any event maintaining good and cordial relations with the Chief Justice of India was thoroughly irrelevant in the context of discharging a constitutional obligation. Having regard to the well settled principles concerning consultation referred to above it is clear that both the Union Law Minister as well as Delhi Chief Justice have failed to discharge their constitutional obligation in the matter of consultation contemplated under Article 217(1). In the first place, contrary to the principles laid down by this Court in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) that the President must make the relevant data available to the Chief Justice of India for obtaining his considered opinion, the Union Law Minister did not forward the complaints which he had received against Shri S.N. Kumar to the Chief Justice of India (which he forwarded to the Delhi Chief Justice); secondly, the Delhi Chief Justice did not forward "further details" and "concrete facts or materials" touching Shri S.N. Kumar's integrity to the Chief Justice of India in spite of the latter having specifically called for the same, and thirdly between them the Union Law Minister and the Delhi Chief Justice saw to it that the communication of May 7, 1981 (from the Delhi Chief Justice to the Union Law Minister) which contained "further details" and "concrete facts or material" in regard to the allegations of lack of integrity against Shri S.N. Kumar was kept confidential from the Chief Justice of India and was not shown to him. It is thus amply clear from the record that the facts which were taken into consideration by the Union Law Minister and the Delhi Chief Justice and which provided the basis to the appointing authority to arrive at the impugned decision were not placed before the Chief Justice of India, and, therefore, there was neither full nor effective - consultation between the President and the Chief Justice of India at required by Article 217(1) of the Constitution.

661. There it another aspect relating the procedure that has to be followed while undertaking such full and effective consultation namely, that the procedure must ensure fair play qua the concerned Judge. That the scope and ambit of consultation includes fair play qua the concerned Judge is clearly laid down in Sankalchand Sheth's case (supra) in the context of question of the Judge's transfer and the same position must obtain in regard to consultation under Article 217(1) in the context of the question of the continuance of an Additional Judge on the expiry of his initial or extended term, especially when it has been held that such an Additional Judge has a legitimate expectancy and a right to be considered foe continuance either for another term or as a Permanent Judge and the consideration of his case would suffer grave infirmity and illegality unless the consultation is again full and effective, that is to say, all facts concerning him are before all the functionaries undertaking the consultation including his version on facts allegedly adverse to him. In other words, the procedure to be followed in such consultation under Article 217(1) qua an Additional Judge must

ensure fair play in relation to him. If a person has a right to be considered how can such right be effective unless he has an opportunity to meet or explain the alleged adverse material against him. Sans such opportunity his right to be considered will be illusory and unreal. The question is whether the procedure followed in Shri S.N. Kumar's case ensured fair play qua him. It is clear from the record that "further details" and "concrete facts and material" in regard to the allegations of lack of integrity against Shri S.N. Kumar were not put to him nor was his explanation thereon sought; and there it no reason why Shri S.N. Kumar's averment that the said material was never disclosed to bias nor put to him by anybody should not be accepted. The question of Chief Justice of India disclosing or putting to him the said material obviously does not arise, for he himself was not apprised of such "further details" and "concrete facts or materials" bat the same constituted the basis on which the Delhi Chief Justice and the Union Law Minister acted leading to the impugned decision and therefore it was up to the Delhi Chief Justice to have apprised Shri S.N. Kumar of such material by telling him that the same it likely to be held against him and by seeking his explanation or version thereon and it was up to the Union Law Minister to see to it that such procedure was followed through the Delhi Chief Justice before advising the appointing authority to act on the same. The record does not show that anything of the kind was done and in that sense also there was no full and effective consultation which vitiates the impugned decision. In short in Shri S.N. Kumar's case it is quite clear that both these high constitutional functionaries, namely the Union Law Minister and the Delhi Chief Justice abdicated their constitutional responsibility or to use Justice Krishna Iyer's language they utterly failed to discharge their "accountability to the justice constituency." 662. The result is that the impugned decision against Shri S.N. Kumar is vitiated by legal mala fides and as such must be held to be void and non-est and his case must go back to the President for re-consideration and passing appropriate orders after the requisite consultation is undertaken afresh, with due observance of adequate fair-play.

WRIT PETITION NO. 274 OF 1981.

AND

TRANSFERRED CASES NOS. 2, 6 AND 24 OF 1981.

663. In the above matters, with the resignation of Shri M.M. Ismail Chief Justice of Madras High Court which has become effective, this Court is only concerned with the challenge made to the transfer of Shri K.B.N. Singh, Chief Justice of Patna High Court to Madras High Court. Initially by a Writ Petition No. 2224 of 1981 filed in the Patna High Court the challenge was made by two lawyers, Shri D.N. Pandey and Shri Thakur Rampeti Sinha, the Secretary and President respectively of Bihar State Socialist Lawyers' Association to which Shri K.B.N. Singh was impleaded as respondent No. 3 but after it was transferred to this Court and became the subject matter of Transfer Case No. 24 of 1981 at his request by this Court's order dated Sep. 15, 1981 Shri K.B.N. Singh was transposed as co-petitioner and he has filed a self-contained comprehensive affidavit dated Sep. 16, 1981 making all the necessary averments and submissions in support of the challenge.

664. The brief facts concerning Shri K.B.N. Singh's transfer are these: while he was practising as an advocate of the Patna High Court, Shri K.B.N. Singh was appointed as Judge of that High Court on Sep. 15, 1966; he was made permanent Judge of that High Court on March 21, 1968; he was first appointed Acting Chief Justice and later on Permanent Chief Justice of that Court by the Presidential Notification dated July 7, 1974 and he assumed charge of that office on July 19, 1976. For about 9 months, i.e. from January to Sep. 21, 1979 he functioned as an Acting Governor of State of Bihar whereafter he resumed work as the Chief Justice. By the impugned Notification dated Jan. 19, 1981 the President, after consultation with the Chief Justice of India, was pleased to transfer him as the Chief Justice of the High Court of Madras with effect from the day he would assume charge of his office. It is this transfer that is being challenged by Shri K.B.N. Singh and other petitioners on four or five grounds, namely, (a) Article 222(1) does not refer to a Chief Justice and hence the impugned transfer is outside its purview; (b) since the said Article properly construed covers only consensual transfers the impugned transfer, which is admittedly non-consensual, is bad in law; (c)it has not been effected in public interest; (d) it has been effected without full and effective consultation contemplated by Article 222(1) and (e) the procedure followed in effecting the same did not ensure fair-play in relation to him and the transfer is punitive in character. On behalf of the contesting respondents, amongst whom is included the Chief Justice of India who has been impleaded as party-respondent No. 2, the challenge is refuted under each of the heads. It is contended that the transfer of a Chief Justice falls within the purview of Article 222(1), that non-consensual transfers also fall within its scope and purview, that the impugned transfer has been effected in public interest, that there was full and effective consultation between the President and the Chief Justice of India as contemplated toy Article 222(1) and that the procedure followed in effecting the same was quite fair and that the impugned order had been made after giving Shri K.B.N. Singh full opportunity to place his point of view and difficulties before the Chief Justice and after these were objectively considered. It is categorically denied that it is a punitive transfer.

665. At the outset it may be stated that Counsel for Shri K.B.N. Singh and the other petitioners did not seriously press the contention that the transfer of a Chief Justice from one High Court to another was not within the purview of Article 222(1) for the reason that it was difficult to maintain that a Chief Justice was not included or could not fall within the expression "a Judge of a High Court"; similarly, having regard to the conclusion reached in the earlier part of the judgment that consent cannot be read in Article 222(1) and that the said Article covers non-consensual transfers it is unnecessary to deal with the second contention again at this stage. The real questions that arise for determination in regard to the transfer of Shri K.B.N. Singh, therefore, are whether the transfer has been ordered in public interest, whether there has been full and effective consultation between the President and the Chief Justice of India as required by Article 222(1) and whether the procedure that was followed ensured fair-play in the sense that Shri K.B.N. Singh was heard fully and his say was taken into consideration before effecting his transfer.

666. On the aspects of the scope and limits of the power to transfer a Judge under Article 222(1) and the built-in-safeguards to prevent its abuse this Court in Sankalchand Sh eth's case MANU/SC/0065/1977(supra) has clearly laid down that the said power is circumscribed by two important safeguards,' namely, (1) the exercise of the power is conditioned by the requirements of public interest and cannot be exercised by way of punishment and (2) there must be a full, complete and effective consultation between the President and the Chief Justice of India before an order under that Article can be made. Chandrachud, J. (as he then was) has observed (at p. 456 of SCR) : (at p. 2349 of AIR) of the Report) thus:

Article 222(1) postulates fair play and contains built-in-safeguards in the interests of reasonableness, In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under the obligation to consult the Chief Justice of India which means and requires that all the relevant facts must be placed before the Chief Justice. Thirdly, the Chief Justices owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before he tenders his opinion to the President In the discharge of this constitutional obligation, the Chief Justice would be within his rights, and indeed it is his duty whenever necessary, to elicit and ascertain further facts either directly from the Judge concerned or from other reliable sources. The executive cannot and ought not to establish rapport with the Judges which is the function and privilege of the Chief Justice. In substance and effect, therefore, the Judge concerned cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed.

It is by reference to these principles that the question will have to be considered whether the impugned transfer is vitiated on any of the three grounds mentioned above.

667. Learned Counsel for the petitioners (including Shri K.B.N. Singh) urged that the three grounds or aspects really get intermixed and will have to be considered together in the light of the relevant material on record and according to counsel the material on record clearly shows that the impugned transfer stands vitiated by the infirmities indicated in each of the said grounds, Counsel contended that a mere recital in the Presidential Notification that the transfer has been ordered by the President "after consultation with the Chief Justice of India" is not enough and will not avail the contesting respondents and when the factum of full and effective consultation has been put in issue the respondents have to show demonstrably that there has been such full and effective consultation as contemplated by Article 222(1) and the material produced is lacking in this behalf particularly when the normal procedure was reversed in that the proposal for transfer in the instant case emanated from the Chief Justice of India and further there was nothing to show whether the communication received from the Chief Minister of Madras containing grounds of his objection to the proposed transfer had been placed before the Chief Justice of India, It was further contended that it has not been shown that the transfer is in public interest or what category of public interest is being served thereby. It was pointed out that there is a divergence between the transferring authority (the President) and the Chief Justice of India as to the reasons for which the impugned transfer has been made; whereas according to the transferring authority it was in pursuance of a policy of having all Chief Justices in every High Court from outside, according to the Chief Justice of India it was a selective transfer made in an appropriate case for strictly objective reasons, but the transfer could not be for the reasons of the policy because that policy had not been then and has not been even now finally formulated or adopted and if it is a selective transfer it has been by way of punishment and therefore bad in law. It was also contended that no reasons or grounds necessitating or justifying the transfer nor materials in support thereof were ever disclosed or discussed with Shri K.B.N. Singh by any one on behalf of the transferring authority or by the Chief Justice of India, that the advanced age and serious illness of his mother and his other difficulties were not properly considered and as such the procedure followed lacked fair-play and for all these reasons the impugned transfer deserves to be quashed or set aside.

668. In view of, the aforesaid contentions raised by the Counsel for the petitioners it will be necessary to indicate briefly the relevant material, on the record and ascertain what facts or aspects emerge clearly therefrom so as to adjudicate upon the validity or otherwise of the grounds of attack levelled against the impugned transfer. The entire relevant material requiring analysis and consideration consists of: (a) Self-contained comprehensive affidavit dated

Sep. 16, 1981 of Shri K.B.N. Singh filed after he was transposed as a co-petitioner containing all the relevant averments and submissions in support of the challenge; (b) Counter-affidavit dated Sep. 24, 1981 of Shri Kankan filed on behalf of the Union of India; (c) Rejoinder-Affidavit dated Sep. 28, 1981 of Shri K.B.N. Singh in reply to Shri Kankan's counter-affidavit; (d) Counter-affidavit dated Sep. 29, 1981 of the Chief Justice of India, respondent No. 2; (e) Rejoinder-affidavit dated Oct. 16, 1981 by Shri K.B.N. Singh in reply to the counter-affidavit of Chief Justice of India; (f) Relevant correspondence between the Chief Justice of India on the one hand and the Union Law Minister and the Prime Minister on the other and between the Chief Minister of Madras and the Union Law Minister contained in a file pertaining to the impugned transfer disclosed by the Union Government pursuant to this Court's order dated Nov. 2, 1981; (g) Relevant nothings in File No. 50/6/ 80-Jus pertaining to the appointment of Chief Justices of Delhi High Court and Andhra Pradesh High Court in the context of the proposed general policy of having all Chief Justices in various High Courts from outside also disclosed pursuant to this Court's order dated Nov. 18, 1981.

669. Reading items (f) and (g) together the following facts or aspects emerge very clearly on the record:

(1) a general policy to have Chief Justices of all the High Courts from outside was being evolved by the Union Government, who had almost decided to accept the basic principles underlying it but bad not finally formulated or adopted the same because the mechanism or modality of procedure had yet to be decided upon and fixed and the nothings in File No. 50/6/80-Jus clearly show that the appointments of the two Acting Chief Justices as Permanent Chief Justices of Delhi High Court and Andhra Pradesh High Court were made on the understanding that they will be liable to be transferred "if eventually a decision is taken that every Chief Justice must come from outside";

(2) that the Government's view in regard to such policy was put across to the Chief Justice of India but the Chief Justice of India was "firmly opposed to a wholesale transfer of the Chief Justices of the High Courts" and had stated, "I take the view, which I have expressed from time to time, that such transfers may be made in appropriate cases for strictly objective reasons." (vide letter dated Dec. 7, 1980 from the Chief Justice of India to the Union Law Minister).

670. Reading the correspondence at item (f) above, the following additional facts or aspects emerge clearly:

(3) that transfers of some of the Chief Justices had been engaging the attention of the Chief Justice of India for the past few months, and he had made personal inquiries in this behalf and bad met several lawyers, and Judges of the concerned High Courts and on the basis of the data which he had collected and which he had considered with the greatest objectivity he had suggested transfers of certain Chief Justices including that of Shri K.B.N. Singh (vide letter dated December 7, 1980);

(4) that initially on December 7, 1980, the recommendation was to transfer 'Shri K.B.N. Singh to Rajasthan High Court to take the place of Shri K.D. Sharma, Acting Chief Justice there, who was proposed to be transferred at the Chief Justice of the Kerala High Court, but after the Union Law Minister had pointed out certain difficulties in the chain of the connected transfers, the Chief Justice of India gave a fresh thought to the problem and by about December 20, 1980 in supersession of his previous proposals the Chief Justice of India recommended that Shri M.M. Ismail Chief Justice of the Madras High Court should be transferred as the Chief Justice of the Kerala High Court and Shri K.B.N. Singh should be transferred as the Chief Justice of the Madras High Court;

(5) that these suggested transfers including that of Shri K.B.N. Singh, apart from being discussed in the correspondence were also discussed orally in meetings and over telephone by and between the Chief Justice of India on the one hand and the Union Law Minister and the Prime Minister on the other an inference arising from the correspondence at item (f) itself.

671. Reading items (a) to (e) above, and particularly the self-contained comprehensive affidavit of Shri K.B.N. Singh, counter-affidavit of the Chief Justice of India and rejoinder-affidavit of Shri K.B.N. Singh in reply thereto together and proceeding on the basis of points of convergence only and excluding or ignoring the points of divergence between them arising from their respective affidavits, the following additional facts or aspects emerge very clearly:

(6) that much prior to his suggesting the transfer of Shri K.B.N. Singh from Patna to Rajasthan High Court on Dec. 7, 1980, the Chief Justice of India had paid a visit to Patna High Court in Feb., 1980 after disclosing to Shri K.B.N. Singh the purpose of his visit and had during that visit met on Feb. 24, 25 and 26, 1980 the Hon'ble Judges of that High Court and the Members of that Bar individually, the Members of the Advocates' Association collectively and the Judges of the District Court at Patna and held discussions with them, and on his objective assessment of the situation and the data collected he concluded that dissatisfactory working conditions obtained in the High Court;

(7) that in regard to the proposal to transfer Shri K.B.N. Singh from Patna to Madras High Court, Shri K.B.N. Singh and the Chief Justice of India had discussions with each other on two occasions --one on the 5th Jan., 1980 over phone and the other on Jan. 8, 1981 at the residence of the Chief Justice of India. What transpired between the two on these two occasions is very material and again leaving points of serious divergence and proceeding on the points of broad convergence between the two it can safely be stated that this is what transpired between them: On Jan. 5, 1981 the Chief Justice of India informed Shri K.B.N. Singh over phone that it was proposed to transfer Shri M. M. Ismail to Kerala and that he (Shri K.B.N. Singh) may have to go to Madras; on further query as to the reason for it, the Chief Justice of India referred to Government policy but further specifically conveyed to him that it was proposed to transfer Shri M. M. Ismail from Madras and it was necessary to appoint an experienced and senior Chief Justice in his place; during the telephonic talk Shri K.B.N. Singh told the Chief Justice of India that his mother was seriously ill and bed-ridden and was not in a position to move out of Patna and accompany him to Madras and further told him that if his transfer was insisted upon he would prefer to resign whereupon the Chief Justice of India requested him not to act in haste and to give the matter a close thought; the Chief Justice of India also added that he (Chief Justice) was making a note of the personal difficulty mentioned by him and that it will have to be taken into consideration before a final decision was taken; the Chief Justice of India also requested him to go over to Delhi to discuss the question of his transfer. During the meeting that took place at the residence of the Chief Justice of India on 8th Jan., 1981 at about 7.30 p. m. the proposed transfer was further discussed and when during the discussion the question of his mother's advanced age and illness cropped up, the Chief Justice of India told him that he was unable to agree with his view on the matter as there were other dependable persons in his family who could look after his mother, that in any case his brother Shri S. B. N. Singh,, who was practising in the High Court, was quite capable of looking after his mother, to which Shri K.B.N. Singh replied that his mother had a special attachment to him and that he could not leave her to the care of his brother and other members of the family; during the discussion Shri K.B.N. Singh told the Chief Justice of India that it was possible that baseless complaints, which were the bane of Bihar, might have been made to him, and if so, he would like to remove any wrong impression that might have been created, whereupon the Chief Justice of India told him that he never went by baseless complaints and he did not believe that his (Shri K.B.N. Singh's) conduct was blame-worthy but that if he wanted to explain any matter, which according to him, had created dissatisfaction about the working of the High Court, he was free to do so; further, during the discussion the Chief Justice of India assured him that he did not hold that he (Shri K.B.N. Singh) himself was to blame but certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. It may be stated that Shri K.B.N. Singh in his rejoinder-affidavit has admitted that during the discussion the Chief Justice of India did mention to him that certain persons were exploiting their proximity to him and that there was misunderstanding and dissatisfaction in the High Court;

(8) the Chief Justice of India has in terms stated on oath that there was full and effective consultation between him and the President of India (meaning the President acting on advice of Council of Ministers) on the question of Shri K.B.N. Singh's transfer from Patna to Madras and that every relevant aspect of that question was discussed by him fully with the President (acting as such) both before and after he had proposed the transfer and that every relevant circumstance, including the personal difficulty mentioned by Shri K.B.N. Singh was considered by him carefully and objectively before coming to the conclusion that he should be transferred to Madras; he has further stated that the paramount consideration in the impugned transfer was public interest and that it was not by way of any punishment at all and that he came to the conclusion on a dispassionate assessment of the relevant facts and circumstances, including the language difficulty involved, that Shri K.B.N. Singh was suited for being transferred to Madras High Court and that it was necessary so to transfer him. The Union of India through the counter-affidavit of Shri Kankan has denied that the impugned order was passed without effective consultation between the President of India (meaning acting on the advice of Council of Ministers) and the Chief Justice of India and asserted that relevant considerations were taken into account by the President (acting as above) and that the impugned transfer has been made only in public interest and is not punitive in character.

672. To the aforesaid facts or aspects that emerge clearly from the relevant materials on the record two more facts will have to be added as having come on record through the statements made by the learned Solicitor-General in answer to pointed queries made by the Court to elicit requisite information and such a course was adopted by the Court with a view to avoid burdening the record with additional filet containing the notings which were, however, produced for Court's inspection and these facts are:

(9) that pursuant to the executive instructions contained in the 1972 Memorandum dealing with the procedure to be adopted in connection with the appointment and transfer of Judges of High Courts the Union Law Minister had ascertained the views of the concerned Chief Ministers, namely, the Chief Minister of Madras, the Chief Minister of Kerala and the Chief Minister of Bihar on 3rd, 4th and 6th January, 1981 respectively, in the matter of the proposed transfers;

(10) that the effective decision on the impugned transfer was taken by the Prime Minister on 9th January, 1981 whereafter the necessary and relevant papers were forwarded to the President of India and the impugned Notification was issued on 19th January, 1981.

673. At the outset, I would like to observe that a needless controversy was raised as to whether the impugned transfer has been a policy transfer (i.e. a transfer pursuant to the policy of having Chief Justices of all the High Courts from outside) or a selective transfer and a great deal of confusion was added to it by the statement which the learned Solicitor-General appearing on behalf of the Union of India was instructed to make during the hearing. As discussed and explained in the earlier part of this judgment it cannot be accepted as an invariably correct proposition that a policy transfer would always be non-punitive in character or that a selective transfer would necessarily be a punitive transfer. It has been pointed out earlier that a policy to have one-third of the Puisne Judges of a High Court from outside, in the absence of any mechanism or modality of procedure giving guidelines as to how that one-third number will be chosen for implementing it, would obviously be fraught with the vice of discrimination; similarly even the policy of having the Chief Justices of all the High Courts from outside stands the risk of being abused by the Executive in the absence of proper guidelines being provided in the matter of regulating which Chief Justice will be posted in what particular High Court A policy transfer, therefore, without fixing the requisite mechanism or modality of procedure that ensures complete insulation against executive interference, could be a punitive transfer in the sense of having been effected with some oblique motive whereas a selective transfer in an appropriate case for strictly objective reasons and in public interest could be non-punitive, with the result that each case of transfer, whether based on a policy or a selective transfer, will have to be judged on the facts and circumstances of its own for deciding whether it is punitive in character in the sense of having been effected with some oblique motive or not. In the instant case, having regard to the facts mentioned at Nos. 1 and 2 above, the impugned transfer must be regarded as a selective transfer and not based on the policy in the contemplation of the Union Government, notwithstanding the reference to 'Government Policy' made by the Chief Justice of India during his telephonic talk with Shri K.B.N. Singh on Jan. 5, 1981. Since the impugned transfer order in the ultimate analysis is of the transferring authority (the President) this Court wanted to know from the learned Solicitor General as to what were the reasons which prompted the transferring authority to pass the impugned order and therefore, a clarification was invited, but the statement that was made by him on Nov. 12, 1981, of course, under instructions from proper quarters, instead of clarifying the position made it more puzzling. The statement in substance was that the Chief Justice of India had suggested certain transfers, including the impugned transfer, in pursuance of his own view that transfers should be made in appropriate cases strictly for objective reasons but the Government had acceded to the transfers proposed by him as "(1) it was felt that not agreeing to these transfers may be construed as though the Government is departing from the view of having Chief Justices from outside; (2) the policy aspect could still be pressed into service later". The statement gives the impression that the transferring authority agreed to the transfers because it did not want to depart from its view of having Chief Justices from outside but at the same time it categorically states that it was felt that the policy could be pressed into service later; the second part of the statement clearly suggests that the policy, which had not been till then clearly formulated, could be and was to be pressed into service later meaning thereby that the instant transfers were not in pursuance of the policy. Perhaps what is sought to be conveyed is that each one of the instant transfers was a selective transfer appropriately made strictly for objective reasons and justified by reasons for which the Chief Justice of India had recommended them but at the same time they indirectly helped the Government in achieving the same result which would have been achieved had the transfers been made in pursuance of the policy which the Government intended to have. That this was intended to be conveyed by the statement of Nov. 12, 1981 has been made clear by the learned Solicitor General later on, for, in his written note filed before this Court on Nov. 18, 1981, he has made the following categorical statement: "The impugned transfer, though not in pursuance of a policy decision, yet is a step forward which is consistent with the view of appointing Chief Justices from outside. The impugned transfer order, is, however, valid in that it satisfies the requirements of Article 222". In other words, even as a selective transfer the Union Government found it justified for reasons given by the Chief Justice of India and valid under Article 222(1) but at the same time accepting his advice and recommendation amounted to taking a step forward in the direction of their intended policy. But, even if it were assumed at the highest that the two parties to the consultation (the Transferring Authority and the Chief Justice of India) had different reasons for agreeing to the ultimate result this cannot vitiate the consultation contemplated by Article 222(1), for, consultation, as has been pointed out by this Court in Sankalchand Sheth's case MANU/SC/0065/1977 (supra), requires the parties thereto to make their respective points of view known to each other and discuss and examine the relative merits of their views and as has been put aptly by Krishna Iyer, J. at page 496 of the report "Consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur". But, apart from this aspect of the matter it seems sufficiently clear that the impugned transfer has been a selective transfer in the instant case and it will have to be decided whether it properly falls within Article 222(1), the same having been made after observing the safeguards of public interest and effective consultation and after following the procedure that ensured fair play.

674. The main question that arises in the case is whether the impugned transfer, being a selective transfer, has been really made in public interest or by way of punishment. In this behalf Counsel for Shri K.B.N. Singh has raised a two

fold contention which has to be squarely dealt with. In the first place it has been urged that merely asserting that the said transfer has been made in public interest without categorising the public interest served thereby would be of no avail; and secondly, it is clear on record that during his visit to Patna in Feb., 1980 the Chief Justice of India had collected some data and information which showed that certain persons were exploiting their proximity to Shri K.B.N. Singh and this had created considerable misunderstanding and dissatisfaction in the working of the High Court which seems to have necessitated or justified Shri K.B.N. Singh's transfer and this certainly implies some reflection on Shri K.B.N. Singh's behaviour and the inference is unescapable that the transfer is by way of punishment and that too is made without disclosing the data or particulars to him amounting to unfair play. It is not possible to accept either of these two contentions for the reasons which I will presently indicate. It is not correct to say that the contesting respondents have been merely asserting baldly that the impugned transfer has been made in public interest without categorising the public interest served thereby. Actually two categories of public interest have been indicated by the Chief Justice of India in his counter-affidavit; so far as the shifting, of Shri K.B.N. Singh from Patna High Court is concerned the reason indicated is that certain persons were exploiting their proximity to Shri K.B.N. Singh which had created considerable misunderstanding and dissatisfaction in the working of the High Court and surely remedying dissatisfactory working conditions in a High Court serves one kind of high public interest; and so far as his posting at Madras High Court is concerned, the Chief Justice of India felt that it would be in fitness of things that an experienced and senior Chief Justice like Shri K.B.N. Singh be posted as the Chief Justice of one of the premier High Courts in the country. It is difficult to countenance any suggestion that either of ' these considerations which weighed with the Chief Justice of India does not serve public interest The first contention, therefore, must be rejected. Coming to the punishment aspect strenuously pressed by Counsel for Shri K.B.N. Singh I would like to observe that it will not be correct to draw an inference of the concerned Judge's connivance or complicity in every case where persons close to him exploit their proximity to him while handling their matters in the High Court and in the absence of any connivance or complicity on his part such exploitation of close proximity would not imply any reflection on the Judge concerned. It is conceivable that undesirable activities are indulged in without his knowledge or consent -- nay even against his wishes and sometimes despite counter measures adopted by him, and yet such exploitation of close proximity and the undesirable activities would spoil the atmosphere and lead to dissatisfactory working conditions in the High Court. In such a case if the atmosphere has to be improved and dissatisfactory working conditions have to be remedied it may become inevitable to transfer the concerned Judge without any blame attaching to him whatsoever; it is obvious that such a transfer will not carry any reflection on him. Further if the data or information, which leads to the discovery of dissatisfactory working conditions in the High court were also to indicate the concerned judge's connivance or complicity in the exploitation then only the question of putting the same to him will arise but not otherwise. The instant case seems to be of that type, for, during his discussion with Shri K.B.N. Singh the chief Justice of India had repeatedly told that it was not his practice to take into account any baseless complaints, that he did not believe that his (Shri K.B.N. Singh's) conduct was blameworthy in any manner and even when he mentioned this particular aspect about certain persons exploiting their proximity to him which had led to needless misunderstanding and dissatisfactory working conditions in the High Court he specifically assured him that he was not to blame for it no responsible for it No material appears to have been placed before Chief Justice of India by anyone even remotely suggesting that there was any convinance or complicity on the part of Shri K.B.N. Singh in the matter of exploitation of proximity leading to dissatisfactory working conditions in Patna High Court and there is no reason why me statement of the Chief Justice of India that Shri K.B.N. Singh was not responsible nor was to blame for it should not be accepted. In the absence of any connivance or complicity on his part in the matter of the exploitation, no reflection on Shri K.B.N. Singh is implied simply by reason of his transfer, which must be regarded as having been made, with a view to remedying the dissatisfactory working conditions in that High Court and no unfair play was involved in the procedure followed by the Chief Justice of India. In the circumstances it is clear that the impugned transfer has been in public interest and not by way of punishment.

675. On the question whether there has been full and effective consultation between the transferring authority (the President) and the Chief Justice of India it is true that a mere recital in the impugned Notification dated 19th Jan., 1981 about such consultation will not be of much avail especially when the factum of such full and effective consultation has been put in issue but here the contesting respondents' case on that aspect does not rest merely on the recital to be found in the impugned Notification but they have produced sufficient material on record to show that there was full and effective consultation as contemplated by Article 222(1) before the impugned order was made. On the question as to whether there was consultation between the transferring authority on the one hand and the Chief Justice of India on the other and if so, what transpired during such consultation Shri K.B.N. Singh obviously has no personal knowledge and one will have to consider what one or both the parties to the consultative process have to say on the matter. It is well known that in writ proceedings the affidavits, counter-affidavits and rejoinder-affidavits filed by the parties constitute not merely their pleadings but also partake of the character of evidence in the case and it is from this angle mat the counter-affidavits filed on behalf of the contesting respondents, particularly that of the Chief Justice of India, a party to the consultative process, will have to be examined. Keeping the recital about the consultation with him that is to be found in the impugned Notification aside, there is a positive statement on oath made by the Chief Justice of India in his counter-affidavit dated September 29, 1981 that there was full and effective consultation between him and the President of India on the question of Shri K.B.N. Singh's transfer from Patna to Madras and that every relevant aspect of that

question, which would include the language difficulty involved at well at the personal difficulty of Shri K.B.N. Singh, was discussed by him fully with the President both before and after he had proposed the transfer and it is obvious that this statement of the Chief Justice of India partakes of the character of the evidence seeking to prove the factum and contents of the consultation. Far from there being anything on record which may detract from this averment there is positive other material on record to corroborate the same. The correspondence file disclosed by the Union Government clearly shows that the question of Shri K.B.N. Singh's transfer was discussed and considered fully by and between the Chief Justice of India on the one hand and the Union Law Minister and the Prime Minister representing the transferring authority on the other not merely through correspondence but also orally in meetings and over telephone. Presumably basing himself on this correspondence file Shri Kankan in his counter-affidavit dated September 24, 1981 has denied that the impugned order was passed without effective consultation between the Chief Justice of India and the President of India (of course meaning the President as tile constitutional head acting on the advice of Council of Ministers) and has further asserted mat the relevant considerations were taken into consideration by the President (acting as such). It was argued that the data collected by the Chief Justice of India during his visit to Patna High Court in February, 1980 does not seem to have been placed before either the Union Law Minister or the Prime Minister but such an argument has to be rejected because the Chief Justice of India's letter dated December 7, 1980 to the Union Law Minister, wherein the reference to the collection of such data by the Chief Justice of India as a result of his discussion with several lawyers and judges of the concerned High Courts and to his having considered the same with greatest objectivity has been made, itself states that the same was written "in furtherance of the discussion which both of them had on the previous day i.e. on December 6, 1980, on many an important matter concerning the High Courts. It was also argued that the statement of the Chief Justice of India in his counter-affidavit that he had discussed the question of impugned transfer with the President of India is vague inasmuch as it has not been clarified as to with whom from the side of the transferring authority he had these discussions, whether with the Union Law Minister or with the Prime Minister or with the President himself personally; this argument has also to be rejected, for the relevant correspondence disclosed by the Union Government clearly shows that the Chief Justice of India had these discussions about the impugned transfer both with the Union Law Minister and the Prime Minister and neither the Chief Justice of India nor Shri Kankan has suggested that the Chief Justice of India had discussed the question personally with the President of India. When the correspondence indicates clearly the two functionaries from the side of the transferring authority with whom the Chief Justice of India had discussions and there being no whisper either from the Chief Justice of India or from Shri Kankan that there were personal discussions with the President, it is ridiculous to suggest that the statement of the Chief Justice of India in that behalf is vague. With this material on record I did not appreciate the necessity or desirability of any clarificatory statement coming from the President that the issue was never discussed by the Chief Justice of India with him personally. What is more, it is surprising that in face of such correspondence showing discussion on the subject with the Union Law Minister the Solicitor General should have been instructed to make a statement which he did on November 12, 1981 to the effect "the Chief Justice of India mentioned to the Law Minister about his proposal to transfer Shri K.B.N. Singh". The twist given in the statement that the Solicitor-General was instructed to make cannot escape this Court's attention. Why was it necessary ? Be that as it may the material on record clearly shows that the impugned transfer was fully discussed by the Chief Justice of India with the Union Law Minister and the Prime Minister. It was also faintly argued that the last discussion between the Chief Justice of India and Shri K.B.N. Singh having taken place in the evening at about 7.30 p.m. on 8th Jan., 1981, the matter could not have been discussed further between the Chief Justice of India and the transferring authority before the effective and final decision was taken by the Prime Minister which is said to have been done by her on 9th Jan., 1981. The argument is merely required to be stated to be rejected, for even after the last discussion between the Chief Justice of India and Shri K.B.N. Singh was over there was ample time and opportunity for the Chief Justice of India to put across all that transpired between him and Shri K.B.N. Singh together with his reaction thereon either to the Union Law Minister or the Prime Minister or to both orally either in a meeting or on the telephone before the final and effective decision on the impugned transfer was taken by the Prime Minister. From the material produced on record, therefore, it is abundantly clear that there was full and effective consultation between the transferring authority on the one hand and the Chief Justice' of India on the other in regard to the impugned transfer as contemplated by Article 222(1) before the effective decision thereon was taken, and if the consultation has been full and effective as contemplated by Article 222(1), as is shown by the material produced on record, the contention that the normal procedure ought not to have been reversed and the proposal should have emanated from the President and not from the Chief Justice of India as is the case here loses its significance. Moreover, there is no hard and fast rule as to from whom a proposal for transfer should emanate.

676. On the last aspect as to whether the procedure followed by the Chief Justice of India ensured fair play in relation to Shri K.B.N. Singh or not the material on record clearly shows that the Chief Justice of India had discussed all the relevant aspects concerning the impugned transfer with Shri K.B.N. Singh including his personal difficulty pertaining to his mother's advanced age and serious illness. That the Chief Justice of India took a different view about it does not mean that any unfair play was involved. After all in his view public interest out-weighed the considerations of personal difficulty as well as the language difficulty which were put before him. As discussed earlier there being no charge nor any imputation against Shri K.B.N. Singh there was no question of giving him an opportunity to meet any. It is thus clear that the procedure that was followed ensured complete fair play qua Shri K.B.N. Singh.

677. It was next contended by Counsel for K.B.N. Singh that the Executive Instructions in Para 12 of the Memorandum of 1972, containing the procedure to be adopted in connection with transfers of High Court Judges issued by the Central Government, in the matter of consultation or ascertainment of the views of the Chief Ministers of the States involved in a transfer had not been followed in this case. The contention was, however, not pressed when the learned Solicitor-General after consulting the relevant files, made a statement at the Bar that in the instant case the Union Law Minister had consuited and/or ascertained the views of the Chief Ministers of Tamil Nadu, Kerala and Bihar on 3rd, 4th and 6th January, 1981 respectively in the matter of the proposed transfers. Further, in my view the question whether the Tamil Nadu Chief Minister's letter pointing out language difficulties was actually placed before the Chief Justice of India or not would not be material if the Chief Justice of India was apprised of the grounds of objection based on language difficulty and he had considered them and the material shows that the Chief Justice of India had taken into consideration the objections based on language difficulty.

678. Counsel for Shri K.B.N. Singh in the last resort faintly urged that simultaneously with the passing of the impugned order the provisions of Article 222(2) ought to have been complied with and since no order fixing compensatory allowance to Shri K.B.N. Singh was passed upon his transfer the impugned transfer order would be invalid. It is impossible to accept such a contention, for, Article 222(2) does not provide that the order fixing compensatory allowance to the transferee Judge has to be issued simultaneously along with the transfer order; all that it provides is that when a Judge has been or is transferred after complying with the requirements of Sub-article (1) he shall, during the period he serves as a Judge of the other High Court, be entitled to receive, in addition to his salary, such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix. It is obvious that such an order fixing the compensatory allowance could follow and would have fallowed in the instant case within reasonable time but here the occasion to make such order got postponed because of the stay of transfer that was ordered by this Court.

679. In the result it is clear that the impugned transfer must be held to be a valid transfer under Article 222(1) of the Constitution.

680. Before parting with these cases I would like to place on record my sense of appreciation and gratitude to all the learned. Counsel who have rendered great assistance to the Court by arguing their respective points with exceptional ability and skill. I have always held the view that the quality of a judgment rendered by a Court varies in direct proportion to the quality of assistance received by it from counsel appearing before it and whatever little I have been able to do in these cases it is mainly due to the excellent assistance received from counsel and I thank them. At the same time I cannot help keeping on record a feeling of uneasiness which I entertained during the hearing of Shri K.B.N. Singh's case because of the manner in which that case was conducted by the contesting respondents through the learned Solicitor General, for which I hasten to add, that the Solicitor General is not at all responsible, though on occasions he was required to do some tight-rope walking, obviously under instructions. On more occasions than one I was left in doubt whether they were really interested in having the transfer order upheld. The statement which the Solicitor General was instructed to make on November 12, 1981 in which a twist was given suggesting, contrary to the documentary record, that the Chief Justice of India had, instead of "discussing" the proposal of transfer, "mentioned" the same to the Law Minister, cannot be otherwise explained. 1 have already mentioned that I have failed to appreciate the desirability or necessity of the statement made on behalf of the President of India disowning the "personal discussion" with the Chief Justice of India on the issue of transfer, especially when the latter had not raised a whisper about such personal discussion. After all is said and done, it most be observed that while acting administratively the attitude and behaviour of the Chief Justice of India was befitting the paterfamilias of the Judiciary. The way he dealt with the cases of Shri S.N. Kumar and Shri K.B.N. Singh has been objective and judicious -- by refusing to rely on unconfirmed reports, rumours or gossip in the case of the former, and by following a procedure that ensured fair play in the case of the latter.

681. The other aspect, I would like to refer is the manner in which a section of the Press has behaved in this case. I am constrained to observe that a section of the Press while reporting the proceedings of this Court in this case seems to have, without fully realising the scope and purpose of the disclosure ordered by the Court, exceeded its limits of fair reporting and fair comment by discussing the merits and demerits of the grounds on which recommendations were made concerning the Judges or the truth or falsity of the disclosed material; assuming that this Court was intending to adjudicate on the merits or demerits of the grounds of the recommendations made or on truth or falsity of the materials even then how could the Press before this Court has finally adjudicated upon the issues involved, pronounce its verdict --which it almost did -- on the high constitutional functionaries involved by holding a trial by Press? The disclosure, which be same necessary in the highest public interest of administration of justice -- for seeing that injustice was not perpetrated and justice was meted out to high judicial functionaries under the Constitution, was not intended for being used for such purpose. Such behaviour of a section of the Press has been most distressing and has unnecessarily affected the image of judiciary and the high constitutional functionaries involved.

682. In conclusion I would pass the Following order:

(1) Writ Petitions in Transferred Cases Nos. 19-22 of 1981 are allowed.

(2) The impugned Circular letter dated March 18, 1981 is quashed and struck down as impinging on judicial independence and as being violative of Articles. 222(1) and 14.

(3) In future extensions to sitting Additional Judges should normally be for two years and no extension to any Additional Judge for less than a year be ever granted.

(4) The decision to drop Shri S.N. Kumar is quashed and his case is sent back to the President for reconsideration and passing appropriate orders after the requisite consultation is undertaken afresh, with due observance of adequate fair play.

(5) Since Shri K.B.N. Singh's transfer is held to be valid, Writ Petition No. 274 of 1981 and those in transferred Cases Nos. 2, 6 and 24 of 1981 are dismissed.

(6) Each party will bear its own costs in these cases.

Desai, J.

683. March 18, 1981 till law courts and lawyers in their present form and structure survive, would be remembered as a day that raised a storm of controversy leading to a spate of writ petitions in different High Courts in the country. The Law Minister of the Government of India selected that fateful day for issuing a circular forwarded it to the Chief Ministers of all States and the Governor of Punjab requesting them to obtain the consent of Additional Judges working in the High Court in their respective States with preference limited to three stations, for being appointed as permanent judges in High Court other than the High Court in which they are, at present, appointed and functioning. A similar consent was also to be obtained from those who may be recommended in future for appointment as judges of the High Court.

684. It appears that the first salvo was fired by Shri S.P. Gupta, Advocate practising in the Allahabad High Court who filed a writ petition in the Allahabad. High Court impleading President of India, Union of India, Chief Justice of India, Chief Justice of Allahabad High Court and Governor of State as respondents praying for a writ, direction or order in the nature of mandamus directing the President to appoint judges of the High Court in accordance with the constitutional scheme etc. There was also a prayer for a direction to appoint three named judges as permanent judges but this prayer was not pressed. This petition was filed, it appears, on the very day on which the circular was issued. After it was admitted, the petition was twice amended with the leave of the Court, the first order being dated May 1, 1981 and the second being July 20, 1981. Respondent 1, president of India, Respondent 3, Chief Justice of India and Respondent 5, Governor of Uttar Pradesh were subsequently dropped and their names from the array of respondents were deleted, This petition stood transferred to this Court by the order dated May 1, 1981, and it, was registered as Transferred Case No. 19 of 1981.

685. After the issue of the impugned circular dated March 18, 1981, some events occurred which may be briefly noticed. The initial term of appointment of three additional judges of Delhi High Court, Mr. O.N. Vohra, Mr. S.N. Kumar and Mr. S.B. Wad expired on Mar. 6, 1981, and each of them was appointed as an additional judge for a period of three months, This short-term extension presumably provoked Shri J.L. Kalra and some others, practising advocates, to file Writ Petition No, 636 of 1981 on Mar. 26, 1981, in the High Court of Delhi impleading Union of India as the sole respondent. A number of prayers have been made in this petition, one which deserves mention is that a direction be issued that Shri N.N. Goswami, Shri Sultan Singh and Shri O.N. Vohra, three additional judges of the High Court of Delhi be appointed as permanent Judges and a further direction that the term of Shri S.N. Kumar and Shri S.B. Wad, additional judges functioning in the same Court be extended for a period of two years. By an order made by this Court on May 1, 1981. this writ petition stood transferred to this Court and is registered as Transferred Case No. 21 of 1981.

686. As a sequel to the issuance of the impugned circular dated Mar, 18, 1981 a special general meeting of the Advocates Association of Western India was held at Bombay on Apr. 3, 1981, where a resolution was adopted questioning the propriety of obtaining the consent of additional judges to be appointed as permanent judges in other High Courts in advance and further resolved to lodge a strong protest with the Union of India. A similar resolution appears to be adopted by the Bombay Bar Association at its Extraordinary General Meeting held on Apr. 7, 1981.

Ultimately Shri Iqbal M. Chagla and three other advocates filed a Writ Petition No. 527/81 in the High Court of Bombay questioning inter alia that the circular issued by the Law Minister on March 18, 1981 be declared ultra vires and void and as a consequence, consent, if any given, and consequent action, if any, taken, be declared null and void. An injunction was sought restraining the respondents from implementing the impugned circular and ad interim relief in terms of this prayer was also sought. The respondents impleaded were the Law Minister, Union of India and ten additional judges of Bombay High Court. This petition was admitted and rule nisi was issued and ad interim in Junction was granted. This led to filing of an appeal by Union of India before a Division Bench of the Bombay High Court. Subsequently by an order of this Court, this case stood transferred to this Court under Article 139A and is registered as Transferred Case No, 22 of 1981.

687. Shri V.M. Tarkunde, former Sludge of Bombay High Court and Senior Advocate practising in the Supreme-Court, General Secretary of the Citizens for Democracy and President of the People's Union for Civil Liberties filed Writ Petition No. 882 of 1981 in the High Court of Delhi on April 22, 1981, impleading initially Union of India as the sole respondent, it appears that subsequently the Law Minister and one Mr. P.K. Kathpalia, Additional Secretary, Department of Justice were impleaded as respondents 2 and 3 respectively. The petitioner also filed CMP. No.. 13425/81 requesting this Court to direct that Mr. Justice O.N. Vohra and Mr. Justice S.N. Kumar be impleaded as respondents. CMP. was allowed by the order dated July 7, 1981. Shri O.N. Vohra and Shri S.N. Kumar, Additional Judges of Delhi High Court who were given extension for three months commencing from March 6, 1981. to June 5, 1981, were impleaded as respondents 4 and 5. Of the two additional judges so impleaded, respondent 5 Shri S.N. Kumar has participated in the proceedings and has appeared through his counsel Shri R.K. Garg. The principal question raised was that independence of judiciary being the basic and fundamental feature of our Constitution, any action of the executive which would be subversive of the independence of judiciary, must be declared unconstitutional. It was stated that the circular of the Law Minister of Mar, 18, 1981, directing the Chief Ministers of States to obtain consent of an additional judge for being posted as permanent judge in other High Court giving him an option to disclose his preference limited to three stations and a similar consent to be obtained in advance from a person to be recommended for appointment as a judge of the High Court is subversive of the independence of Judiciary. It was submitted that the extension of the term' of an additional judge or his appointment as a permanent judge cannot be left to the unfettered discretion of the executive because it would make a serious inroad on the independence of judiciary. Another important contention raised in the petition was whether short-term extension of additional Judges is permissible under Article 224 and whether it is open to the executive to appoint additional judges leaving vacancies in the permanent strength of the High Court judges unfilled, even though the arrears are mounting. A specific contention was raised with specific reference to the position of the Delhi High Court alleging that it would be contrary to the constitutional intendment underlying Article 218 to maintain half the strength of the Delhi High Court as additional judges, This petition under an order made by this Court stood transferred to this Court under Article 139A and is registered as Transferred Case No. 20 of 1981.

688. In all these petitions, Mr. K.C. Kankan. Deputy Secretary in the Department of Justice, Ministry of Law, Justice and Company Affairs has filed his counter-affidavit with regard to the circular of the Law Minister and other contentions. It was stated that the present government is vitally concerned in maintaining the independence of judiciary and in the administration of Justice according to the rule of law. With regard to the circular dated March 18, 1981, issued by the Law Minister, it was submitted that the circular is not meant to be covert method to transfer judges from one High Court to other High Court circumventing the requirements of Article 222(1) or ratio of the decision in Union of India v. S.H. Sheth MANU/SC/0065/1977. It was in terms stated that the failure of the judge to give consent would not be a relevant factor while considering him for appointment as a permanent judge or for a second term as an additional judge, as the case may be. It was stated that the appointment of additional judges for two years or for shorter period has been done after following the constitutional provision in this regard and keeping the public interest in view. With regard to the second appointment of an additional judge after the expiry of the first term, it was stated that it is a fresh appointment and fresh warrant has to be issued and judge has to take a fresh oath as prescribed and, therefore, the full round of consultation under Article 217 will have to be gone through. Reference was made to the guidelines prescribed for the disposal of cases by a High Court Judge and these guidelines provide a yardstick for calculating the number of additional judges. It is also stated that the strength of the Delhi High Court was raised in June, 1979. and a proposal of the Chief Justice of Delhi High Court for sanction of two extra judges was approved. Short term appointments were sought to be justified on the plea that there were valid reasons for such short term appointments and privilege was claimed against disclosure of papers relating to appointment of additional Judges. It was specifically denied that the circular was meant to be utilised for transfer of judges circumventing the requirements of Article 222. It was stated that complaints have been received about the prejudicial attitude of certain judges including additional judges, bred by kinship and other local links and affiliations. Political links have also been mentioned in certain cases and various state authorities have expressed their reservations about continuance of some additional judges. These matters were generally mentioned to the constitutional authorities. There is an averment in the affidavit that it is not the intention of the Government to appoint every additional judge in another State. This is specifically referred to because a serious controversy developed that the Government wants to arm itself with power to pick and choose Judges for

transfer outside the State and that this would provide an opportunity for extending political patronage so that Judges, to avoid harassment of being appointed to a High Court outside their State may lean towards the Government for their survival. Explaining the reason d'etre it was stated that the purpose behind the circular dated March 18, 1981, was to take steps in the direction of having outsider in the High Court to help in the process of national integration and also to improve the functioning of various High Courts by having in each High Court the presence of a number of Judges who would not be swayed by local considerations or affected by the issues which arouse passions and emotions. Support was drawn for this statement from the 14th Report of the Law Commission and from the latest 80th Report of the Law Commission presided over by Mr. H.R. Khanna and from the study group set up by the Administrative Reforms Commission. It was in terms admitted that the additional judge is not a judge on probation. It was stated that short term appointments are made pending the final decision, a thing which would appear objectionable in view of the mandate of Article 224. Power was claimed by the executive to appoint any additional judge for any shorter period as may be considered justified. If conceded, this can lead to a logical absurdity, namely, from day to day, the situation very difficult even to conceive in any form of political society one may think of. However, a mitigating circumstance was pleaded that additional judges for shorter periods have been appointed in special circumstances and only when there are exceptional factors necessitating appointments for shorter periods. In respect of Shri O.N. Vohra and Shri S.N. Kumar, it was stated that the short-term appointment was made to enable the Government to take a final view having regard to the complaints that have been received against some of them after consultation with the constitutional authorities. The statement in the petition that the Chief Justice of Delhi High Court and Chief Justice of India both had recommended the appointment of these two judges for a further period of two years was denied. It appears that the Chief Justice of Delhi High Court had not recommended Shri S.N. Kumar for appointment as additional judge after expiry of his initial term of two years on Mar. 6, 1981. The incorrect averment in the petition has found its place in an order made by the Vacation Judge on June 6, 1981. At the appropriate place, it will be pointed out that Chief Justice of Delhi High Court had, for his reasons, declined to recommend appointment of Shri S.N. Kumar as an additional judge on the expiry of his first terms on Mar. 6, 1981.

689. As almost identical contentions have been raised by Mr. Kankan in the various affidavits filed by him in every case, it is not necessary to recapitulate them here except recalling one averment made in his counter affidavit filed on July 6, 1981, in reply to the petition filed by Shri Iqbal M. Chagla and others in Bombay High Court because it was the subject-matter of debate. In para 9 (VII) it is stated that the data collected pursuant to the circular issued by the Law Minister would be made available to the Chief Justice of India, Chief Justice of the High Court concerned and the Governor of the State. The submission was that the circular was issued for data collection is a subterfuge resorted to, to provide an innocent cloak to a dagger aimed at independence of judiciary.

690. It may be briefly mentioned here that Writ petition No. 274/81 filed in this Court and Transferred cases Nos. 2, 6 and 24/81 were listed to be heard along with the present batch of cases with a view to avoiding. the repetition of the arguments on points common to both sets of cases. In the first group of cases the question of construction of Articles 217, 224 and other connected articles prominently figured in the context of circular of the Law Minister dated Mar. 18. 1981, seeking consent of additional judges for being appointed as permanent judges in other High Courts and the short term extensions given to Shri. O.N. Vohra, Shri, S.N. Kumar and Shri S.B. Wad. additional judges of Delhi High Court and the final non-appointment of Shri O.N. Vohra and Shri S.N. Kumar. The submission was that the circular of the Law Minister manifests a covert attempt to transfer additional judges from one High Court to other High Court without consulting the Chief Justice of India as required by Article 222(1) and thereby 'circumventing the majority decision in Mr. Sheth's case. The central theme was the scope, ambit and content of consultation which the President must have with the three constitutional functionaries set out in Article 217(1). In the second group of cases, the question arose in the context of transfer of Shri K.B.N. Singh, Chief Justice of Patna High Court as Chief Justice of Madras High Court consequent upon the transfer of Shri M.M. Ismail. Chief Justice of Madras High Court as Chief Justice of Kerala High Court by Presidential Notification dated Jan. 19, 1981, in exercise of the power conferred upon him by Article 222. The controversy centered down the scope, ambit and content of consultation that the president must have with the Chief Justice of India before exercising the power to transfer under Article 222, Thus, the scope, ambit and content of consultation under Article 217 as also one of Article 222 which, as Mr. Seervai stated was more or less the same though the different facets on which consultation must be focused may differ in the case of transfer and in the case of appointment, figured prominently in both the groups of cases. The parameters of scope, ambit and content of consultation both under Arts. 217(1), 222 and 224, were drawn On a wide canvas to be tested on the touchstone of independence of judiciary being the fighting faith and fundamental and basic feature of the Constitution. It was stated that if the consultation itself is to provide a reliable safeguard against arbitrary and naked exercise of power against judiciary, the procedure of consultation must be so extensive as to cover all aspects of the matter and it must be made so firm and rigid that any contravention or transgression of it would be treated as mala fide or subversive of independence of judiciary and the decision can be corrected by judicial review. Therefore, at the outset it is necessary to be properly informed as to the concept of independence of judiciary as set out in the Constitution,

691. The entire gamut of arguments revolved principally round the construction of Arts, 217 and 224 in one batch of petitions and Article 222 In another batch but the canvas was spread wide covering various other Articles of the Constitution, analogous provisions in previous Government of India Acts, similar provisions in other democratic constitutions and reports of Law Commission. Rival constructions canvassed centered upon the pivotal assumption that independence of judiciary is a basic and fundamental feature of the Constitution which has its genesis in the power of judicial review which enables the court to declare executive and legislative actions ultra vires the Constitution. In this connection we are not starting on a clean slate as the contention in this very form and for an avowed object was widely canvassed in S.H. Sheth v. Union of India (1975) 17 Guj LR 1017 (FB) and in Union of India v. S.H. Sheth AIR 1977 6C 2328. Some additional dimensions were added to this basic concept of independence of judiciary while both the parties vied with each other as in the past (see statement of Shri S.V. Gupta then Attorney General in Mr. Sheth's case), on proclaiming their commitment to independence of judiciary though in its scope and content and approach there was a marked divergence.

692. Petitioners in both the batches of petitions passionately asserted that independence of judiciary is the basic postulate of our Constitution and any interpretation of the articles in the fasciculus of articles relating to judiciary must keep it inviolate. The construction, asserted the petitioners which would make any inroad on the absolute independence of judiciary must be rejected because the entire edifice of Parliamentary democracy as envisioned in our Constitution rests on the firm structural foundation of the independence of judiciary. It was asserted that Parliamentary democracy of Westminster model with a written Constitution and with division of functions amongst the three branches of the Government, the executive the legislature and the judiciary postulate that where a transgression of power takes place there must be a body of independent persons with power to correct deviations, so that all constitutional functionaries act within the framework of the power and perform duties as envisaged by the Constitution. This role, it was averred, rightly belongs and has been unreservedly assigned to the judiciary 'as a sentinel on qui vive' and in order that this branch which has a duty to check excess or transgression of or arbitrary exercise of power, functioned 'without fear or favour and solely committed 'to the upholding of the Constitution must be free wholly and unreservedly from the other more powerful organs of the Indian polity, namely, the executive and the legislature.

693. Developing this submission reference was made to various provisions of the Constitution and the interpretation put on some of those provisions by the decisions of this Court. It was urged that independence of judiciary has been put beyond the pale of controversy in the Court but this Court must spell out its contours and limits, the fringes and the horizon, so that wherever an intrusion takes place or an erosion is threatened it can be checkmated by judicial review.

694. A reference to some of the important provisions of the Constitution would bear repetition though they have been enumerated at length in Mr. Sheth's case, Taking cue from the Act of Settlement of the United Kingdom and Section 220(2) of the Government of India Act. 1935, whereby tenure of judges was altered from King's pleasure to one during good behaviour, in U. K. and India respectively, Article 217(1) and Article 124(2) ensure tenure during good behaviour up to the age of 62 and 65 years respectively to the High Court and Supreme Court Judges. Article 202(3)(d) and Article 112(3)(i) provide that expenditure in respect of the salaries and allowances of High Court judges and the salaries and allowances and pensions payable to Judges of the Supreme Court of India is charged on the consolidated fund of each State and of India respectively. Article 203(1) and Article 113(1) ensure that so much of the estimates as relate to the expenditure charged upon the Consolidated Fund of a State and Consolidated Fund of India shall not be submitted to the vote of the legislative assembly and the Parliament respectively. High Court Judges and the Judges of the Supreme Court are assured salaries guaranteed by the Constitution as set out in Schedule II by virtue of Article 221(1) and Article 125(1) and a further assurance is held out by the proviso to Article 220 and Article 125 that the same shall not be varied to the disadvantage of a judge after his appointment. Article 211 in respect of High Court Judges and Article 124 in respect of Judges of the Supreme Court as also of a High Court immunise them in discharge of their duties from discussion in the legislature of a State and parliament save and except where an address to the President is presented praying for removal of the Judge as provided in Article 124(4) and (5). Article 215 and Article 129 make the High Court and Supreme Court respectively a Court of Record with power of such Court including the power to punish for contempt of itself. The power to appoint officers and servants of the High Court and officers and servants of the Supreme Court is conferred on the Chief Justice of the State under Article 229 and upon the Chief Justice of India under Article 148 and conditions of service of the officers and servants of High Court as well as officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of the High Court or by the Chief Justice of India, as the case may be, but in each case this power is to be exercised subject to the provisions of any law made by the legislature of any State or the Parliament, as the case may be, and in case of rules relating to salaries, allowances, leave or pension would require in case of High Court the approval of the Govenor of the State and in case of Supreme Court approval of the President.

695. By Articles 233 and 235 members of the subordinate judiciary are brought under the control of the High Court and except for initial entry and final exit they are under the direct control of the High Court.

696. In cases dealing with subordinate judiciary by as catena of decision commencing from State of West Bengal v. N.N. Bagchi MANU/SC/0310/1965 and ending with Shamsher Singh v. State of Punjab MANU/SC/0073/1974 it has been authoritatively laid down that in matters concerning the conduct and discipline of District Judges, their further promotion and confirmations, disputes regarding their seniority, their transfers, the placing of their services at the disposal of the Government for ex cadre posts, considering their fitness for being retained in service and recommending their discharge from service, exercise of complete disciplinary jurisdiction over them including initiation of disciplinary inquiries and their premature retirement, the members of the subordinate judiciary are under the direct control of the High Court, In Shamsher Singh's case MANU/SC/0073/1974the learned Chief Justice observed:

The members of the subordinate Judiciary are not only under the control of the High Court but are also under the care and custody of the High Court.

It has been said that subordinate Judiciary have no two masters.

697. After reviewing all these provisions and the decisions in Mr. Sheth's case, Chandrachud, J. (as he then was) in his leading judgment observed that: "it is beyond question that independence of the judiciary is one of the foremost concerns of our Constitution. Constituent Assembly showed great solicitude for the attainment of that ideal devoting more hours of debate to that subject, than to any other aspect of the Judicial provisions." "If the beacon of the judiciary were to remain bright, the courts must be above reproach, free from coercion and from political influence' (see The Indian Constitution -- Cornerstone of a Nation by Granville Austin, pp. 164-65). Sardar Vallabhbhai Patel tersely observed that the judiciary should be above suspicion and should be above party influence, Dr. Ambedkar concluded the debate saying that "there would be no difference of opinion that the judiciary had to be independent of the executive

698. In another judgment forming part of the majority view, Krishna Iyer, J. speaking for himself and Justices S. Murtaza Fazal Ali at p. 485, after referring to various provisions of the Constitution, observed that "these muniments highlight the, concern of the founding fathers for judicial insulation, a sort of Monroe doctrine". Tunning in his own words in Shamsher Singh's case that fearless justice is a prominent creed of our Constitution and the in dependence of judiciary is the fighting faith of our founding document he reasserted that the creed of judicial independence is our constitutional 'religion.'

699. Justice Bhagwati in his dissenting judgment at p. 473 observed that 'independence of judiciary was held to be a part of our ancient tradition which has produced great judges in the past and judicial independence is prized as a basic value and so natural and inevitable that it has come to be regarded and so ingrained in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise.'

700. Having showered encomiums on She independence of Judiciary, Justice Krishna Iyer was not oblivious to the fact that judiciary a non-elective institution, has an elitist approach with little or no accountability. Having been immunised from any discussion in the Parliament or the Legislature of a State and by the sword of Contempt of Court Act from Public criticism, it re mains within its insulated vaults and more often has been found to be utterly unaware of the mores of the day. Conceding that independence of judiciary must be ensured and its immunity from executive and legislative overt and covert pressures or intrusions, must be guaranteed in larger public interest, the role of judge power and the immunity of the judiciary must be studied, "with aware allegiance to the scheme and sweep of the Constitution with insightful homage to the soul of the Paramount Parchment and with sociological appreciation that economic and political order of which the legal order is but a juridical reflection is sharply pluralist. The apparatuses of activist justice, working under such societal strains and stresses and charged with engineering progressive change through the law, may have to enjoy more than traditional functional freedom. For, in a dynamic democracy with goals of transformation set up by the Constitution, the judge, committed to uphold the founding faiths and fighting creeds of the nation so set forth has to act heedless of executive hubris, socio-economic pressures and diehard obscurantism.

701. Mr. Sorabji reinforced the conclusion reached in Mr. Sheth's case that independence of judiciary is the fighting faith of the founding fathers when he drew our attention to the Government of Canada' by Dawson, and edn., Revised 1954 wherein it is said that the unique functions which the Judiciary perform in the Government make imperative that they should be given a position quite different from that of the great majority of Government officials. It was, however, conceded by the same author that the judges cannot remain completely unaffected by their environment and cannot and should not be indifferent to the effects of their decisions on the social and political needs of the nation, There will always be some interplay among the habits of mind of the Judge, the society in which he lives, and the decisions which he renders. This view reflects what was urged as value packing in the matter of appointment of judges to which a reference will be presently made. The author concludes that the 'fundamental decisions in a democracy arise from a constant interchange of desires and commands, tentative advances and retreats, experiments and consolidations, the

adoption of one policy, the rejection of another, the haphazard and almost unconscious acceptance of a third, compromises without number, all forming a part of the extremely complex process of determining and applying public policy.' Awareness of these constitutional changing values must inform the judicial personnel and in the superior judiciary the value system of the judge unconsciously but invariably reflects in his Judgments. Thus the coincident that what is disclosed by the people to the Parliament which in turn went to the Cabinet and to the administration and the resulting action, has to be remembered so that 'the stream of command--albeit somewhat uncertain and wandering, and sometimes showing little perceptible motion -- and also a means whereby honesty and efficiency and devotion to public duty can be appraised and suitably recognised.' No doubt, people do see in judicial independence a greater promise of justice than could be obtained through the application of ordinary political sanctions but it has a continuous interplay of forces and interaction of various organs ultimately concerning on realisation of constitutional goals.

702. Attention was also drawn to 'Judges on Trial' by Shetreat, 1976 Edn., and after reading out the struggle for judicial independence, pointed reference was made to the fact that since Coke's disgrace' the Crown could no longer expect to obtain the moral support which it had hitherto received from decisions pronounced by the Bench of the judges who were comparatively at least, with the men who held office subsequently to Coke's disgrace, independent of the favours and the anger of the Crown.'

703. Nor independence of judiciary is some a priori concept a fact when Judges attempt on their own insulation is occasionally clouded or overlooked. Independence of judiciary under the Constitution has to be interpreted within the framework and the parameters of the Constitution. There are various provisions in the Constitution which indicate that the Constitution has not provided something like a 'hands off attitude' to the judiciary. The power of appointment of High Court Judges and the Judges of the Supreme Court vests in the President and the President being a constitutional head, he is constitutionally bound to act according to the advice of the Council of Ministers. One can profitably refer to a number of Articles in the Constitution conferring power on other constitutional institutions such as the executive which when it acts within the limits of power will have a direct impact on the functioning of the judiciary. To briefly refer to some of these provisions, Article 32(3) confers power on the Parliament to frame a law, inter alia, empowering any other Court to exercise within local limits of its jurisdiction any of the powers exercisable by the Supreme Court under Article 32. Article 133(3) confers power on the Parliament to enact a law enlarging the jurisdiction of the Supreme Court. Article 135 preserves the existing jurisdiction of the Supreme Court but makes it subject to the law made by Parliament which might otherwise provide. Article 138 enables Parliament to enlarge the jurisdiction of the Supreme Court in respect of certain matters. Article 139 contemplates conferment on Supreme Court by a law of Parliament all powers to issue writs for any purpose other than those mentioned in Clause (2) of Article 32. Article 140 provides for parliamentary legislation even in regard to supplemental powers of the Supreme Court Article 130 enables the Chief Justice of India with the approval of the president to provide for sitting of Supreme Court at places other than Delhi. Similarly, Arts. 225, 230, 231 and 237 confer power on Parliament to make law directly impinging upon the jurisdiction of the High Courts. Article 126 vests power in the President to appoint acting judges and it does not postulate consultation with any functionary in the judiciary. The position under Arts, 127(1) and 128 point in the same direction, subject of course, to the construction canvassed for on behalf of the petitioners which would be examined a little while after. This conspectus of articles, not meant to be exhaustive, do indicate that Parliament has power to regulate Court's jurisdiction and as Hart and Webster in the 'Federal Judicial System' at p. 317 said that "the bald truth is, is not it that power to regulate jurisdiction is actually a power to regulate rights to judicial process whatever they are and substantive rights generally.

704. Undoubtedly judiciary, the third branch of the Government cannot act in isolation. They are ensured total freedom, of course, after entering the office, from any overt or covert pressure or interference in the process of adjudicating causes brought before them and to this end they are ensured tenure, pay pension, privileges and certain basic conditions of service. The judiciary like any other constitutional instrumentality has however, to act towards attainment of constitutional goals. This in one sense is conceded by Mr. Seervai who led on behalf of the petitioners when in his Sir Chimanlal Setalvad Lectures styled: 'The position of Judiciary under the Constitution of India, he tersely observed as under:

The Court is essentially a check of the past upon the present. But it is the present that represents the will of the people and it is that will that must ultimately be given effect in a democracy. If the democratic bases of our system are to be respected, the review power of one non-democratic organ in our government should be exercised with self-restraint,

It would' thus unquestionably appear that the independence of judiciary is not to be determined in all its ramifications as some a priori concept but it has to be determined within the framework of the Constitution, True, that the thrust is to ensure that adjudications are untrammeled by external pressures or controls and it was conceded that independence of judiciary under the Constitution is confined to the adjudicatory functions of the Courts and tribunals and they are insulated from executive control in that behalf. It is not unlikely that the total insulation may breed ivory tower attitude

a bishop delivering sermon from the pulpit and therefore no claim to be imperium in imperio can be extended to the judiciary or for that matter to any other instrumentality under the Constitution. It is not as if judicial independence is Ian absolute thing like a brooding omni presence. Nothing is more certain in a modern society, declared. U.S. Supreme Court in the mid century, than the Principle 'that there are no absolutes'. Nor should Judges be independent of the broad accountability to the nation and its indigent and injustice ridden millions. Therefore, consequently one need not too much- idolise this independence of judiciary so as to become counter-productive.

705. A further submission was that the concept of judicial independence may be examined in the context of parliamentary democracy where other organs of the Government, namely, the executive and the legislature are elected people's representatives while we have eschewed the elective element in appointment of judges. This absence of elective element in judges with guaranteed tenure, conditions of service and immunity from criticism denies any method of accountability of judiciary and the power of judicial review often described as undemocratic (see Schwartz A Basic History of U. S. A. Supreme Court, p. 87) can set at naught the will of the people expressed through its chosen representatives. In order to mitigate the trend disclosed by total aloofness, the Constitution makes envisaged power of appointment in the President advised by the Council of Ministers an elected body so as to make judiciary, accountable and responsible to the constitutional goals. It was urged that this methodology will permit 'value packing' in the judiciary. The expression 'packing' raised a derisive laughter. It is a much misunderstood word. One must reject emphatically any packing of courts, of persons, of the belief, hue and colour of the party in power but it is equally undeniable that all the three organs of the Government must work towards realisation of constitutional goals and the judiciary has to be inspired by the values enshrined in the Constitution if rule of law is to run akin to rule of life and a feudal society is to be transformed into an egalitarian society by the rule of law, an introduction of the element of reflection of popular will so as to make judicial system more viable and effective as an instrument of change is inevitable and total aloofness of judiciary is inconceivable. While undoubtedly political packing must be abhorred in putting the independence of Judiciary on pedestal one cannot lose sight of the fact that the Judiciary must keep pace with the changing mores of the day, its decision must be informed by values enshrined in the Constitution, the goals set forth in the fundamental law of the land, peoples' yearning desire for a change for the better and the promised millennium. An activist role in furtherance of the some is a sine qua non for the judiciary. If value packing connotes appointment of persons otherwise well qualified as required by the Constitution but having the additional qualification of awareness of the high priority task of eradication of poverty, removal of economic disparity, destroying the curse of illiteracy, ignorance, exploitation feudal over lordship, coupled with conscious commitment to administering socio-economic justice, establishment of a just social order, an egalitarian society, then not only the value packing is not to be frowned upon nor thwarted by entrenched establishment prone people but it must be advocated with a crusader's zeal. And judiciary cannot stand aloof and apart from the mainstream of society. This will ensure its broad accountability to injustice ridden masses and therefore it is not unnatural that the status quoits can enter their caveat to value packing but which does not commend. While appointing each individual the constitutional philosophy of each individual ought to be a vital consideration and if this is labeled as value packing, it is neither unethical nor unconstitutional nor a weapon to strike at independence of judiciary.

706. What should be the ideal method for selecting personnel entrusted with the task of dispensing justice has been an endless source of discussion In the democracies the world over till today there are two known methods of selection appointment and election. As election method has not been accepted by the Constitution, it need not detain us. Constitution provides for appointment of judges of the High Court and the Supreme Court by the highest executive in the country, the President. And even in this sphere, in view of the provisions contained in Article 74, the President will be guided by the advice of the Council of 'Ministers. Undoubtedly, therefore, the power to appoint Judges vests in the executive. This power was specifically conferred after a long debate to which reference will be presently made, But before coming down to the debates of the Constituent Assembly bearing on the subject, a brief survey of the methodology adopted by various democratic countries in the matter of appointment of judges would prove illuminating. In U. S. A. all the federal court judges are appointed by the President subject to confirmation by a simple majority vote of the Senate. The Attorney General has a decisive voice in the nomination made by the President. In the later months of the Truman Administration, the 12 member committee of federal judicial set up of the American Bar Association has come to play an increasingly significant role in the appointive process of the federal judiciary in the U. S. A. but the power still vests in the President whose nomination must be ratified by the Senate meaning thereby the power is in the executive with a legislative veto over it. In the United Kingdom Lord Chancellor is the Queen's chief adviser on the selection. Lord Chancellor presides from the Woolsack over the House of Lords. He is a member of the Cabinet. He is also the head of the Judiciary and thus combines in his person the three-fold function of executive, legislative and judicial. Even though thus the power is in executive, Richard M. Jackson in his 'Study on the Machinery of Justice in England,' noticed that political considerations have hardly entered the process of judicial selection since 1907. In France the President of the Republic who is charged by the Constitution to be "guarantor of the independence of judicial authority," selects the judges, They are chosen either by the 11 member Counsel Superieur de la Magistrature in the case of court' Appeal and Cour de Cassation, or by the Minister of Justice who may consult with, or receive advice from, the High Council in the case of lower courts. The High Council consists of the President of the Republic,

the Minister of Justice, and nine-persons with legal background chosen by the President for a once-renewable term of four years (see The Judicial Process by Henry J. Abraham p. 31). Gainer, in his "political Science and Government" at p. 726 notices that in nearly all countries other than the U. S. A., the judges are appointed by the executive and even in the U. S. A., it is the method followed for the selection of the federal judges. In countries having the cabinet system of Government this in effect means appointment by the Minister of Justice. In Foot-note No. 107, he notices that in Belgium the judges of the Court of Cassation must be appointed from two lists of nominees, each containing twice as many names as there are vacancies to be filed one presented by the court itself, the other by the Senate. This system represents a combination of co-operation, election and appointment, In principle, it has much to commend and it has been advocated in France by various jurists and commissions on judicial reform. Garner at p. 728 recollects the statement of Dean Hall in his study wherein he thus evaluates the system of appointment by the executive; "Of all the methods of selecting judges. of which we have actually had considerable experience in this country, that of appointment by the executive has unquestionably produced the ablest and most satisfactory courts." Prof. Laski in his Grammar of Politics, p. 545, notices that there are two methods of selection election and nomination, and in England where practically all judicial appointments are under the control of the Lord Chancellor the nomination system is followed and there is similar practice in France, Italy and Germany where all judicial appointments are nominated by the executive, He proceeds to point out that of all methods of appointment, that of election by the people at large is without exception the worst. He notices with satisfaction that most of the great Judges in recent English history, men like Blackburn, Bowen, Watson, Macnaghten, were entirely unknown to the public outside and they were all appointed by nomination. He concludes that by a process of elimination the choice is thrown back upon nomination as the best method available for choice. This method is also not fruitful because it leaves the door too wide open for measurement of fitness in terms of political eminence rather than judicial quality and he illustrates this statement by pointing out that Lord Halsbury used his power of nomination to elevate members of his own party. As a via media he suggests a compromise by recommending that the appointment should be made on the recommendation of the Minister of Justice with the consent of a standing committee of judges which would represent all sides of their work. Be that as it may, this bird's eye view of the world phenomena should be sufficient to convince us that power to appoint judges where election method is eschewed is always vested in the executive and that it has not been found to be subversive of independence of judiciary. At this stage it would be advantageous to recall that in the 80th Report of the Law Commission of India, it has been frankly admitted that most of the High Courts to which a reference was made by the Law Commission about the existing system of appointment of judges, have in their replies to the questionnaire, expressed the view that the existing system is by and large sound. Therefore, it is not possible to accept a sweeping statement that the vesting of the power of appointment in the executive is subversive of independence of judiciary.

707. I would here briefly refer to the relevant debate in Constituent Assembly bearing on this topic, Winding up the debate on the articles concerning judiciary, Dr. Ambedkar observed that:

With regard to the question of concurrence of the Chief Justice, it seems to be that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have, and I think to allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore think that that is also a dangerous proposition." C. A. D., Vol. 8 p. 258 What is specifically moved and rejected while drafting the Constitution cannot be introduced by the back door through the process of interpretation. A specific amendment was moved to the draft Article 193 (corresponding to Article 217 of the Constitution). The proposed amendment reads as under:

C. A. D. Vol. 8, p. 674:

That for, Clause (I) of Article 193, the following shall be substituted:

(I)' Every judge of a High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court concerned after consultation with the Governor of the State concerned and with the concurrence of the Chief Justice of India and shall hold office until he attains the age of sixty-three years.

(Underlining mine).

708. A similar proposal was also contained in the memorandum representing the views of the Federal Court and of the Chief Justice representing all the Provincial High Courts of the Union of India submitted to the Constituent Assembly. (See Shiva Rao: The Framing of India's Constitution, Select Documents. Volume 4, page 195). The implication of the

amendment is that proposal for appointment of a judge of High Court can only be initiated upon the recommendation of the Chief Justice which would imply that no one else can initiate the proposal for appointment of a High Court judge, an aspect which has some relevance on the construction of Article 217(1) but for the present discussion the importance is of the word 'Concurrence' in the proposed amendment. If the amendment had been accepted no appointment of a judge of High Court could be made unless the Chief Justice of India concurred in the appointment. In other words, if the Chief Justice of India does not approve the proposal, he would have a veto on the proposal and his lack of concurrence would kill the proposal. The power of appointment which at present vests in the President would thus stand transferred to the Chief Justice and if such a situation emerged it would have accorded great strength to the submission. Be it noted that this amendment was negatived. In other words, the Constituent Assembly in terms rejected any veto to be vested in the Chief Justice of India in the matter of appointment of a High Court judge. And it is too late in the day to contend that debates in Constituent Assembly do not provide an aid to construction of articles of Constitution or it is impermissible to refer to them. (See State of Mysore v. E.V. Bidap MANU/SC/0397/1973; Union of India v. H.S. Dhillon MANU/SC/0060/1971 and Sagnata Investment Ltd. v. Norwitch Corporation (1971) 3 WLR 133 at P. 137.

709. In this context, Mr. S. P. Gupta, petitioner appearing in person contended that much of the evil flowing from the power of appointment of judges of High Courts and Supreme Court being vested in the President would be eliminated if by a process of interpretation the Court can eliminate the binding character of the advice that may be tendered to the President in discharge of his function of appointing the judge. Article 74(1) provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. A proviso has been added by the Forty-fourth Amendment Act. 1978, which enables the President to require the Council of Ministers to reconsider such advice either generally or otherwise but makes it obligatory on the President to act according to such advice tendered after reconsideration. The contention is that the President in discharge of his function of appointing judges of Supreme Court and High Courts is to act on his own after consultation with the constitutional functionaries set out in Arts. 124 and 217 and is not to act according to the advice offered by the executive in this behalf. This would have necessitated the ascertainment of the position of the President in our Constitutional scheme but a decision of the seven judges Constitution Bench of this Court in Shaxnsher Singh's case MANU/SC/0073/1974 has authoritatively concluded this point. A.N. Ray, C. J. speaking for himself, Palekar, Mathew. Chandrachud and Alagiriswami, JJ, has held that the President is a constitutional or formal head and he must exercise his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. An exception was noted in the case of Governor where the Constitution has conferred upon him an obligation to exercise his function in his discretion but there is no such provision in case of President and it was concluded that the decision of any Minister or Officer under the rules of business made under Article 77(3) is the decision of the President, In a concurring judgment Krishna Iyer, J. speaking for himself and Bhagwati J. succinctly observed that it is the function of the Council of Ministers to advise the President over the whole of the Central field and nothing is left to his discretion or excepted from that field by this article, After referring to the debates in the Constituent Assembly, Iyer, J. concluded as under: (at p. 2230)

We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles, shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations.

These exceptional situations need not be enumerated because they do not touch upon the subject under discussion. Add to this the consistent view of this Court that the position of the President under the Indian Constitution is akin to the position of the Crown under the British Parliamentary system (See Ramjawaya Kapur v. State of Punjab MANU/SC/0011/1955. A Sanjeevi Naidu v. State of Madras MANU/SC/0381/1970 U.N.R. Rao v. Indira Gandhi MANU/SC/0059/1971. In the case of U.N.R. Rao, the Constitution Bench held that Article 74(1) was mandatory and, therefore, the President could not exercise the executive power without the aid and advice of the Council of Ministers. The larger Bench overruled the decision of this Court in Sardarilal v. Union of India MANU/SC/0656/1971 Mr. Gupta, however, relied upon the decision of this Court in Jayantilal Amritlal Shodan v. F.N. Rana MANU/SC/0046/1963 some observations from which may at first blush seem to support the conclusion reached in Sardari Lal's case. However, once the decision in Sardari Lal's case is overruled, observations in Shodon's case may be hardly of any assistance. Now, even Mr. Gupta concedes that the power to appoint judges of the Supreme Court and High Court conferred by Arts, 217(1) and 124 is executive power and the function is executive function. But after an elaborate reference to the debates in the Constituent Assembly; and especially the stage at which an instrument of instructions was sought to be prepared for providing guidelines to the President as to the manner of discharging his function in the matter of appointment of judges' of High Courts and Supreme Court, it was urged that while exercising the power in the matter of appointment of judges of High Courts and Supreme Court the President was to act not according to the advice of the Council of Ministers, Too much reference to piecemeal debates at the drafting stage, provisions in the draft Constitution and views expressed by different speakers during the debates in the Constituent Assembly is likely to raise a picture in support of some of the provisions of the Constitution which may be misleading, After a long debate,

discussion, suggestions amendments, the end product namely, the provision finally inserted in the Constitution must be examined. The history of the provision may occasionally assist in illuminating the blurred contours. But an over emphasis on the history and debates divorced from the provision which finally emerged after mature deliberation would net help in bringing out the clear intendment underlying the provision. Drawing inspiration from the scheme of Sections 13 and 14 of Government of India Act, 1935, an idea to prepare an instrument of instructions was certainly mooted but finally shelved. In this connection, it would be advantageous to remember that in the memorandum of May 13, 1947, prepared by the Constitutional Adviser for the use of the Union Constitution Committee, the principal provision, embodied in this respect stated that there should be a Council of Ministers to aid and advise the President in the exercise of his functions, but it went on to add "except in so far as he is required by this Constitution to act in his discretion." A note was appended to this clause which referred to the discretionary powers of the president. Certain special responsibilities were set out in the memorandum in respect of which, according to the note, President was required to act in his discretion. While discharging his functions in respect of his special responsibilities wherein he was required to act in his discretion, a Council of State whose composition was set out in the memorandum was proposed to be set up. At a later stage, a suggestion was made that the subject-matter of appointment of judges of High Court and Supreme Court should be included in the instrument of instructions. The draft of instrument of instructions was also prepared by the Drafting Committee. The instrument listed six categories of appointment in regard to which the President was required to consult the Advisory Board. Of the six categories, two are: The Chief Justice and other judges of the Supreme Court and the Chief Justice and the other judges of the High Court.. Finally the very idea of instrument of instructions and setting up of the Council of State or Advisory Board was dropped. (See Shivarao: The Framing of India's Constitution, Vol. 4, Pages 338, 374, 491 and 492.) A long debate spreading over sometime took place as to where the power to appoint judges must be centered. A very passionate plea was made for centering this power in the Chief Justice of India. As has been pointed out above this suggestion was specifically negatived and the power was conferred on the President. Thus, if the power to appoint judges is conferred on the President and that power is an executive power, and in the absence of a provision in the Constitution which permits the President to act in his discretion, bereft of the advice of the Council of Ministers, it is not possible to hold that in the matter of appointment of judges of High Court and Supreme Court, the advice offered under Article 74 is not binding on the President, Where the President is hot expected to act on the advice of the Council of Ministers a clear indication is given in the Constitution. To illustrate the point, a reference to Article 103 would be profitable. Article 103 provides that if any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in Clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final. Sub-article (2) provides that before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion. The Constitution itself has made it obligatory upon the President not to act on the advice of the Council of Ministers but in accordance with the opinion given by the Election Commission. In other words, the opinion given by the Election Commission is binding on the President. Similarly, Article 217(3) confers power on the President to decide the question of age of a judge of the High Court if any such, question arises, after consultation with the Chief Justice of India and the decision of the President shall be final. The question arose in Union of India v. Jyoti Prakash Mitter MANU/SC/0061/1971 as to the nature of the function discharged by the President while determining the question of age of a High Court judge. After noticing that the President by Article 74 of the Constitution is the constitutional head who acts on the advice of the Council of Ministers in exercise of his function, this Court held that the President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. It was, therefore, held that he cannot act on the advice of his Ministers. Once the function of the President while exercising power under Article 217(3) is held to be judicial it follows as a necessary corollary that the President has to act on his own after consultation with the Chief Justice of India but he cannot act on the advice of the. Council of Ministers because a person discharging a judicial or quasi-judicial , function cannot act at the behest or dictate of some other authority. But it cannot be said that while exercising the power of appointment of judges of the Supreme Court and High Courts, the President is either performing a judicial or quasi-judicial function. It is admittedly an executive function and howsoever one may like to wish away the interference of the Council of Ministers in the matter of appointment of judges of High Courts and Supreme Court, the framers of the Constitution after having examined various aspects of the matter conferred power on the President rejecting simultaneously the veto of Chief Justice of India. Once this function is held to be an executive function, Article 74 would come into operation with all its rigours and the President will have to act on the advice of Council of Ministers.

710. Turning now to the group of cases in which circular dated Mar. 18, 1981 issued by the Law Minister, short term extension given to Shri S.N. Kumar, additional judge of Delhi High Court and his subsequent non-appointment on June 6. 1981 figure prominently, what is put in the forefront is position privilege and status of an additional judge appointed under Article 224. Article 224 is such an inseparable adjunct of Article 217 that it was not possible to lay down precisely the construction of Article 224 divorced from or dehors Article 217. Therefore, as a first step, one must now dwell upon the proper and precise construction of Arts. 217 and 224. Construction of a constitutional provision is of long term utility and therefore to eschew the heat and passion and dust of raging controversy, it is always considered prudent to approach the question of construction in abstract and thereafter the fact of a given case may be examined in the light of the construction put on a prevision of the Constitution.

The fasciculus of articles in Chapter V. part VI, provide for a High Court for each State, Article 216 provides for Constitution of High Court, It reads as under:

Every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint.

Draft Article 192 corresponding to Article 216 may be referred to here. It reads as under:

Every High Court shall be a court of record and shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint.

There was a proviso to the draft Article 192 which has not been adopted while enacting Article 216. Article 217 provides for appointment and conditions of office of a judge of the High Court. It reads as under:

217. Appointment and conditions of the office of a Judge of a High Court -- (1) Every judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of , a judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years:

Provided that-

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

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

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

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

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

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession. Explanation -- For the purpose of this clause--

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

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

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area as the case may be.

(3) If any question arises as to the age of a Judge of High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

Article 222 confers power on the President to transfer a judge from one High Court to another, Article 224 provides for appointment of additional and acting judges. It reads:

224. Appointment of additional and acting Judges (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional judges of the Court for such period not exceeding two years as he may specify.

(2) When any judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a judge of that Court until the permanent judge has resumed his duties.

(3) No person appointed as an additional or acting judge of a High Court shall hold office after attaining the age of sixty-two years.

Article 224 initially enacted in the Constitution corresponding to Draft Article 200 was deleted by the Constitution (Seventh Amendment) Act, 1956 and present Article 224 was substituted in its place. By the Constitution (Fifteenth Amendment) Act, 1962 original Article 224 deleted in 1956 was reintroduced as present Article 224A.

711. Article 217 confers power on the President to appoint a judge of the High Court after consultation with the Chief Justice of India, the Governor of the State and in case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court, The power to appoint a judge of a High Court vests in the President but it is hedged in with a condition that it can be exercised 'after consultation with' the three constitutional functionaries set out in the article. The use of the expression 'after consultation with' instead of 'in consultation with' was harped upon to indicate that the expression 'after consultation with' means that the power of the President remains intact but before exercise of the power the duty is cast upon him to consult the three functionaries. If on the other hand the expression 'in consultation with' was used it may have indicated that the President shared his power with the three constitutional functionaries. Looking to the language of Article 217, I see no distinction in the use of the two expressions which may have an impact on the construction of the article. The power is the power to appoint and the limitation on the power is to consult the three functionaries.

712. Ultimate power of appointment unquestionably vests in the President Before the power to appoint is exercised the President is under a constitutional obligation to consult the three constitutional functionaries.

713. In practice the procedure for appointment has more or less proceeded along the lines as indicated by the Law Commission in its 14th Report, Vol I, p. 71. Briefly recapitulated, it appears that the Chief Justice of the High Court forwards his recommendation to the Chief Minister who in turn forwards his recommendation in consultation with the Governor to the Minister of Justice, Formerly it used to be Home Minister. If the Chief Minister does not agree with the recommendation of the Chief Justice he makes his own recommendation but in such a situation the Chief Justice is given an opportunity to make his comments on the recommendation made by the Chief Minister. Either agreed or the rival recommendations are then forwarded to the Minister of Justice who forwards the recommendation to the Chief Justice of India. After obtaining opinion of the Chief Justice of India the Minister submits his advice to the President as to the selection to be made. The Law Commission noticed that this procedure places the Chief Justice in an awkward position. In practice occasionally the Chief Justice may have a judge appointed at the instance of the local executive and. against his own preference. In order to obviate executive interference in the matter of appointment of judges the Law Commission recommended that Article 217 must be suitably amended to provide for appointment of a High Court Judge on the recommendation of the Chief Justice of the High Court which would in practice lead to a situation where one not recommended by the Chief Justice can never be appointed as a High Court judge. Undoubtedly Chief Justice of the High Court would be the most competent person to evaluate the merits, ability and efficiency of a person recommended but as noticed by the Law Commission there may be and frequently there are other matters relating to the person recommended which the State executive would alone be in a position to know and of which they may inform the Chief Justice. Such other matters may include, factors such as the local position of the person proposed, his character and integrity, his affiliations, which may have considerable bearing upon his efficient functioning as a judge and all these may at all be within the knowledge of the Chief Justice of the High Court. Approaching the matter from this angle the Law Commission rejected the submission that the State executive should have no share in the decision making process for appointment of a judge of the High Court and ultimately expressed a considered opinion that where the Chief Justice of the High Court recommends a person for a judgeship, the State executive should have an opportunity to effort its comments upon that recommendation but that such consultation with the State executive should be limited to other factors such as have been enumerated hereinbefore. It may be mentioned that this recommendation of the Law Commission was not accepted by the Government. The fact remains that even a body like the Law Commission was of the considered opinion that it would not be conducive to appointment of suitable persons to totally exclude the State executive in the decision making process for appointment of a judge of the High Court. Fourteenth report was submitted in 1958 but as late as 1980 in Eightieth Report the Law Commission has reaffirmed the view that

the present procedure is good. Therefore, it is not possible to, accept rather an extreme argument that participation of the executive in the decision making process for appointment of a judge would be subversive of the independence of the judiciary. In fact, viewed from another angle also it would be impermissible to exc lude participation by the State executive in this process. The power to appoint a judge of the High Court is in the President. When appointed by the President the judge would be working as a judge of the High Court to which he is appointed. His salary, pension, allowances, etc. would be chargeable on the Consolidated Fund of the State. probably influenced by these considerations the Constitution itself provides for giving a share to the State executive in the decision making process and it would be contrary to the intendment of the Constitution to exclude it by process of interpretation.

714 The Constitution makers attached a high degree of importance to the office of a judge of the High Court. By a conscious effort they were insulating the judiciary against executive interference and, therefore, made the task of removal of a judge once appointed very difficult, if not impossible. It was conceded on all sides that the Judges (Inquiry) Act, 1968 has provided such an elaborate and cumbersome procedure that it would be rather next to impossible to impeach a judge. Once therefore, someone is appointed as a judge of the High Court under Article 217, he is to be suffered even though his continuance may not be conducive to the fair administration of justice. Extreme care was, therefore, focused on the question of initial appointment, probably in order to see that error of judgment of one or the other constitutional functionary may not go unnoticed. Three high constitutional functionaries were involved in the process of appointment of a judge of the High Court, and each one, namely, the Chief Justice of the High Court, the Governor of the State, are the highest judicial and executive functionaries in the State and the Chief Justice of India holder of the highest Judicial office in the country, were to be consulted before the President took the step of making an appointment under Article 217. When three such high constitutional functionaries participate in the process of consultation there would be a remote or minimal chance of some infirmity being Overlooked or any vital consideration relevant to the process of appointment being ignored and the best man will be selected. In the ultimate analysis consumers of justice are interested in securing undiluted justice free not only from bias or subservience but free from predilections, aberrations, preconceived notions and personal philosophies of incumbent of the office of a judge. In a country ruled by rule of law, respect for the law is a sine qua non and the respect for law would increase and enhance directly in the proportion to the work of judges in law courts which would inspire confidence. Mr. Justice Arthur T. Vanderbilt in the "Challenge on Law Reforms" (Princeton; Princeton University Press. 1955), pp. 4 and 5 vividly stated which bears quotation:

...it is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts, their respect for law will survive the short comings of every other branch of government: but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.

There seems to be, therefore, no doubt that actuated with a burning desire that the best one is selected for appointment, while vesting the power in the highest executive of the country three high constitutional functionaries were involved in the decision making process. The State executive, therefore, must participate as intended by the Constitution in this process and its role cannot be minimised by the specious plea that it might erode independence of judiciary.

715. Experience gained for a period of three decades in working Article 217 undoubtedly with some rare exceptions would show that the framers of the Constitution envisaged that by a process of discussion amongst themselves, by cross fertilisation of information from each other, if these three high constitutional functionaries reached a concensus it will eliminate even the microscopic error in making the appointment. Undoubtedly, in saying this the role of the President in making the final appointment is not to be minimised.

716. But Mr. Garg contended that looking to the position of the Chief Justice of India as the incumbent of the highest office at the apex of the judiciary, in the event of an unfortunate, albeit undesirable situation of the difference of opinion amongst the three constitutional functionaries, the view expressed by the Chief Justice of India must have primacy. This submission may be examined from two independent standpoints. First, is there anything in the language of Article 217 which places Chief Justice of India on a pedestal in relation to the other two constitutional functionaries? And secondly, is the Chief justice of India in a position more advantageous compared to other two functionaries to be infallible in his view? Brusquely stated, does he have a veto over the view expressed by the other two constitutional functionaries ? The last question can be answered at once. In the earlier portion of this judgment a statement by Dr. Ambedkar opposing an amendment to draft Article 193 (corresponding to Article 217) making concurrence of Chief Justice of India for appointment a sine qua non describing it as a dangerous proposition has been noticed. What is specifically rejected cannot be brought in by the back door.

717. Article 217 on its own language and intendment repels the contention. The President is under constitutional obligation to consult the three constitutional functionaries. Each is on par. They are coordinate authorities. There is no

relative hierarchy. At any rate, the appellate jurisdiction of the Chief Justice of India functioning as a Judge of the Supreme Court over a decision of the Chief. Justice of the High Court would not provide an indicia that the view of the Chief Justice of India in administrative matters has predominance or overriding effect over the view of the Chief Justice of the High Court. It must be recalled that in the process of drafting the Constitution there was some suggestion that the Supreme Court shall have administrative supervision over the High Court and this suggestion was rejected. Initiation of proposal for appointment of High Court is not a judicial Junction of the Chief Justice of the High Court. While performing this function Chief Justice of the High Court is not under the administrative subordination of the Chief Justice of India, Further, as the system functions, proposal for appointment of a High Court judge is initiated by the Chief Justice of the High Court. The person recommended may be a member of the Bar or from the subordinate judiciary, say a District Judge. As the High Court has both administrative and judicial control over the subordinate judiciary, the Chief Justice of the High Court is more knowledgeable about the capacity, ability and eligibility of a District Judge for being considered for the post of High Court Judge. Chief Justice of India will have very little information about the capacity, eligibility and quality of a Dist. Judge. Similarly, while recommending a person from the Bar in the State, Chief Justice of the High Court is more advantageously placed compared to Chief Justice of India. And, Chief Justice of India will have to depend upon his sources of information which may not either exclude grapevine or hearsay. He has little or no opportunity of seeing the member of the Bar functioning as a lawyer in the Court. Cumulatively, therefore, Chief Justice of the High Court is more advantageously placed compared to the Chief Justice of India in this behalf. About the various other factors which enter into the verdict, the State executive will be more favourably placed than the Chief Justice of India because it has its own instrumentalities for inquiry and information. Therefore, the view of the Chief Justice of India cannot have any primacy in this behalf.

718. Reference in this connection to an observation in Shamsher Singh's case MANU/SC/0073/1974 that "in practice the last word in such sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order" (at p. 873 of SCR) : (at p. 2228 of AIR) is not apposite. Shamsher Singh belonged to the subordinate judiciary and while examining his case reference was made to Union of India v. Jyoti Prakash Mitter MANU/SC/0061/1971 in which case the question of determination of the age of a judge and the construction of Article 217(3) figured. Article 217(3) obliges the President to consult the Chief Justice of India before deciding the question as to the age of a judge of the High Court. The view expressed therein, would not support the contention about primacy, because unlike Article 217 and similar to Article 222. Chief Justice of India is the only constitutional functionary required to be consulted by the President while discharging his function under Article 217(3).

719. Mr. Seervai in this context urged that the Chief Justice of India has been given the position of primacy because his training as a judge gives him a judicial outlook which would help him to consider the appointment of judges in a judicial spirit. Further, the Chief Justice of India having reached the highest position in the judiciary is free from even a suggestion that his action was actuated by a desire to secure a promotion for himself in the judicial hierarchy. Add to this the consideration that if parochial and local considerations are to be excluded in the appointment of High Court judges, the Chief Justice of India is more likely to exclude such considerations than the Chief Justice of High Court, To say that high constitutional functionaries like the Chief Justice of a High Court would not be free from such shortcomings set out above and that the Chief Justice of India would be free from such shortcomings appears to be an unwarranted assumption. It is well known that some Chief Justices declined to come to the Supreme Court and had they come at least one of them was likely to be the Chief Justice of India by vertical movement according to seniority. If he declined to become the Chief Justice of India and continued to remain Chief Justice of High Court, merely because he opted for High Court judgeship would not be sufficient to reject his opinion, or merely because Chief Justice of India who opted to come to the Supreme Court and became the Chief Justice of India, his view as Chief Justice of India should have greater weight. The submission is not basically sound to overreach the plain intendment of Article 217. It was said that if the submission that the view of the Chief Justice of India should be accorded primacy is rejected in the unfortunate event of divergence of opinion between the Chief Justice of India and the Chief Justice of High Court, the executive would function like an umpire and that this would erode independence of Judiciary and to avoid this undesirable situation the Court must lean in favour of according primacy to the view of the Chief Justice of India. In support of the submission, the expression 'paterfamilias' used by me in my judgment in Mr. Sheth's case in reference to the Chief Justice of India was relied upon and it was urged that this very description would unerringly point in the direction of the primacy being accorded to the view of the Chief Justice of India. Undoubtedly, I described the Chief Justice of India as paterfamilias of judiciary. And that was in the context of the consultation which the President must have with the Chief Justice of India before exercising the power under Article 222. But let it not be overlooked that there was no question of primacy to be accorded to the view of the Chief Justice of India with regard to the advice preferred by him When consulted under Article 222 because he is the only constitutional functionary required to be consulted. The very expression 'primacy' envisages two or more co-ordinate authorities, one having a preferential position over the other. Such a situation does not arise under Article 222 and, therefore, turn out of context the use of the expression paterfamilias would not help. Therefore, it is not possible to accept the submission that the view of the

Chief Justice of India when consulted under Article 217 would have primacy over the view of the Chief Justice of the High Court.

720. Interestingly a reference in passing may be made to the divergent views on this aspect even amongst the petitioners. Article 222 which confers power on the President to transfer a judge of the High Court to another High Court provides that the power to transfer can be exercised in consultation with the Chief Justice of India. While hearing the petition challenging the transfer of Chief Justice K.B.N. Singh of the Patna High Court to the Madras High Court, Dr. Singhvi appearing for Mr. K.B.N. Singh vehemently traversed the argument of Mr. Garg that the view of the Chief Justice of India must have primacy and it was said that no such primacy as is contended for can be accorded to the view of the Chief Justice of India. Specific submission was that if the proposal for transfer is initiated by Chief Justice of India it would be violative of Article 222. If Article 222 which confers power on the President to transfer a Judge from one High Court to another High Court is hedged in with a condition that it can be exercised after consultation with the Chief Justice of India and this consultation has been held to be an adequate safeguard against improper transfer in Mr. Sheth's case, and even though that being the only safeguard, it was submitted that the view of the Chief Justice of India cannot have primacy; how would it be proper to accord primacy when Article 217 mandates consultation with three constitutional functionaries including the Chief Justice of India? Primacy has the flavour of veto and if conceded the authority to be consulted would become the final decision making authority. No canon of construction permits such a thing to be done. As stated by Dr. Ambedkar the Court cannot assign to one authority powers explicitly granted to another. This will be elaborated at a later stage. Therefore, also, the contention about primacy of the view of the Chief Justice of India must be negatived.

721. The next limb of the argument is as to whether the proposal for appointment can be initiated by the Chief Justice of the High Court or the Chief Justice of India only or it can be initiated by any of the four constitutional functionaries adumberated in Article 217. In this context the practice followed till the 14th Rep ort of the Law Commission and till the 80th Report has been set out earlier in this judgment Even, the Law Commission, after noticing the defects and drawbacks in the procedure followed for appointment under Article 217 ultimately recommended that Article 217 be suitably amended so that the proposal for appointment of a High Court judge must initiate upon the recommendation of the Chief Justice meaning thereby that the Chief Justice alone would be able to initiate the proposal. It expressly stated that it should not be open to the State executive to propose a nominee of their own and forward the name of such nominee to the Centre. In its view, if the State executive disagrees with the recommendation of the Chief Justice for such other reasons as mentioned in the Report it should be open to it to disagree with the recommendation and request the Chief Justice to make a fresh re-commendation. The weighty recommendation of Law Commission that a proposal for appointment of a High Court Judge can originate only upon the recommendation of the Chief Justice was in terms negatived by the Constituent Assembly. C. A. D. Vol. 8, p. 674. There is nothing in the language of Article 217 that the proposal cannot be initiated by any of the four constitutional functionaries set out in the article. If elaborate provision was made for appointment of a High Court Judge with a view to securing the appointment of the best available man for the time being it would not be conducive to effectuating the purpose underlying the article if the proposal can be initiated by the Chief Justice of the High Court alone. Cases are not unknown where the Chief Justice of the High Court having his own philosophy adopted the same as his yard-stick to determine suitability for appointment and thereby excluded from his consideration a sizeable section of the Bar. Similarly, the Chief Justice of India can also initiate a proposal because if he finds someone practising in the Supreme Court as one suitable for appointment to the High Court, we see nothing objectionable Or improper in his initiating the proposal. Similarly, there could not be a blanket embargo on the State executive initiating the proposal We agree that the State executive should not make its own recommendation and forward it directly to the Centre. The State executive initiating the proposal must first forward it to the Chief Justice of the High Court who would be better informed about the practising advocates as well as the District Judges subordinate to the High Court, and seek the views of the Chief Justice. The views of both may be forwarded to the Chief Justice of India. The process of consultation must go on whatever new facts relevant to the consideration are elicited or obtained by any of the constitutional functionaries for consideration of the other constitutional functionaries and this may ultimately lead to a possible concensus, amongst all the constitutional functionaries and translate the purpose underlying Article 217 into reality by appointing the best man to this high office. The submission that any proposal from the State executive or even from the Central Executive for consideration of the other two constitutional functionaries would make a serious inroad on the independence of judiciary is to ignore the role assigned to these two constitutional functionaries in the process of appointment. However, the consultation must be not merely formal but of substance and the scope and the content of the consultation will be presently examined.

722. But before spelling out the scope and content of consultation envisaged by Article 217. it is necessary to refer to Article 224. Frankly, the scope, ambit and the underlying purpose of Article 224 has consumed maximum time at the hearing of these matters. In the draft Constitution there was no provision similar to present Article 224, which was introduced by Constitution (Seventh Amendment) Act, 1936. How ever, Article 192 of the Draft Constitution provided for Constitution of a High Court consisting of a Chief Justice and such other judges as the President may from time to

time deem it necessary to appoint. There was a proviso to the article which provided that the judges so appointed together with any additional judges appointed by the President in accordance with the next following provisions of the Chapter shall; at no time exceed in number such maximum as the President may by order fix in relation to that Court Article 216 corresponding to draft Article 192 without proviso has not cast any obligation on the President to fix maximum number of judges that can be appointed in a given High Court. It provides for a flexible situation in that the President may from time to time appoint such other Judges when deemed necessary to appoint. If the number was fixed by the Constitution every time a constitutional amendment would become necessary if more Judges were required to be appointed. pragmatism and flexibility informed the approach of the Constituent Assembly in deleting the proviso and thereby removing the obligation of the President to fix maximum number of Judges in relation to each High Court. Article 224 makes provision for appointment of additional Judges, The concept of additional Judges also figured in the proviso to draft Article 192. Therefore, when the draft Constitution envisaged appointment of additional judges, the expression 'additional judge' may be understood in contradistinction to permanent judge or an acting judge or recalling of a retired High Court Judge, The expression 'permanent judge' in relation to High Court Judge is to be found in Art 220 which prohibits a permanent Judge of a High Court from pleading or acting in any court or before any authority in India except the Supreme Court and the other High Courts. One can legitimately say that the trainers of the Constitution envisaged appointment of an Additional Judge in the High Court in contradistinction to a permanent judge or acting judge. A retired Judge of a High Court who is requested to sit and act as a Judge of the High Court is not deemed to be a Judge of the High Court and can be given no label or nomenclature and is certainly not an Additional Judge as contemplated By Article 224.

723. Article 224(1) enables the President to appoint additional judges of a High Court if the conditions enabling the exercise of power are satisfied. There are two situations, contingencies or eventualities in which alone an additional Judge can be appointed in a High Court and they must pre-exist before an additional judge can be appointed. These are (1) if by reason of any temporary increase in the business of a High Court or (2) by reason of arrears of work therein it appears to the President that to deal with the aforementioned situations it is necessary to increase the number of High Court judges for the time being, he may do so and may proceed to appoint duly qualified persons to be additional judges of the court for such period not exceeding two years, as he may specify. There is thus the power to appoint additional judges with a limitation on power that it can be exercised if one or the other or both of the aforementioned pre-conditions for the exercise of the power are satisfied. If one or the other or both of the pre-requisites are satisfied the President may proceed to appoint an additional judge but in the absence of both there is no power in the President to appoint an additional judge in the High Court. Appointment cannot be made for a period exceeding two years and before or while making the appointment the number of judges in the High Court may be increased for the time being, that is, not permanently. Recalling Article 217(1) which confers power on the President to appoint a judge of the High Court, one can say without the fear of contradiction that the expression 'Judge' in Article 217 includes an additional judge. If the pre-conditions set out in Article 224 are satisfied and the President proceeds to exercise the power to appoint an additional judge, he can appoint only such person who is qualified. The eligibility qualifications for being appointed as a judge of the High Court are set out in Learned Counsel Article (2) of Article 217 and it is unnecessary to recall those qualifications save and except saying that the qualifications for a judge to be appointed under Article 217 or an additional judge to be appointed under Article 224(1) are the same. However, the tenure of a judge appointed under Article 217 and one appointed under Article 224 materially differ. A High Court Judge appointed under Article 217 s entitled to hold office until he attains the age of 62 years, but in the case of an additional judge the period has to be specified and the maximum period that can be specified by the president for which he can hold office is two years. The view that the expression 'judge' in Article 217 includes an Additional Judge is reinforced by the fact that while introducing Article 224 by Constitution (Seventh Amendment) Act, 1956, a consequential amendment was inserted in Article 217. In the absence of the amendment, an additional judge would enjoy tenure till he reached the age of sixty-two years. In order to avoid any confusion in this behalf the words "shall hold office n case of an additional judge or acting judge as provided in Article 224 and in any other case, until he attains the age of 62 years" were added in Article 217. If the expression 'judge' in Article 217 were not to include an additional judge it would be redundant to incorporate the maximum tenure of two years prescribed in Article 224 for an additional judge in Article 217. It was however, foreseen that if the necessary amendment was not incorporated in Article 217 one could have argued with confidence that even the additional judge would retire on attaining the age of 62 years. Therefore, to put the matter beyond the pale of controversy while introducing Article 224 in 1956 a consequential amendment was made in Article 217 that the tenure of an additional judge shall be as set out in Article 224 and that it cannot exceed two years. It is not necessary to refer to the tenure of an acting judge as envisaged in Article 224(2) because that aspect is not relevant to the present discussion. So far there is no controversy.

724. It may be mentioned that an additional judge appointed under Article 224 and a judge of a High Court appointed under Article 217 as far as pay, privileges, duties, obligations, adjudicatory powers are concerned, are on par, the glaring difference being in the tenure. But, in this context our attention was drawn to Krishan Gopal v. Prakash Chandra MANU/SC/0249/1973. An election petition was filed in the Madhya Pradesh High Court which in course of time came to be assigned to Suraj Bhan, J. who had retired on Feb. 2, 1971. but the Chief Justice of Madhya Pradesh

High Court, after obtaining previous consent of the President, requested Suraj Bhan. J. to sit and act as a Judge of that Court under Article 224A of the Constitution. Before the allocation of the election petition to Suraj Bhan, J. the same was being heard by Vyas, J. and when an intimation was sent to the petitioner that his petition was allocated to Suraj Bhan, J., he objected to the same. Suraj Bhan, J, rejected his application upholding the order of allocation of the petition to him. This order was challenged by a petition under Article 226 of the Constitution for the issuance of a writ of mandamus directing Suraj Bhan, J. to forbear from giving effect to the order of Chief Justice. A Bench of the Madhya Pradesh High Court dismissed this writ petition. Upon a certificate under Article 132, an appeal was filed in this Court. In this case construction of Article 224A came up before this Court Two contentions were urged on behalf of the appellant. They were: (i) that a person requested to sit and act as judge of the High Court under Article 224A was not a judge of the High Court for the purpose of Section 80A of the Representation of the People Act, and (ii) that even assuming that he was a judge for the purpose of Section 80A of the Act, the election petition could not, after it had been entrusted to a permanent judge, be allocated to a judge appointed under Article 224A. This Court rejected both the contentions but finally observed as under (at p. 216 of AIR):

...All the same, looking to the special facts and circumstances of this case, we are of the opinion that it is fit and proper and in the interest of justice that the election petition filed by the appellant be tried by another learned judge of the High Court who may be assigned for the purpose by the Chief Justice of that Court, even though we find that the additional or acting judges or those requested under Article 224A of the Constitution to sit and act as judges of the High Court, if assigned for the purpose by the Chief Justice, are legally competent to hear those matters.

This question is hardly of any assistance on the question of eligibility, capacity and competence of an additional judge to undertake any adjudicatory process of any matter assigned to him by the Chief Justice and no distinction can be made between a permanent judge, if one appointed under Article 217 can be so designated and an Additional Judge appointed under Article 224.

725. If an additional judge can only be appointed either by reason of temporary increase in the business of the High Court or by reason of arrears of work therein, what would be the position of such an additional judge at the expiration of his period of two years constitutionally fixed if the temporary increase and/or the arrears to deal with which he was appointed remain unabated? In other words, if the temporary increase to clear which he was appointed continues to remain uncleared or the arrears to tackle which he was appointed not only neither decrease nor wholly get eradicated but remain at the same level or may be found mounting up what would be the right to further continuance of the additional Judge? Some vital questions arise qua the position and continuance of an Additional Judge.

726. The questions posed are of such dimension and magnitude in the field of constitutional law and of such far-reaching effect, defying simple and straightforward solutions because extreme position was adopted on both sides. Wisdom and circumspection should therefore be our watchwords.

727. The questions posed are: Is the Additional Judge, given the continued existence of situation which necessitated his initial appointment, entitled as a matter of right to be reappointed for a further period of two years? If in the mean time there is a vacancy in the permanent strength of the High Court, is the additional judge without anything more entitled to be appointed as permanent Judge? If an additional Judge was appointed by reason of any temporary increase in the business of the High Court or by reason of arrears of work there in or if the temporary increase has become a permanent feature of the High Court and if the arrears have not only not been reduced but are mounting up meaning thereby that the prerequisites, existence of which enabled the President to exercise the power of appointment of additional judge, continue to exist, is he entitled to be re-appointed as a matter of right? Could he be deemed to be permanently appointed? Answer posed on the other side was that he had no right to be considered nor is he deemed to be appointed as permanent judge even if he is available and it would be open to the President to appoint anyone else without considering the case of the additional judge whose tenure has come to an end. In other words, he has neither weightage nor a right to be considered. He is on par, according to the learned Attorney General, with any other person in the Bar or in the subordinate judiciary.

728. One submission may be disposed of at the outset Conceding the contention of Mr. Seervai that the position, powers, privileges and jurisdiction of permanent and additional judges of High Court and the qualifications for their appointment are the same, but the marked contrast in the raison d'etre of their appointment and the tenure for which they are appointed cannot be overlooked. The present agonising situation arose from a common understanding of the requirements of Article 224 both by the judiciary and the executive in making appointments of High Court judges since 1956 till today. Every High Court has a sanctioned strength of permanent judges and additional judges. Save rare exceptions, not easily noticeable, whenever a vacancy arose to the permanent strength, the senior most additional judge was offered the permanent vacancy and in the vacancy so caused in the strength of additional judges a fresh appointment was made. When I say senior most additional judge, I only refer to the length of period for which the

judge has worked and one who has worked for the longest duration amongst additional judges is described by me as senior most, If the tenure of an Additional Judge specified by the President in the warrant of appointment expires and there is no vacancy in the permanent cadre of High Court judges obviously such additional judge was usually offered a further tenure of ordinarily two years.

729. While making a fresh appointment the procedure followed was one prescribed in Article 217. Article 224 cannot be divorced from Article 217 because an additional judge appointed under Article 224 is a judge within the meaning of the expression in Article 217 and such an additional judge before entering upon his office has to make and subscribe an oath or affirmation according to the form set out in the Third schedule. Article 224 obliges the President to specify the tenure of the additional judge for such period not exceeding 2 years. Now, therefore, if the additional judge with the knowledge of the specified period of tenure enters upon his office, makes and subscribes to the oath and starts functioning as a judge of the High Court, undoubtedly when the period expires, if nothing else takes' place he ceases to be a judge of the High Court. Assuming that he has to be appointed again, the whole gamut of consultation as constitutionally ordained in Article 217 has to be gone through again. Harsh though this may appear, it is an inescapable situation flowing from the provisions of the Constitution. Now if the process of consultation starts over again, undoubtedly the various constitutional functionaries are bound to express their opinion on the relevant merits and demerits of the judge and the expression of opinion would be more or less on the same lines as when a person is being appointed for the first time as a judge of the High Court. Whatever canon of construction one may resort to, it is not possible to hold that the consultation in respect of an additional judge who has been once appointed and whose tenure has expired and being eligible, is being considered for appointment afresh for a fresh tenure, the relevant consideration which would I govern the decision for appointment would be different, save and except saying that the constitutional functionaries will have the additional benefit of the experience of the person concerned as a Judge of the High Court for the period he was appointed and he worked,

730. Three different contentions have been advanced in this behalf and each one will have to be separately examined. One submission of Mr. Garg strongly supported by Mr. Seervai, and learned advocates for the other petitioners is that the Additional Judge is not on probation and, therefore, his eligibility or all those relevant considerations in service jurisprudence which are taken into account while offering a substantive appointment of a probationer could not be brought into consideration. The contention is that his qualifications for being appointed as a judge have once been examined and accepted, when he was appointed as additional judge: these considerations cannot be re-examined. And at any rate, it is not open to the Chief Justice of the High Court to sit in appeal over the judgments of the judge concerned and reach his own conclusions about the judicial capacity as flowing from the judgments of the judge, Another limb of the submission is that in order to ensure independence of judiciary, an additional judge who has functioned as a Judge and has had numerous occasions to deal with a litigant, namely, the executive which has the power to make fresh appointment, should not be at the mercy of the executive and, therefore, it was urged by Mr. Seervai that if one or the other of the two pre-conditions in Article 224 which enabled the President to exercise the power of appointing an additional judge continues to exist a fresh apment must either follow as a matter , of right or if the conditions for exercise of the power continue to exit he must be deemed to have been appointed as a permanent Judge. The submission is that the permanent Judge is appointed for the routine work of the High Court including the work to deal with the arrears and if the work load is sufficient for the permanent strength at the time of initial appointment and continues to disclose the same position, the initial appointment of the Additional Judge was not within the purview of Article 224 but it must be deemed to have been within the purview of Article 217 and therefore, such a judge would, be a permanent Judge. On the other hand, the learned Attorney General contended that if the appointment is made within the four corners of Article 224, the assumption is that the Judge so appointed would either deal with the problem arising out of the temporary increase in the business of the High Court or tackle the arrears to clear which he was appointed and it is not a relevant consideration whether he has succeeded or not succeeded and it would be open to the Government to appoint him or to appoint anyone else completely ignoring any claim of such an additional Judge whose tenure has expired. It was asserted with emphasis that such an additional judge has no right to be reconsidered and the situation at the expiry of his tenure is the same as it was at the time of his entry and he or any other person could have been appointed and he is not entitled to be considered in priority or preference to any other person who can be picked up from the Bar or from the subordinate judiciary. Extreme illustrations were given to make good either point, of view by both sides but the illustrations hardly if ever provide a reliable yard-stick to- interpret a constitutional provision.

731. In an emotionally surcharged voice we were told that there were more than 65 additional judges on April 1st, 1980 all over the country whose fate to in balance and, therefore, the Court should be very careful and circumspect in putting such construction on Article 224 which would not leave these 65 additional judges to the vicissitudes of executive smile or frown. On the other hand we were told that the whole conspectus of the Articles with which the Court is dealing with in these matters were debated over a long period in the Constituent Assembly and the trend indicates that speaker after speaker repeatedly asserted that the mechanism for appointment of judges must be so devised that the best in the country is available for this high constitutional office and that the checks and balances provided must be such as

to weed out and eliminate the unworthies. It was, therefore, said that such rigid construction should be avoided which would enable an additional judge who has made himself thoroughly undesirable during the period of his tenure should not be foisted (to be foisted?) upon the society and the consumers of justice because the door against his exit is tightly bolted. We have thus to steer clear of all these extreme propositions.

732. We were told that constitutional conventions and practice are a sure guide to ascertain, decipher and unravel the intendment of the various articles. The constitutional conventions and practice as an aid to construction were canvassed because Article 224 has been so implemented under a common belief albeit mistaken of the executive and judiciary that the present impasse is the end-product of it.

733. The proviso to draft Article 192 envisaged appointment of additional judges but the tenure of such additional Judges was not specified. However, when the Constitution was adopted and Article 216 took place of draft Article 192, the proviso was deleted. Article 216 casts an obligation on the President to appoint a Chief Justice and such other Judges from time to time as he deems it necessary to appoint. Therefore, the power to appoint coupled with a duty to appoint has been cast on the President. It is not necessary to consider whether this duty can be enforced by a mandamus. An extreme illustration was taken that the President may appoint one Chief Justice and one additional judge and the consumers of Justice would suffer inordinate delay in disposal of their cases if the judiciary denies to itself power to issue a mandamus to the President to perform his function to appoint such number of judges keeping in view the institution, disposals and arrears, to be able to dispose of cases speedily and within a reasonable time. Such an illustration overlooks a vital point that the arrears in the courts are not attributable solely to the inadequate number of judges in each High Court. It would be merely adding to the length of this judgment if all the causes more vital than the inadequacy of the number of judges contributing to the mounting arrears are enumerated here. But I cannot resist the temptation of referring to what Mr. Seervai bluntly stated to the Court that to a considerable extent the senior members of the Bar are responsible for the sorry state of affairs more so because the courts have refused to enforce the provision in Order XVII, Rule 2, Civil P. C. namely that non availability of counsel is not a ground for adjournment. Present malaise in this Court was also touched upon by him. Be that as it may, the Committee appointed by the Government presided over by the then Chief Justice of India, Shri J.C. Shah, extensively examined the question of mounting arrears in the High Courts and found that the inadequacy of number of judges in each High Court is relatively a minor factor contributing to the mounting arrears but there are more weighty factors which are to be tackled with.

734. In a parliamentary democracy with a written Constitution in which three organs of the Governments are clearly marked out, it becomes a primary duty of the State to provide for fair and efficient administration of justice. Justice must be within the easy reach of the lowest of the lowliest. Rancour of injustice hurts an individual leading to bitterness, resentment and frustration and rapid evaporation of the faith in the institution of judiciary. Two vital limbs of the Justice system are that Justice must be within the easy reach of the weaker sections of the society and that it must be attainable within a reasonably short-time, in other words, speedily. Leaving aside other factors contributing to the arrears in courts, it cannot be gainsaid that in each High Court adequate number of Judges must be appointed and the situation in each High Court must be regularly reviewed by the President so as to efficiently discharge the duty cast on him by Article 216. In the course of hearing a statement was made on behalf of the Union of India that the Government is taking steps to review the strength of each High Court to determine the adequate strength of each High Court and then to take steps to make appointments according to the targets so devised. As this statement is a solemn undertaking to this Court, it may be reproduced in extenso:

The Union Government has decided to increase the number of posts of permanent judges in the various High Courts keeping in view the load of work, the guidelines prescribed and other relevant considerations. In fact in 1980 itself, on the basis of institution, disposal and arrears of cases and the guidelines prescribed, the Governments of seven States where the problem was more acute, had been addressed to consider augmentation of the Judge strengths of their High Courts. It has been decided that where necessary the guidelines prescribed will be suitably relaxed by taking into account local circumstances the trend of litigation and any other special or relevant factors that may need consideration. The Union Government will take up the matter with the various State Governments so that after consulting the Chief Justices of the High Courts, they expeditiously send proposals for the conversion of a substantial number of posts of Additional Judges into those of permanent judges.

2. The Union Government has also decided that ordinarily further appointments of Additional Judges will not be made for periods of less than one year.

But to say that a litigant who wants his case to be disposed of as early as possible being convinced that his case is not handled by the Court for want of adequate number of judges can bring an action to issue a mandamus to the Government to appoint adequate number of judges requires more elaborate arguments and in view of the statement it is not necessary to deal with the submission. An additional error in the submission founded on a mistaken belief is that all

shortcomings and infirmities in the system can be remedied by judicial process. There is no greater error than entertaining such unwarranted belief. Courts cannot cope with all infirmities in the system. That is the admonition of Frank Furter, J. I quote:

In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of people's representatives. (Baker v. Carr (1962) 369 US 186 at 270). Failure to perform duty of appointing adequate number of Judges in High Courts cast on the President by Article 216 would make him answerable to the Parliament and not to the Court.

735. The problem of arrears is much too complex to be referable to one single cause, namely, inadequate strength. Obligate the President by a mandamus to appoint adequate number of Judges in High Courts and this intractable problem defying solution would evaporate like the morning dew, betrays woeful lack of appreciation of Parkinson's Law that a large number of Judges may result in further mounting of arrears. Not the number, the system is cancer ridden. The justice delivery system of this country is utterly alien to the genius of this country. This is a smuggled system from across the shores imposed upon us by the empire builders for their own political motives and during the foreign rule a class came into existence which has enormously benefited by this justice delivery system to the detriment of teeming millions and, therefore, they have become the protagonists of the system. A society composed of 70% illiterates living in rural backward area having some simple easily solvable problems by the common sense approach of local populace is being served with a highly complex time-consuming, cost-mounting, justice delivery system evolved over centuries for a cent per cent literate society. What a paradox? The utter failure of the system stems from the fact that it is an alien system unsuited to our genius. It has become static and nonfunctioning if not counter-productive. Both the Judges and the lawyers failed to suitably revise the system to suit the needs of a republican form of Government and egalitarian society with emphasis on socio-economic justice. We administer justice in a foreign language not understood by a very large number of litigants. If the litigant is present in the Court he hardly understands what is going on. The judgments are written in a foreign language and the seeker of justice hardly knows what has happened to his cause or controversy which he has brought before the Court, In search of justice he is chasing a mirage, in the process spending his hard-earned fortune. This is the basic draw-back and this aspect can be examined in meticulous detail but this is neither the place nor the environment for elaboration.

736. Examining first the contention whether an additional Judge is on probation during the period of his initial tenure or till he is offered a permanent vacancy, it must at once be said that in the case of a High Court Judge, a high constitutional functionary holding a high constitutional office the expression 'probation' is wholly inept and inappropriate and apt to prove misleading. Such words from the service jurisprudence would be of no assistance. One must keep in view the scheme envisaged by the Constitution for deciding the position of the additional Judge.

737. Before the scheme is examined the common error of executive and Judiciary in making appointments of High Court Judges for a period commencing from 1956 till today must be examined. Article 224 was not meant to provide an entry door for becoming a Judge of a High Court under Article 217. Article 224 was for a specific and specified purpose, When the Constitution came into force in January 1950 present Article 224A was Article 224. Article 224A enables the Chief Justice of a High Court with the previous consent of the President to request any person who has held the office of a Judge of a High Court to sit and act as a Judge of the High Court. It was believed that whenever work-load in the High Court temporarily goes up, retired Judges of the High Court may be requested to sit and act as Judges of the High Court and the problem of work-load in the High Court can be solved. In 1956 it was found that this system has not worked satisfactorily. This becomes clear from the 'objects and reasons' set out in the Bill seeking to amend the Constitution by inserting Article 224 in its present form. Therefore, the present Article 224 was introduced and as pointed out earlier, it was meant to confer power on the President to increase for the time being the number of Judges in a High Court and to appoint additional Judges to fill in the increased strength. Thus power can be exercised if one or the other of the two pre-requisites set out in Article 224 is satisfied, namely, temporary increase in the business of a High Court or by reason of arrears therein The Article was enacted to meet these two specific situations only. In practice it appears and not controverted by any one, in fact admitted, that the article was worked as if an entry in the High Court for a permanent judgeship is via Article 224, namely, by first being appointed as an additional Judge and then when a vacancy occurs in the permanent strength of the High Court, to be appointed as a permanent Judge. This has been invariably the practice save in rare cases ascertainable by miscroscope. Every one was ordinarily, first appointed as an additional Judge and in course of time even after once, twice or thrice being appointed as an additional Judge till the vacancy occurred in the permanent strength that one became a permanent Judge. This is clearly contrary to the intendment of Article 224, and the present malaise arises out of this impermissible, yet without exception or with rare exception, use of Article 224 both by the executive and the judiciary, This has also led to inaction on the part of the President in not reviewing regularly and at regular intervals the permanent strength of the High Courts. Even Chief Justices were unconcerned about the undesirable situation in that they have asked for increase in the strength of additional Judges. In 1979, Chief Justice of Delhi High Court even with 10 additional judges asked for two more

without any attempt at reviewing the strength of permanent Judges. If permanent strength was reviewed from time to time the renewal of tenure of an additional Judge twice or thrice could have been avoided. If an additional Judge was appointed to deal with temporary increase in work and his term is renewed twice or thrice and the temporary increase has become a permanent feature of the High Court, what was needed was increase in the permanent strength of the High Court. It is unbecoming for a High Court Judge to be on two years' tenure repeatedly. That is clearly contrary to what was intended by Article 224.

738. Ordinarily an additional Judge save in rare cases was always offered a permanent judgeship unless he himself wanted to opt out. In order to curb and thwart an undesirable practice of a person returning to the Bar after adoring the Bench for a short-time, a system of taking an undertaking from an additional Judge, that if offered he will accept the permanent judgeship was commenced upon a note of the former Chief Justice of India, Mr. Wanchoo, though the practice does not appear to be universal. The tendency to return to the Bar after adoring the Bench for some time was to be thwarted. The undertaking was devised to meet this situation. This would however show that save in rare exceptional case, first appointment was as an additional Judge. An additional Judge will have a fixed tenure and can safely return to Bar with a perceptible added advantage because it was felt that there was no other way except to offer first appointment as an additional Judge, and therefore a system of taking the undertaking was devised. But again save in rare exceptional cases an additional Judge on the occurring of a vacancy in the permanent strength was always offered a berth. From this invariable practice, a firm belief, therefore, developed that an additional Judge enters upon office with almost an unwritten albeit incontrovertible assurance to be appointed a permanent Judge. Howsoever strong the belief may be, it is not borne out by the constitutional provision. After all, the appointment was as an additional Judge within the constraints and limitation of Article 224 and no canon of construction would permit the Court to treat the appointment as one under Article 217. If, therefore, the tenure was of two years, on the expiry of it the appointment will have to be a fresh appointment and for making such a fresh appointment, consultation as ordained by Article 217 is inescapable. Once the consultation, starts, all possible hazards in the process of consultation cannot be wished away and the appointment has to be |afresh.

739. It would be at this stage worth-while to examine the submission that constitutional convention and practice Provide a reliable aid to construction of constitutional provisions. It was also urged that in interpreting a constitutional provision implication's arising from the Constitution have to be borne in mind. The submission is that the Court should not dismiss the universal practice invariably followed for a quarter of a century in the matter of appointment of additional and permanent Judges of the High Court as a common error or common understanding of the scope, content and ambit of Article 224, but the Court must proceed on the basis that both the executive and the judiciary who have a vital role to play in the matter of appointment of additional and permanent Judges of the High Court unambiguously understood Article 224 to provide the only entry door for permanent judgeship and made recommendations leading to appointments on the clearest and unquestionable understanding that once an additional Judge is appointed in course of time when a vacancy arises in the permanent strength he would become the permanent Judge. In other words, from the day of his entry he is more or less a permanent Judge and there was no question of examining his merits and demerits on the expiration of each tenure during the period of his additional judgeship leading in a given situation to his non-appointment.

740. Constitutional interpretation has been a fruitful 'subject of discussion amongst Judges, jurists and authOrs. Number of canons have been devised for interpretation. Language being, an imperfect vehicle of translating thoughts and intendments, when the legislature finishes its task and produces a legislation in more general terms, while applying its various provisions to cases and controversies brought before the Court, a debate always ensues as to what was intended by the legislature in using a certain expression. 'A word is not crystal, transparent and unchanged it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used', Holmes, J. in Towne v. Eisner, (1917) 245 US 418 at p. 425. Word when used in a certain context may mean a different thing than used in a different context and therefore, while construing particular word or expression in a statute it is better to read the statute as a whole and ask oneself the question: 'In this state, in this context, relating to this subject-matter, what, is the true meaning of the word' (1948-2 All ER 995 at p. 998). If this is true of an Act of Parliament, it is equally true of the fundamental law of the land, viz., the Constitution.

741. Aids to construction help in finding out the intendment of the provisions. It is the duty of the Court to ascertain the intendment of a provision which comes up for construction. What was the purpose in enacting the provision and whether it was to meet or remedy a certain situation or provide for a certain eventuality, are all relevant considerations in ascertaining the intendment of the constitution. Ascertain the underlying purpose and give such construction to the provision as would effectuate the purpose. One such aid, it was urged, is the prevalent conventions and constitutional practices. Where a Constitution has worked for a reasonably long time, conventions which grow up relevant to the constitutional provisions or the constitutional practice can be a torch-bearer in ascertaining the intendment of the provisions because over a period the provision has been so understood and worked that it can be safely said that it was

correctly and wisely understood and accurately applied, Coupled with this is the fact that implications which arise from the structure of the Constitution itself or from the constitutional scheme may be legitimately made. An implication was raised from the federal character of the Australian Constitution in Lord Mayer, Councillors and Citizens of the City of Melbourne v. The Commonwealth (1947) 74 CLR 31 at p. 70, wherein it was observed that the intention is to be plainly seen in the very frame of the Constitution, namely, the federal character of the Constitution. As a corollary the provision contrary to the implications to be derived from the federal character of the Australian Constitution was challenged as ultra vires in State of Victoria v. Commonwealth of Australia 122 Commonwealth LR 353, wherein the State of Victoria had challenged the power of Parliament of the Commonwealth requiring the State to pay pay-roll tax upon wages paid by it to its employees in certain departments claiming that the legislation was contrary to the implications of the Australian Constitution. A question was raised in that case as under:

Does the fact that the Constitution is federal carry with it implications limiting the law making powers of the Parliament of the Commonwealth with regard to the States.

The question was answered in the affirmative both on principle and authority:

742. Similarly, in Commercial Cable Co. v. Govt. of Newfoundland (1916) 2 AC 610, the Privy Council read a limitation on the prerogative power of the Governor conferred by the Letters Patent imposed by the constitutional practice of the colony. The Privy Council again in British Coal Corporation v. The King 1935 AC 500 after referring to its Constitution under the Act for the Better Administration of Justice in His Majesty's Privy Council and further referring to the provisions set out in the Act for the conduct of appeals, observed that the Judicial Committee as established by the Act after hearing the appeal could make a report of recommendation, to His Majesty in Council for his decision, the nature of such re port or recommendation being always read out in the open court. Proceeding further it was held that even if the Judicial Committee of the Privy Council is regarded as a judicial body or court, all it can do is to report and re commend to His Majesty in Council by whom alone the order in council, which Is made to give effect to the report of the Committee, is made. Having deter mined the legal position of the Judicial Committee, it was further held as under to which specific reference was made:

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred.

743. Similarly, in Re. Alberta Legislation, (1938) 2 Dominion LR 81 at p. 107 it was held that the Parliament of Canada possesses authority to legislate for the protection of the right of freedom of press. That authority, it was said, rests upon the principle that the powers requisite for the protection of the Constitution itself arise by necessary implication from the British North America Act as a whole. A little further it was observed that the provincial legislature is not entitled to interfere with the working of parliamentary institutions of Canada as contemplated by the provisions of British North America Act and the Statute of Dominion in Canada, Such limitation, it was held, is necessary in order to afford scope for the working of such parliamentary institutions and in this region of constitutional practice it is not permitted to a provincial legislature to do indirectly what cannot be done directly. This decision was followed in Saumur v. City of Quebec and Attorney General of Quebec (1953) 4 Dominion LR 641 at p. 672.

744. In the State of South Australia v. The Commonwealth (1942) 65 CLR 373 at p 447, it was held that some implications arise from the structure of the Constitution itself, but it is inevitable also that these implications can only be defined by a gradual process of judicial decision.

745. In U.N.R. Rao v. Smt. Indira Gandhi MANU/SC/0059/1971 a question was in terms raised that the Court should interpret Article 75(3) according to its own terms regardless of the conventions that prevailed in the United Kingdom, Rejecting this contention, the Court observed as under (at p. 1003 of AIR).

If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are Interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a parliamentary system of government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed.

This would show that in arriving at the true intendment of Article 75 the Court not only took assistance of the form of Government established in India by the Constitution but simultaneously referred to the conventions in the United Kingdom and other countries having similar political system being adjuncts of parliamentary form of Government.

746. Implication but not the splint arising from the Constitution is another aid to construction, After referring to some of the Canadian decisions, Sikri, C.J, pointed out in Kesavananda Bharati Sripadagalavaru v. State of Kerala MANU/SC/0445/1973 that some of the Judges in Canada have implied that freedom of speech and freedom of the Press cannot be abrogated by Parliament or Provincial legislatures from the words in the Preamble to the Canadian Constitution, i.e. "with a Constitution similar in principle to that of the United Kingdom". Examining the submission in that case about implied and inherent limitations on the amending power of Parliament, Shelat, J. recalled the statement that the rule is established beyond cavil that in construing the Constitution of the United States, "what is implied is as much a part of the instrument as what is expressed" (American Jurisprudence (2d.), Vol. 16, p. 251) and after reviewing a large number of foreign decisions it was observed that the concept of implications can be raised from the language and context of the various provisions (see p. 258), At page 316 Hegde, J. observed that implied limitations on the powers conferred under a statute constitute a general feature of all statutes. The position cannot be different in the case of powers conferred under a Constitution. A grant of power in general terms or even in absolute terms may be qualified by other express provisions in the same enactment or may be qualified by the implications of the context or even by consideration arising out of what appears to be the general scheme of the statute.

747. In Chapter III, Sir Ivor Jennings in The Law and the Constitution, refers to the conventions of the Constitution. At p. 80, the author observes as under:

Political institutions', said John Stuart Mill, 'are the work of men; owe their origin and their whole existence to human will. Man did not wake on a summer morning and find them sprung up. Neither do they resemble trees, which, once planted, 'are aye growing', while men 'are sleeping'. In every stage of their existence they are made what they are by voluntary human agency'. But men being what they are, they tend to follow rules of their own devising; they develop habits in government as elsewhere, And when these men give place to others, the same practices tend to be followed. Capacity for invention is limited, and when an institution works well in one way it is deemed unnecessary to change it to see if it would work equally well in another. Indeed, people begin to think that the practices ought to be followed. It was always so done in the past, they say, why should it not be done so now? Thus within the framework of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with government must follow.

Constitutional convention is broadly defined as rules of political practice which are regarded as binding by those to whom they apply but which are not laws as they are not enforced by the Courts (p. 121). It may be an aid to construction but not positive rule of law, breach of which is remediable by Court action. It must, however, be remembered that the conventions grow around and upon the principles of a written Constitution. The conventions generally grow where the powers of the Government are vested in different persons or bodies or where, in the words of Sir William Holdsworth, the Conventions of the Eighteenth Century Constitution. 17 Iowa Law Review, p. 162, there is a mixed Constitution. But conventions do presuppose the law and any convention contrary to the written context is of no validity. The conventions are built in the first instance, on the foundation of law but once they are established, they tend to form the basis for the law. It may, however, be noticed that these rules of law which are conventions are a mere matter of practice and their effect must change with the changing circumstances of national life. That apart what is sought is not enforcement of the convention in the Court but its being invoked as an aid to construction of Article 224. Does it help in that behalf? W. A. Wynes in Legislative, Executive and Judicial Powers in Australia, p. 29, foot note 20, noticed that in the Commonwealth v. Colonial Combing etc. Co. Ltd. (1922) 31 CLR 421 at Pp. 438-439, Isaacs, J., drew attention to the duty of the Judiciary to recognise and give effect to new positions and circumstances in the national life. The conventions of the Constitution, he said, are not to be omitted from construction in its interpretation.

748. Implications arising from the provisions of the Constitution, constitutional conventions and constitutional practice all stand on a different footing. A constitutional convention when spread over a long period, of immemorial antiquity, followed invariably becomes entrenched as a rule of law but any convention contrary to the written pro vision is of no validity. Implications may arise from the context in which a provision is placed or the use of the language in the provision or from the nature of the power claimed vis-a-vis the whole constitutional scheme. That was how implied limitations on the power of Parliament to amend the Constitution were spelt out in Keshavananda Bharati's case MANU/SC/0445/1973. Constitutional practice may be spelt out as a course of conduct over a reasonably long period which may indicate how the authorities charged with a duty to implement the Constitution have worked out or implemented a certain provision of the Constitution.

749. To begin with as pointed out earlier, a constitutional convention must be founded on some provision of law. They provide 'the flesh which clothes the dry bones of the law, they make the legal situation work, they keep in touch with the growth of ideas; a Constitution does not work itself, it is worked by men. It is an instrument of national co-operation and the spirit of co-operation is as necessary as the instrument. Conventions are rules elaborated for effecting that co-operation. (The Law and the Constitution by Sir Ivor Jennings, p. 81). As Oppen Heimer in the Constitution of

the German Republic p. 9, observes, that 'conventions which have already begun to quite a considerable extent not only to supplement, but also to modify, if not actually supersede express provisions' grow within a short time. It would thus distinctly appear that any convention contrary to the provision of the Constitution and its basic intendment cannot be given effect to as a convention, Its genesis must be in the provision itself.

750. If Article 224 conferred power on the President to appoint Additional Judge only in the specified situations set out in the article and for a fixed limited duration beyond which even the President had no power to appoint, it cannot be said that because the way in which the article has been worked, a constitutional convention has grown up that every additional Judge right from the day of his entry irrespective of his two years' tenure would be deemed to be appointed as a permanent Judge or would be entitled as a matter of right to a renewal of his tenure till a permanent vacancy. Such a construction of Article 224 would run counter to the plain intendment of the Constitution and no such convention can be spelt out as would pro tanto amend Article 224. Nor any such implication can be raised that an Additional Judge is deemed to be appointed as permanent Judge or he is entitled as of right to a renewal of his tenure till a permanent berth is found for him,

751. Frankly, there is some force in the submission that a practice has grown up for over last quarter of a century (1956-81) that whenever an additional judgeship is offered to a person, he accepts it in the reasonable behalf that in course of time he would get a berth as a permanent Judge. It may generate hope in him and his expectations could be said to be well founded and reasonable more so it is, save in rarest of rare cases, invariably done so far. At the minimal most he is entitled to be first considered for a fresh tenure of two years or when the permanent vacancy arises for appointment to that permanent vacancy before any rank outsider is considered given the situation that the pre-requisites which necessitated his initial appointment continue to exist.

752. No cases were pointed out to us that where there were additional Judges in the High Court and a permanent vacancy occurred someone was appointed who had not functioned as an additional Judge, An additional Judge was usually offered permanent judgeship. May be there might be some rare cases in which some fortunate few were directly appointed as permanent Judges but no case was brought to our notice where there were additional Judges in a High Court and a permanent vacancy occurred and overlooking the claims of all additional Judges either a member of the Bar or a District Judge was directly appointed to that permanent vacancy. Therefore, there is no gainsaying the fact that a practice was followed for over 25 years that an additional Judge was always first considered and he was entitled to be considered for a fresh tenure if there was no permanent vacancy and if there was a vacancy in the permanent strength, for being appointed as a permanent judge. A contention of the learned Attorney-General to the contrary that he has no priority, preference, weightage or right to be considered and that he is on par with any other man who can be brought from the market would be subversive of the constitutional scheme and must be rejected. An additional Judge who has worked for the period of his tenure has a weightage in his favour compared to a fresh appointee and any process of appointment while filling in a vacancy must commence with the additional Judge whose tenure has come to an end and has led to the vacancy.

753. Two consequential limbs of the same submission may be dealt with here. If Article 216 postulates fixing of a permanent strength of the High Court and review of the strength at regular intervals and if Article 224 enables the President to appoint additional Judges in the two contingencies mentioned therein, would it be open to the President to appoint an additional Judge when there is a vacancy in the permanent strength of the High Court. The constitutional scheme is that ordinarily there should be permanent Judges of the High Court. Article 224 is an enabling provision conferring power on the President to appoint additional Judges to meet a specific situation, namely, a temporary increase in the work of the High Court or the arrears in the High Court. Ordinarily, therefore, the Constitution envisages appointment of permanent Judges. Permanent Judges are appointed to deal with the regular work of the High Court and the strength is fixed keeping in view the institutions and disposals and minimum work-load which each Judge is supposed to handle. When permanent strength of the High Court is fixed and there is a vacancy, it would mean that for the routine work of the High Court the number of Judges is inadequate and, therefore, it is incumbent upon the President to fill in the vacancy unless it can be made out that the workload in the High Court does not justify the appointment. But if the permanent vacancy is not filled in and the President proceeds to appoint an additional Judge, which can only be done if there is a temporary increase in the work of the High Court or if there are arrears, it would mean that the regular work is not sufficient for the sanctioned strength of permanent Judges and vacancy may remain unfilled, an additional Judge is necessary as if temporary increase in the work of High Court or arrears cannot be dealt with by permanent Judges. Two situations cannot co-exist. Additional Judges can be appointed when the permanent Judges while dealing with the regular work of the High Court are unable to deal with such temporary increase in the work of the High Court or clear the arrears. If the permanent strength is reduced by not filling in a vacancy and it is considered not necessary to fill in such vacancy it would only imply that not only regular work of the High Court is being adequately handled but any other work in the High Court can also be handled by the number of Judges then working in the High Court. In such a situation appointment of additional judge cannot be justified and in the absence of

preconditions set out in Article 224 the appointment of an additional judge would be plainly outside the purview of Article 224 and contrary to the intendment of Article 224. Therefore, when a permanent post is vacant an additional judge cannot be appointed.

754. But having said this, it most also be conceded that an additional Judge even if appointed, could not be deemed to be a permanent Judge. If the President appoints an additional Judge and specifies his tenure as two years in the warrant of appointment, it is not open to the appointee to ignore the tenure and to expect the appointment as being of a permanent Judge. A reference in this connection was invited to the Waterside Workers' Federation of Australia v. J.W. Alexander Ltd. (1918) 25 CLR 434 (Aus). Section 12 of the Commonwealth Conciliation & Arbitration Act provided for the appointment of a President. The provision was to the effect that "the President shall be appointed by the Governor-General from amongst the Justices of the High Court. He shall be entitled to hold office during good behaviour for seven years...." The Constitution provided for tenure of High Court Judges during good behaviour and they were not removeable except by the Governor-General in Council on address from both houses of Parliament praying for such removal on specified grounds (see p. 72). The contention was that if the President was to be justice of the High Court and the tenure was only for a period of seven years, this was contrary to Section 72 of the Constitution and the appointment is invalid and that the appointment being non-severable from the main Act, the whole Act was invalid. The Chief Justice who presided over the Bench held that the word 'appointed' is used in the sense of assignment and the life tenure is not whittled down by making a specific appointment for a certain period. Views contrary to the view of the Chief Justice are also expressed but this decision hardly helps in resolving the problem posed in this case.

755. If the President even by a misconception of a situation, makes an appointment specified in Article 224 limited for a duration of two years, it is inconceivable that the appointee can ignore the tenure and claim to be appointed as a permanent Judge. Undoubtedly consultation for the purposes of Article 224 and for appointing a permanent Judge under Article 217 is of the same width and dimension and the constitutional functionaries involved in the process of appointment are all the same, none the less power of the President to appoint for a fixed duration in a given situation even if the situation is shown not that the President had some other power under some other Article and is deemed to have acted under that Article. In such a situation It may possibly appear that the initial appointment was bad. It was, however, urged that while purporting to appoint an additional Judge under Article 224 the clear and unmistakable intention was to appoint a permanent Judge, this intention cannot be defeated by use of such words as 'additional' and 'for two years'. The Court must give effect to the intention. It was said that the Judge was appointed not because there was temporary increase in the work of the High Court or the arrears therein but to deal with the cases in the High Court and in such a situation the appointment has to be under Article 217. If it is so, the Judge would be deemed to be appointed a permanent Judge with the tenure prescribed in Article 217. The submission is that the Intention was to exercise power under Article 217 but by a mistaken understanding it was treated under Article 224 and the tenure was, therefore, limited to two years but this is done in disregard of the duty of the President under the Constitution, and the Court should not disregard the intention and must enforce the duty, Specific submission is that in a conflict between a qualified intention and an obligatory duty, the Court would enforce the latter. Reliance was placed on Sewpujan Rai v. Collector of Customs MANU/SC/0056/1958, wherein the Collector of Customs ordered confiscation of gold and imposed penalty of Rs. 10 lacs on payment of which gold was to be released. Penalty was levied with two conditions and it was conceded that he had no power to impose conditions. The question was whether the whole order was void, or two impermissible conditions could be severed and order upheld. This Court held that the impermissible conditions were severable and they were struck down and order was upheld. In this connection, reliance was also placed on the decision of Y. Mahaboob Sheriff v. Mysore State Transport Authority MANU/SC/0189/1959 wherein the question was whether a permit granted for one year was according to law. Section 58(1)(a) read with Section 58(2) of the Motor Vehicles Act enabled the Authority to grant permit for a period not less than three years. It was urged that order granting permit was bad being outside the provision. This Court held that the intention to grant permit was manifest and giving effect to the intention directed the Authority to issue a permit for a period not less than three years and not more than five years as the Authority may specify. I fail to see how these would render any assistance in this case. Here the President has specifically set out in the warrant of appointment that the Judge is appointed as 'additional Judge' for 'a period of two years'. Even if the prerequisite for exercise of power was absent and, therefore, it was an impermissible exercise of power under Article 224, there was no intention to appoint a permanent Judge which this Court by a deeming fiction can enforce, Doctrine of severability is not attracted. The intention not shown to be to appoint permanent, as two years' tenure furnishes contrary indication the submission that Court must enforce it must be negatived.

756. I may then turn to the next submission incidental to the points under discussion. It was said that if an additional judge has to be appointed either for dealing with the temporary increase in the work of the High Court or for tackling arrears in the High Court the Constitution makers believed that the situation has reached such a stage that an additional judge if appointed for a period of two years would be able to bring relief. It may be that the problem may not be wholly solved within the period of two years but the reasonable expectation was that a period of two years would provide adequate length of time to the additional judge to deal with the problem for tackling which he is appointed. Therefore,

Article 224 provides for a tenure not exceeding two years. By and large save with very recent rare exceptions the appointment of additional judge in the first instance has always been for two years. And it should be so, because no one is unaware of the three dimensional problem of arrears corroding the vitals of the justice delivery system and presenting a formidable threat to it. There is no shortcut and there are no readymade solutions and the problem cannot be overnight wished away. In fact, with sadness the agonising fact must be confessed that no serious efforts have been made to tackle the problem and whatever spasmodic or sporadic attempts have been made have proved counter-productive, It was, therefore, assumed that a period of reasonable duration such as two years would give adequate opportunity to an additional judge appointed for a specific task and the approach in appointment would be a result oriented approach. If this was the underlying assumption in enacting Article 224, the appointment of short-term duration of six months or in the two cases before us, of three months, is inconsistent with the intendment of Article 224 and unbecoming of the dignity of a High Court Judge. Article 224 confers power on the President. It is enacted for a specific purpose. There is an underlying purpose while conferring such power on the President. To effectuate that purpose hot only a power of appointment is given but the President is authorised to make such an appointment for a period not exceeding two years. If when making the appointment of an additional judge it must be deemed to have been assumed that there is such temporary increase in the work of the High Court or there are such arrears that it has become a compelling necessity to appoint additional judges to deal with the situation, the appointment for such a ridiculously short duration of three months or six months appears not only to be an exercise in futility but is inconsistent with the intendment of Article 224. Appointment under Article 224 can only be made as repeatedly pointed out, to meet the specific contingencies, Such appointment cannot be made for the purpose of making inquiry into the suitability, eligibility or fitness of the incumbent additional judge at the time of consideration of his appointment for a fresh term. In. this behalf both the judiciary and the executive are in the same bracket. In the case of Mr. S.N. Kumar and Mr. O.N. Vohra, the Chief Justice of India recommended an extension for a period of six months in order to gain time to make inquiries in respect of complaints which appear to have been mentioned by the Law Minister in the correspondence. This is utterly impermissible. Chief Justice of India could not have recommended extension of six months, not for dealing with temporary increase nor for tackling arrears, but for gaining time to complete his inquiry. The Law Minister in his turn presumably must have advised the President to grant extension for three months. Such short-term appointments are wholly inconsistent and contrary to the clear intendment of Article 224 and unbecoming of the dignity of a High Court Judge. I am not prepared to believe even on a hypothetical case that in foreseeable future a situation may arise when an appointment of an additional judge is necessary for such ridiculously short term of three months or six months to dispose of temporary increase in work or to tackle arrears. If such a situation can be imagined, better let that work be dealt with by permanent judges rather than appointing persons to such high constitutional office for a ridiculously short period.

757. To put the position beyond the pale of controversy, it must be emphasised, even at the cost of repetition, that whenever the tenure of an additional judge is about to expire, sufficiently in advance the process of consultation for considering his case for appointment as envisaged by Article 217 must start and it must proceed along the hitherto chalked out lines. It has to be completed sufficiently in advance before the tenure is to expire and a decision has to be taken. If the incumbent of the office is considered suitable for a fresh tenure, keeping in view the only two relevant considerations, namely, the existence of the temporary increase in the work of the court or the continued existence of the arrears for resolving or tackling which the judge was appointed, his fresh tenure, should be fixed. If on objective consideration it appears that the situation is not likely to improve even within a period of two years, normally the fresh tenure should be of two years unless a contrary legitimate decision verifiable on objective facts is reached that the problem can be resolved within a short period which should in no case be less than one year. One cannot appoint the lowest grade servants on such a short term duration of six months or three months. It violently hurts the dignity of a Judge of a High Court to be appointed for a period of six months or three months and that during this period he is not supposed to clear the arrears to deal with which he was appointed but during the period of three months either this executive or the Chief Justice of India will be holding their inquisitions to consider his future suitability, a decision which these two high constitutional functionaries could hot reach within a period of two years for which initially the additional judge was appointed. We emphatically declare that short-term extensions of three months or six months are beyond the intendment of Article 224. Ordinarily, as herein indicated the fresh tenure must be for two years subject to the overriding consideration that if an honest and legitimate opinion can be formed by all the constitutional functionaries that the temporary increase in the High Court or the arrears to tackle which the additional judge was appointed could be resolved to the satisfaction of all within a period of say one year, the duration can be of one year but not less than that in any case.

758. In passing it was briefly stated there can be a short term appointment when in a near future a vacancy in the permanent cadre of the High Court is likely to occur. That approach is hardly relevant because even if the additional judge is appointed, save for a period of one year, and a vacancy occurs within three months of his appointment, there is no bar in law in offering him the permanent appointment and if the work load still justifies, to appoint someone else as an additional judge.

759. The stage is now reached where it would be appropriate to deal with the scope and content of consultation as envisaged by Article 217. It may be recalled that Article 222 also provides for consultation with the Chief Justice of India when the President proposes to transfer a judge of a High Court to another High Court. The Question posed is whether consultation as envisaged by Article 217 and consultation envisaged by Article 222 is the same or there is some marked divergence in it. Mr. Seervai in terms said that scope and ambit of consultation with constitutional functionaries both under Article 217(1) and Article 222(1) is the same only content may, differ because the purpose of consultation under both the articles is 'different, to wit, under Article 217, consultation is to be had for appointment as High Court Judge while under Article 222(1) consultation is for the purpose of transfer of a High Court Judge from one High Court to another High Court. There are a number of articles in the Constitution which provide for consultation with different authorities. Article 124(2) provides for appointment of a judge of the Supreme Court by the President after consultation with the Judges of the Supreme Court and of the High Court in States as the President may deem necessary and the proviso to Article 124(2) makes it obligatory on the President to consult the Chief Justice of India in case of appointment of a Judge other than the Chief Justice of India. The marginal note of Article 143 which confers advisory jurisdiction on the Supreme Court specifies the power of the President to consult Supreme Court Article 217 provides for consultation with the Chief Justice of the High Court, Chief Justice of India and the Governor of the State while making appointment of a Judge of the High Court, Article 222 provides for consultation with the Chief Justice of India before transferring a Judge of the High Court to any other High Court. Article 233 provides for appointment of the District Judges by the Governor of the State in consultation with the High Court. Article 234 provides for recruitment of persons other than District Judges to the judicial service in accordance with the rules made by the Governor in that behalf after consultation with the state Public Service Commission and with the High Court exercising jurisdiction in relation to the State, Article 320(3) makes consultation obligatory with the Union Public Service Commission and State Public Service Commissions, in respect of matters specified in the article. The word 'consultation' has thus been used in different contexts and different authorities are required to be consulted for different purposes before exercise of certain power. Obviously, therefore, the scope and content of consultation may vary from situation to situation. The word 'consult' has been defined to mean 'to discuss something together, to deliberate', deliberation being the quintessence of consultation. The word 'consult' would take its colour and its content and scope will depend upon the context in which it is used. If the consultation is for appointment all those relevant considerations which enter the verdict before an Appeal ment is made would be the subject-matter of consultation. If the consultation is for transfer of a High Court Judge under Article 222(1) the word 'consultation' would mean examination of all those relevant aspects to be presently mentioned including the consequences of transfer, Chandrachud, J. affirmed the observation in Chandra-mouleshwar Prasad v. Patna High Court MANU/SC/0495/1969, on what constitutes consultation within the meaning of Article 233(1). It reads as under (MANU/SC/0065/1977), "Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more cannot be said to have been issued after consultation.

This observation provides the content and ambit of the process of consultation, Though this observation has been made in the context of Article 233(1) but it is accepted as applicable to consultation to Article 222(1) and in my opinion it is good law even for Article 217(1). At another stage it was observed that deliberation is the quintessence of consultation'. That implies that each individual case must be considered separately on the basis of its own facts, Iyer, J, in his concurring opinion in Mr. Sheth's case MANU/SC/0065/1977, recalling the observation in Chandramouleshwar Prasad's case MANU/SC/0495/1969 extracted hereinbefore, observed that consultation in order to fulfil its normative function must, be real, substantial and effective consultation based on full and proper materials placed before the constitutional functionaries. In the context of consultation for transfer he examined various facets on which consultation must be focused and concluded that the Government must forward every possible material to the Chief Justice of India so that he is in a position to give an effective opinion, Maybe, the opinion of the Chief Justice of India may not be binding on the Government but it is entitled to great weight and is normally to be accepted by the Government in order to avoid the charge that the power is exercised whimsically or arbitrarily, These observations on the scope and content of consultation in the context of Article 222 would mutatis mutandis apply to the scope and ambit of consultation in Article 217. To recall the words of Justice K. Subba Rao in R. Pushpam v. Stats of Madras MANU/TN/0194/1953 the word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution', would provide a rational, legal and constitutional yardstick to measure and ascertain the scope and content of consultation as contemplated in Article 217(1). It must not be forgotten that the consultation is with reference to the subject-matter of consultation, and therefore, the relevant facets of the subject-matter must be examined, evaluated and opined upon to complete the process of consultation.

760. Reverting to Article 217(1), the consultation is for the purpose of appointment of a Judge of High Court. The constitutional functionaries to be consulted are the Chief Justice of the High Court, Governor of the State and Chief Justice of India. Attention must first be focussed on what are the relevant considerations apart from the qualifications

prescribed in the Constitution while making a proposal for appointment of a High Court Judge. Tha questions, one would pose to oneself are; (i) does he satisfy the qualifications prescribed in Article 217(2), (ii) whether he is of sufficiently mature age which is generally considered a good guide form a sombre approach in a law court; (iii) is he of unimpeachable integrity; (iv) has he a spotless character (v) is he a man of reliable habits; (vi) what is his equipment in law; (vii)" does he subscribe to the social philosophy and values enshrined in the Constitution; (viii) does he suffer from any in-surmountable aberrations; (ix) does he disclose a capacity to persuade and be persuaded; (x) would he have a team spirit; (xi) has he a quick grasp, a smart intellect and a compassionate heart. These are only illustrative and not exhaustive, As pointed out earlier, the Chief Justice of the High Court who would ordinarily and generally speaking be the initiator of the proposal would evaluate the candidate in his mind from all these angles and set out his opinion in the proposal formulated by him, The State executive will focuss on the aspects other than his legal acumen and equipment, his grasp, his ability to deal with complex legal problems being brought before him, because in that behalf the Chief Justice is more advantageously placed. Undoubtedly, on character and integrity with the resources at the command of the State it could express its opinion. If it has some other opinion which runs counter and contrary to what the Chief Justice of the High Court has stated, it must inform the Chief Justice of the High Court of whatever is in its possession and permit the Chief Justice of the High Court to react, After this two-way discussion has followed, the proposal may be sent to the Union Minister of Justice who in turn must pass it on to the Chief Justice of India, The Chief Justice of India, free from local, parochial, regional, caste considerations prevailing at the State level would in meticulous detail examine all aspects of the matter, If he has reliable sources for collecting further information if would be open to him to do so. If he collects something which appears to be not known either to the Chief Justice of the High Court or the State executive he may set out the same and refer the proposal back for the consideration of the aforementioned two authorities, After this exhaustive discussion -- not expected to be the oral or telephonic discussion or personal discussion--there is a meeting of the minds on relevant aspects of the matter with possible differences of opinion, the same has to be dealt with by the Minister of Justice who may in turn give his advice, not examinable by the Court, to the President. The consultation has to be meaningful, purposeful, result oriented and of substance, Much water has flown below the bridges when initially it was said that when a duty is cast to consult the authority, one who has to consult, has to inform of its proposal to the authority to be consulted and wait for some time for reply and forget the whole thing. After the decision in Mr. Sheth's case it is now the law of the land that wherever the President can exercise power in consultation with the Chief Justice of India or other constitutional functionaries, the consultation has to be on all relevant aspects which would enter the final verdict. All the parties involved in the process of consultation must put all the material at its command relevant to the subject under discussion before all other authorities to be consulted. Nothing can be kept back. Nothing can be withheld, Nothing can be left for the eye of any particular constitutional functionary. To recall the words of Justice Iyer in Mr. Sheth's case 1978-1 SCR 433 at p. 506. MANU/SC/0065/1977, all necessary facts in support of the proposed action of transfer must be communicated to him and all his doubts and queries must be adequately an-) swered by the Government. The President has, however, a right as rightly conceded by Mr. Seervai upon consideration of all relevant facts to differ from the other constitutional functionaries for cogent reasons and take a contrary view. Chandrachud,- J. in his Judgment stated as under:

Article 222(1) which requires the President to consult the Chief Justice of India is founded on the principle that in a matter which concerns the judiciary vitally, no decision ought to be taken by the executive without obtaining the views of the Chief justice of India who, by training and experience, is in the best position to consider the situation fairly, competently and objectively. But there can be no purposeful consideration of a matter, in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken. It must, therefore, follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion, If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President, the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Article 222(1), therefore, means full and effective, not formal or unproductive consultation." So far there is no controversy.

761. The learned Attorney-General, however, contended that the consultation is obligatory when the president proceeds to exercise his power of appointment but in the case of non-appointment consultation is not obligatory. There is an apparent fallacy in this submission. This argument proceeds on the erroneous assumption that there is something like a process of appointment and a distinct and independent process of non-appointment. Can one start a process of non-appointment either in case of a fresh appointee or in case of a fresh tenure of an additional judge who has already served as High Court judge for the period for which he is appointed by the President under Article 224? What has to start is a process of appointment. The Chief Justice when there is a clear vacancy, has to initiate the proposal for

appointment. He may think of selecting someone from the Bar or from the subordinate judiciary. But what he initiates is a proposal for appointment. It is unthinkable that the Chief Justice of High Court would start a proposal for non-appointment for the first time. Such, a situation is possible in case of an additional judge, an aspect to be presently examined. But save such a situation what happens is that the Chief Justice of the High Court thinks of certain names and ultimately reaches his own decision and initiates his proposal for appointment. This is a process of appointment. The proposal is forwarded to the State executive as consultation with the Governor is obligatory. Assuming the Governor does not agree, is it that the further examination of the proposal must come to an end? That is not the constitutional scheme, The Governor may disagree or set out his valid reasons for disagreeing with the proposal of the Chief Justice but he cannot put an embargo on further examination of the proposal by the other constitutional functionaries. If the view advanced by Attorney General that once one of the constitutional functionaries does not assent to the proposal the proposal falls there and cannot be further examined is accepted, it would be putting the power of veto on a constitutional functionary only entitled to be consulted. On a true interpretation of Article 217, the proposal must move further. It must reach the Chief Justice of India and the Minister of Justice. There might be differences of opinion as they have surfaced in the case of Mr. S.N. Kumar and Mr. O.N. Vohra. That is inevitable when four constitutional functionaries are involved in the decision making process. Ultimately the President may not accept the proposal and drop the proposal resulting in non-appointment. The non-appointment is the end product of a process of appointment. There is nothing like an independent process of non-appointment.

762. This aspect becomes vital in the case of additional judge. When initial term for which the additional judge was appointed is about to expire, if one can legitimately think of a process of non-appointment, the Chief Justice of the High Court may sit silent till the last day and the judge walks out. Does he have a veto sub silentio over other constitutional functionaries? The answer is an emphatic No. It must be the obligatory duty of the Chief Justice to initiate the proposal. Maybe, his initiation of the proposal may start with a recommendation that he is not in favour of a fresh term for the concerned additional judge. He is entitled to express his opinion. Proposal has, however, to be proceeded further and must be sent to the Governor of the State who with his own opinion endorsed in the proceeding should forward the same to the Minister of Justice and "who in turn must send if to the Chief Justice of India, NO constitutional functionary merely entitled to be consulted has a right to kill the proposal on his own. If there are differences of opinion qua a person amongst the three constitutional functionaries entitled to be consulted, it is inevitable in the very scheme of things that the President will have to choose keeping in view the fundamental assumption underlying this complex scheme that the best must be appointed and the doubtful must be eliminated. Therefore, there is nothing like a process of non-appointment in respect of which consultation can be eschewed.

763. How far the provision contained in Article 124 would be helpful in ascertaining the scope of consultation in Article 217 as also the contention about primacy of the opinion of the Chief Justice of India and the response to the argument on behalf of the respondents that the three constitutional functionaries to be consulted are co-ordinate authorities. In fact, reference to Articles 124 and 126 is only incidental because the construction of these two articles did not figure directly in the contentions canvassed in these cases. Attention was drawn to them to point out that there are situations envisaged by the framers of the Constitution where the President, the highest executive in the country, may proceed to appoint Chief Justice of India, the highest, at the apex of the judicial hierarchy, without consultation with any functionary in the judicial branch of the State. Article 124 provides for establishment and Constitution of Supreme Court, Sub-article (2) provides that every judge of the Supreme Court shall be appointed by the president by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. There is a proviso which is material, It reads as under;--.

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

Sub-article (2) of Article 124 which provides for appointment of every Judge of the Supreme Court will comprehend appointment of Chief Justice of India also. Incidentally it was also pointed out that upon a superficial view of Article 124, Chief Justice of India may be appointed by the President without consultation with any functionary in the Judicial branch. Article 126 caters to a situation where an Acting Chief Justice of India is required to be appointed. It provides that when the office of the Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other judges of the Court as the President may appoint for the purpose.

764. Now, power is conferred on the President to make appointment of judge of Supreme Court after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary. The submission is that the expression 'may deem necessary' qualifies the expression 'confutation' and that if he deems otherwise the president can proceed to make appointment of the Chief Justice of India without consultation with any of

the judges of the Supreme Court and of the High Courts. In other words, it was submitted on behalf of the respondents, the President has a discretion to consult or not to consult Judges of the Supreme Court and High Courts before making appointment of Chief Justice of India. It was pointed out that where consultation is obligatory it is specifically provided and reference was made to the proviso extracted hereinabove wherein it is stated that it would be obligatory upon the president to consult the Chief Justice of India before making appointment of a judge of the Supreme Court other than the Chief Justice of India. Undoubtedly, the proviso leaves no option to the President but to consult the Chief Justice of India while making appointment of a Judge of the Supreme Court other than the Chief Justice of India, but it is rather difficult to accept the construction as suggested on behalf of the respondents that in making appointment of the Chief Justice of India the President is at large and may not consult any functionary in the judicial branch of the State' before making appointment of Chief Justice of India. The expression 'may deem necessary' qualifies the number of judges of the Supreme Court and High Courts to be consulted. What is optional is selection of number of judges to be consulted and not the consultation because the expression 'shall be appointed after consultation' would mandate consultation. An extreme submission that the president may consult High Court judges for appointment of the Chief Justice of India omitting altogether Supreme Court judges does not commend to us, because the consultation with such of the judges of the Supreme Court and of the High Courts would clearly indicate that the consultation has to be with some judges of the Supreme Court and some judges of the High Courts. The conjunction and is clearly indicative of the intendment of the framers of the Constitution. If there was disjunctive 'or' between Supreme Court and High Courts in Sub-article (2), Article 124 there could have been some force in the submission that the President may appoint Chief Justice of India ignoring the Supreme Court and after consulting some High Court judges. Undoubtedly, Sub-article (2) does not cast an obligation to consult all judges of the Supreme Court and all judges of the High Courts but in practical working the President in order to discharge his function of selecting the best suitable person to be the Chief Justice of India must choose such fair sprinkling of Supreme Court and High Court judges as would enable him to gather enough and relevant material which would help him in decision making process. Mr. Seervai submitted that this Court must avoid such construction of Article 124 which would enable the President to appoint Chief Justice of India without consultation with any judicial functionaries. That is certainly correct. But then he proceeded to suggest a construction where, by a constitutional convention, any necessity of consultation would be obviated and yet the executive power to be choosy and selective in appointment of Chief Justice of India can be controlled or thwarted. He said that a constitutional convention must be read that the senior-most amongst the puisne Judges of the Supreme Court should as a rule be appointed as Chief Justice of India except when he is physically unfit to shoulder the responsibilities. This constitutional convention, it was said, when read in Article 124(2) would obviate any necessity of consultation with any functionary in the judicial branch before making appointment of Chief Justice of India and yet would so circumscribe the power of the president as not to enable the executive to choose a person of its bend and thinking. In this very context it was pointed out that Article 126 permits the President to appoint even the junior-most judge of the Supreme Court to be an Acting Chief Justice of India and it was said that such an approach or such construction of Article 126 would be subversive of the independence of the judiciary. It was said that if the junior-most can be appointed Acting chief Justice of India, every Judge in order to curry favour would decide in favour of executive, And as far as Article 124 is concerned it was said that if the convention of seniority is not read in Article 124(2), every judge of the Supreme Court would be a possible candidate for the office of Chief Justice of India and on account of personal bias would be disqualified from being consulted. There is no warrant for such an extreme position and the reflection on the judges of the Supreme Court is equally unwarranted. On the construction as indicated above there will be positive limitation on the power of the President while making appointment of Chief Justice of India and it is not necessary to read any limitation on the power of the President under Article 126 while making appointment of a judge of the Supreme Court as Acting Chief Justice of India. But the observation is incidental to the submission and may be examined in an appropriate case. And the question of construction is kept open.

765. If it is held that an additional Judge before he is not appointed for a fresh term on the expiry of his initial term of appointment has a weightage in that he has a right to be considered before he is dropped and that this consideration must proceed along the line of consultation under Article 217 with three constitutional functionaries and if in the ultimate analysis he is not appointed without completing the process of consultation, is the decision open to Judicial review? Simultaneously, the question would be whether in the case of a first appointment from the Bar when the Chief Justice may proceed to cast his glance on the Bar for selecting the best person and initiate the proposal for appointment of a particular person which gets stuck up or dropped before completing the process of consultation, is such a decision subject to judicial review? Is the Court in a position to grant any relief? There is no doubt in my mind on one point that whenever a proposal for appointment is initiated by any of the constitutional functionaries before it can be killed at any stage the process of consultation must go through in its entirety. When I say that the process of consultation must go through in its entirety mean that the initiator of the proposal must forward the proposal to other constitutional functionaries according to the channel and the proposal must reach ultimately the President. It is not open to any of the constitutional functionaries entitled to be consulted to sit tight over the proposal without expressing opinion on the merits of the proposal and by sheer inaction kill the proposal. Viewed from this angle when a term of additional Judge is about to expire it must be deemed obligatory on the Chief Justice of the High Court in which the additional Judge is functioning to initiate the proposal very much in time for completing the process of consultation through various stages before the period of initial appointment expires. Maybe, that the Chief Justice is not willing to recommend him for his

own reasons. He may say so and forward his own view through the appropriate channel of communication for consultation. The Chief Justice of the High Court has no veto by sheer inaction to deal with the fate of an additional Judge. That is not the role assigned to him and he cannot arrogate the same to himself by own inaction. It may be that in case of a fresh appointment the Chief justice may not initiate the proposal at all because he may not be inclined to fill in the vacancy. But it is equally possible that in such a situation any other constitutional functionary entitled to be consulted in the matter of appointment of a Judge of the High Court can initiate the proposal and the proposal must move along and reach each constitutional functionary entitled to be consulted ultimately culminating in the proposal reaching the President with all the collected material in the process of consultation. So far there is no controversy. The question is, if in case of an additional Judge in whose favour there is a weightage and he is entitled to be considered as held above, a proposal is killed or an affirmative decision is reached not to appoint him without completing the process of consultation in its letter and spirit, would the additional Judge be entitled to question the validity of the decision and would the decision be subject to judicial review. The answer is in the affirmative. This right to question the decision and the power in the Court to grant relief whatever may be the form in which the relief may be moulded, flows directly from the right of the additional Judge to be considered for being appointed for a fresh term or as a permanent Judge, Right to be considered for a further term or as permanent Judge necessitates, full and effective consultation. Any drawback, defect or deficiency in the process of consultation may Invalidate the decision. Such invalid decision when questioned, the court may not be able to direct appointment, but the court can certainly give a direction to complete the process of consultation which may leads to a different result because the assumption is that high constitutional functionaries involved in the process of consultation will act bona fide and in the highest tradition of fair administration. If the decision is shown to be based on extraneous or irrelevant considerations or mala fide such executive decision is always open to judicial review. I need not affirm this well-established proposition by precedents. The case of a seniormost District Judge may be on par with the additional Judge. But the same cannot be said for a fresh appointee. He was not entitled to be appointed. He had no right to the post. When a person is being selected from the Bar, even if a proposal is initiated and is killed without completing the process of consultation there being no right in such person to the post or he is not entitled as a matter of right to be appointed, the decision not to appoint him will not be a subject-matter of judicial review, because it is not possible to grant him any relief.

766. Having examined the true meaning and effect of the relevant articles of the Constitution and keeping in view what is discussed hereinabove, it is now time to turn to the two petitions, one filed by the four Bombay Advocates brought before this Court in Transferred Case No. 22/81 and the second filed by Shri V.M. Tarkunde in the High Court of Delhi and brought before this Court in Transferred Case No. 20/81. These two cases specifically challenge the constitutional validity of the circular dated March 18, 1981, sent by the Law Minister. Government of India, to the Governor of Punjab and the Chief Ministers of all States in India, and secondly granting of short-term extension to three Judges of Delhi High Court, Sarvashri O.N. Vohra, S.N. Kumar and S.B. Wad, and subsequently not appointing Shri O.N. Vohra and Shri S.N. Kumar by not granting them a fresh tenure of High Court Judge-ship.

767. Law Minister appears to have stirred up the hornet's nest by the impugned circular dated March 18, 1981. This circular in its preamble recites that repeated suggestions have been made to the Government by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one third of the Judges of a High Court should as far as possible be from outside the State in which the High Court is situated. With a view to taking first step towards this goal the circular was issued. The circular desired the Chief. Minister of each State and the Governor of Punjab to obtain from all the additional Judges working in the High Court of the State their consent to be appointed as permanent Judges in any other High Court in the country. An opportunity was given to such Judges to name three preferences in which each of them would like to be appointed as permanent Judge, A further request was that whenever in future a proposal is made for initial appointment as a High Court Judge it must be accompanied by the consent of the person so recommended to be appointed to any other High Court in the country coupled with the preference limited to three. It was made abundantly clear that option to give preference does not imply on the part of the Government commitment either to appoint the person concerned or to appoint him necessarily at anyone of the three preferences. A copy of the letter was also sent to the Chief Justice of each High Court. Constitutional validity of this circular is questioned in the petition filed by Shri Iqbal M. Chagla and others. The submission is that with a view to circumventing the ratio in the majority judgment in Mr. Sheth's case MANU/SC/0065/1977 this is a covert attempt at transferring Judges under coerced consent. The web of the argument was woven around the alleged covert attempt by the circular to transfer each Additional Judge to a High Court other than the High Court in which he is functioning. The circular was read and re-read before the Court, Having examined it with microscopic meticulousness I find it impossible to read any overt or covert attempt at transferring Judges from one High Court to other High Court by this Circular. There is not even a whisper of transfer in the circular, But in this connection our attention was invited to the statement made by Law Minister in connection with calling attention motion on the impugned circular in Lok Sabha on April 16. 1981. In course of the discussion Law Minister appears to have stated that if there is a complaint against an additional Judge, 'it has to be examined on merit and a decision taken. The decision could be either to drop a person based on evidence or to see if he could be transferred. Lok Sabha Debates

Fifth Series, Vol. XVI, No. 42. Column 271: At a later stage it would be made abundantly clear that transfer power conferred by Article 222 cannot be exercised by the executive to punish a Judge because of complaints against him which may on enquiry he found to be of substance. But that is another aspect, Circular is not devised as a weapon of mass transfer outside the Constitution. But use of word 'transfer' in the discussion cannot be read turn out of context. A little later at column 273 Law Minister states that Chief Justice of India inquired whether it was the intention of the Government to transfer each and every Judge and this showed that Chief Justice of India was labouring under a mistaken impression that circular was devised for mass transfer but Law Minister explained to him that it is not a case of transfer at all but it is a case of fresh appointment and it is not the intention 'to appoint every Additional Judge outside.' The later part of the statement has raised another crop of controversy to be presently dealt with but there is no whisper of transfer in the circular. As has been pointed out earlier, an additional Judge has a maximum tenure of two years. At the end of two years he gets a fresh appointment either as a permanent Judge or an additional Judge for a further period of two years. The consent for fresh appointment is a must. It is open to an additional Judge whose tenure comes to an end to decline the fresh appointment at least in the High Courts where undertaking is not taken to accept permanent appointment, if offered. If he is, therefore, to be appointed again, necessarily it can be done with his consent. The consent to be obtained is of additional Judge. Additional Judge is now being told that, it is possible that he may be appointed in some other High Court, and that therefore, while giving consent for being appointed for a fresh term or as permanent Judge he is informed that he may be appointed in some other High Court and that he may give his consent with the knowledge of it. The fresh appointment is not a transfer. In fact, in the course of this judgment it will be succinctly thrashed out that a Judge who is transferred cannot be said to be appointed afresh to the High Court to which he is transferred, Once it is held that the circular was not a covert way of transferring a Judge because transfer was not even on the distant horizon, the whole edifice of argument built over the decision in Mr. Sheth's case tumbles down. To be specific, a fresh appointment cannot be bracketed with a transfer more so when the submission that transfer implies fresh appointment has been rejected in the past and is being rejected by this judgment. Consent is sought from an additional Judge whose tenure is about to expire and to whom a fresh tenure is to be offered. Ipso facto it will be a fresh appointment. Initial tenure having come to a close, he is offered a fresh appointment, in another High Court. It being a fresh appointment, it is being done with his consent. In case of such a fresh appointment one cannot say that the additional Judge is transferred on the expiry of 1982 S.C./31 II G-23 his first tenure, to another High Court where he is appointed afresh with a fresh tenure. The concept of transfer is foreign to the situation. Once the alleged noxious feature of transfer being in the circular is taken out, there is nothing in the circular which would be in contravention of any particular constitutional provision.

768. It was also stated that the expression 'obtain' in the circular has the element of coercion and a consent ceases to be consent if it is obtained under coercion. It was said that consent and coercion go ill together because forced assent would not be consent in the eye of law. It was said that the threat implicit in the circular becomes evident because the Chief Minister, the strong arm of the executive is being asked to obtain consent. If every little thing is looked upon with suspicion and as an attack on the independence of judiciary, it becomes absolutely misleading. Law Minister, if he writes directly to the Chief Justice or the Judge concerned, propriety of the action may be open to question. Chandrachud. J. has warned in Mr. Sheth's case MANU/SC/0065/1977 that the executive cannot and ought not to establish rapport with Judges (p. 456 CD) (of SCR): (at p. 2349 of AIR). Taking this direction in its letter and spirit, the Law Minister wrote to the Chief Ministers. The Chief Minister in turn was bound to approach the Chief Justice. This is also known to be a proper communication channel with Judges of High Court. In this context the expression 'obtain' would only mean request the Judge to give consent if he so desires. If he gives the consent, well and good, and if does not give, no evil consequences are likely to ensue. I am not impressed by the submission of the learned Attorney-General that one who gives consent may have some advantage over the one who does not. I do not see any remote advantage and if any such advantage is given and if charge of victimisation is made out by the Judge not giving consent, the arm of judicial review is strong enough to rectify the executive error;

769. it was, however, said that what is not stated in the circular is more objectionable and of devastating effect than what is stated. It was urged that omission to mention in the circular that one who would not give consent would not suffer any evil consequences or would not be placed at a comparative disadvantage to one who gives consent, and this would precisely convey a threat to the judge either to give consent or suffer consequences because the negative assurance is not offered. That is hardly the correct way of reading the circular. Let it be noted that no positive advantage was to accrue to one who gives his consent, If any positive advantage was to be given to one who gives consent and if it had been spelt out, there would have been some force in this submission but mere omission to mention any evil consequences flowing from not giving consent would not necessarily imply that such would be the case. Similarly, the statement in the circular that giving an opportunity to indicate preferences would not imply that the Government would be bound to give the additional Judge an appointment or he would be at least given a station of his choice out of the three preferences indicated by him would mean that while unilaterally obtaining consent on one hand, there was no quid pro quo that the appointment would be given. This is clearly reading the circular with coloured glasses and the submission is unwarranted by the language used in it. If an option to indicate preferences is given and option is exercised, undoubtedly that by itself cannot obligate the Government to appoint an additional judge for a fresh

term or a new entrant either as additional or a permanent judge, because various factors will have to be taken into consideration over and above his consent and preferences in making the appointment. Consent is asked for at a stage prior to the decision to appoint is taken. Therefore, this caution was absolutely necessary and has been rightly stated that it implies any promise to do a certain thing. It was then urged that if every additional judge was not to be posted outside the State, the executive will have an opportunity to pick and choose, favourites protected, dis favourite pushed out and this would strike a heavy or a near fatal blow at the independence of judiciary. Apprehension voiced is utterly unwarranted because in every appointment of an additional judge to permanent judge in any High Court the chief Justice of India is to be consulted and his views would always receive the weight they enjoy. Therefore, once Chief Justice of India gives his considered opinion with respect to every proposal, the element of picking and choosing is effectively curbed or controlled. With these observations, I broadly agree with the view taken by Bhagwati J. in his judgment that there is nothing in the circular which would render it constitutionally invalid.

770. Turning now to the petition filed by Shri V.M. Tarkunde in which Shri S.N. Kumar has been joined as respondent 5 and who has participated in the proceedings questioning the validity of the short term extension granted to him and his subsequent non-appointment. Shri Kumar was appointed an additional judge of Delhi High Court for a period of two years by a Presidential Notification dated March 6, 1979. His term was to expire on March 6, 1981. The Chief Justice of Delhi High Court by his letter dated February 19, 1981, addressed to the Law Minister, did not recommend an extension for Shri Kumar. While stating that the pendency in the Court still justified the appointment of additional judges, he considered it his painful duty not to recommend Shri Kumar for three reasons: (i) that there have been serious complaints against Shri Kumar both orally and in writing and on examination he was of the opinion that the 'complaints were not without basis'; (ii) responsible members of the Bar and some of his colleagues whose names he was reluctant to mention have also complained about Shri Kumar; (iii) that Shri Kumar has also not been very helpful in disposing of cases. He said that he has no investigating machinery to conclusively find out whether the complaints were genuine or not but all the same the complaints have been persistent. A copy of this letter was sent to Chief Justice of India. Response of the Chief Justice of India as evident from his note dated March 3. 1981, and his letter dated March 14, 1981, was that he would like to look carefully into the charges against Shri Kumar because in his view the letter of Chief Justice of Delhi High Court dated February 19, 1981, 'was too vague to accept that Shri Kumar lacks integrity'. Consistent with his desire to look carefully into the charges and to gain time for the came he recommended that the term of Shri O.N. Vohra, Shri S.N. Kumar and Shri S.B. Wad be extended for six months. This is how the ball was set rolling for short term extension. The duration for the which extension was to be given and the reasons for such short term extension are both contrary to the mandate of Article 224 as has been pointed out earlier. As a matter of fact, taking cue from the recommendation of the Chief Justice of India, the Law Minister improved upon it by granting extension of three months which would expire on June 6, 1981. To continue with the Chronology, by the letter dated March 19, 1981, the Law Minister conveyed to the Chief Justice of Delhi High Court the reaction of the Chief Justice of India to the observations made by the Chief Justice for not recommending extension of Shri Kumar especially the charge of vagueness and requested the Chief Justice to offer his comments on the question of continuance Or otherwise of Shri Kumar in the light of the view expressed by the Chief Justice of India. On March 28, 1981, the Chief Justice of Delhi High Court replied to the letter dated March 19, 1981, of the Law Minister. In this letter the Chief Justice of Delhi High Court informed the Law Minister that he had since received a letter from the Chief Justice of India asking him to furnish him with "details and concrete facts in regard to the allegations against Justice Kumar". This has reference to the letter of Chief Justice of India dated March 14, 1981, to Chief Justice of Delhi High Court. He proceeds further to state that 'he has since had an opportunity to discuss the entire matter in detail with the Chief Justice of India'. This sentence was relied upon by the learned Solicitor-General to submit that the Court should note that prior to March 28, 1981, the Chief Justice of Delhi High Court met the Chief Justice of India and discussed the entire matter in detail with the Chief Justice of India with reference to the recitals in his letter dated February 19, 1981. He said that read in juxtaposition, the only permissible inference is that at this meeting there was full and elaborate discussion with regard to what Chief Justice of Delhi High Court had written in his letter dated February 19, 1981, by which he had declined to recommend the extension of the term of Shri Kumar. It was, therefore, said that the three reasons which prompted the Chief Justice of Delhi High Court not to recommend Shri Kumar must have been thoroughly discussed and thrashed out because the expression 'entire matter in detail' would leave no room for doubt that nothing was withheld, nothing was assumed and every aspect was gone into The Chief Justice of Delhi High Court proceeds further to state that after this discussion which appears to have taken place on March 26, 1981, he addressed a letter dated March 28, 1981, to the Chief Justice of India, a copy of which was annexed to the letter dated March 28, 1981, to the Law Minister. Thus on March 28, 1981, the Chief Justice of Delhi High Court wrote two letters, one to the Law Minister and another to Chief Justice of India and a copy of the letter to Chief Justice of India was annexed to the letter addressed to the Law Minister. Reverting to the letter dated March 28, 1981. written by the Chief Justice of Delhi High Court to the Chief Justice of India, it may be noted that in this letter the Chief Justice of Delhi High Court in terms says that since receiving the letter dated March 14. 1981, with regard to Mr. Justice Kumar, he had also had an opportunity to discuss this 'delicate matter' with the Chief Justice of India. He refers to the three points made by him in his letter dated February 19, 1981, which means that at the meeting on March 26, 1981, the very three points referred to by the Chief Justice of Delhi High Court in his letter dated February 19, 1981. came up for discussion and the discussion was in details and the matter is styled as delicate because it involved the painful task of talking about the integrity of a

colleague. But there is a further averment in the letter which leaves no room for doubt that during this meeting integrity and general conduct of Shri Kumar was discussed between them. With regard to the other point about Shri Kumar not being helpful in the work of the High Court he appears to have enclosed a statement of disposals of Shri Kumar. Even in this letter it is conceded that the Chief Justice of Delhi High Court has no investigating agency of conclusively find out whether the complaints are genuine or not. Then he proceeds to make a point that in such a delicate matter as reputation of a colleague working in the High Court, 'there would be some who would support the allegations and there will be some who would refute them', and, therefore, an affirmative decision of a conclusive nature is by its very nature not possible. The Chief Justice of Delhi High Court also noticed the divergence of opinion that may be expressed by different people. One thing that emerges clearly from this correspondence is that question of character and integrity of Shri Kumar came up for detailed discussion between the Chief Justice of Delhi High Court and the Chief Justice of India at their meeting on March 26, 1981. I propose to ignore any other complaint against Shri Kumar or inadequacy of his disposals because these aspects are not relied upon for non-appointment of Shri Kumar. Ultimately, the decision not to appoint him was founded upon his reputation about integrity. On April 15, 1981, the Law Minister wrote to Chief Justice of Delhi High Court requesting him that it may be that he may not have investigating machinery to conclusively establish the truth of the complaints against Shri Kumar, nevertheless he must have had some material which provided the basis on which he concluded that Shri Kumar's reputation for integrity was not above board and recommended that he may not be continued, and it would be necessary for the Government to have the material and his comments. There is some reference to a complaint by Shri Sabir Hussain against Shri Kumar in this letter but I propose to ignore it because it is hardly relevant save and except saying that it was relied upon by the learned Solicitor-General to urge that the Chief Justice of Delhi High Court had acted most objectively and in a wholly unbiased manner. That may come later on.

771. In the meantime on April 22, 1981, a writ petition was filed by Shri V.M. Tarkunde in the Delhi High Court questioning the validity of the Circular of the Law Minister dated March 18, 1981, and in this writ petition, inter alia, relief was sought in the form of a direction to convert 12 posts of additional judges in Delhi High Court into permanent judges and to appoint Shri N.N. Goswami, Shri Sultan Singh and Shri O.N. Vohra as permanent judges and to appoint Shri S.N. Kumar and Shri S.B. Wad, additional judges of Delhi High Court for a full term of two years. By an order made by this Court on May 1, 1981, this case stood transferred to this Court, when the matter was pending before this Court an order was made on May 8, 1981, directing the Union of India to decide not less than 10 days before June 6, 1981, whether any of the three additional judges which included Shri S.N. Kumar should be appointed for a further term as additional judge or they should be appointed as permanent judges or otherwise.

772. In the meantime on May 7, 1981, in response to the letter dated April 15, 1981, of the Law Minister, the Chief Justice of Delhi High Court has written a long letter and which has been the subject-matter of intensely ferocious controversy both as to the significance of its contents, propriety of the request contained in the letter not to show the same to the Chief Justice of India and the violation of the constitutional mandate of consultation as prescribed by Article 217, in the letter not being shown to the Chief Justice of India enabling him to offer his comments and taking a decision not to appoint Shri Kumar. The letter dated May 7, 1981, is a long epistle. At the top it is mentioned "Secret (for personal attention only)". The Chief Justice of Delhi High Court refers to his meeting with the Chief Justice of India on March 26, 1981, and then proceeds to state that as is desired by him, he wrote his letter dated March 28, 1981, a copy of which was forwarded to the Law Minister. The expression 'as desired by him' has been a subject-matter of rival contentions. The learned Solicitor-General urged that this statement clearly conveys that the Chief Justice of India himself desired after discussion, at the meeting on March 26, 1981, that the Chief Justice of Delhi High Court should not refer to the details of discussion and, therefore, wrote his letter dated March 28, 1981. to the Law Minister in abstruse terms. The specific suggestion is that even in the letter dated March 28, 1981, the Chief Justice of Delhi High Court did not furnish details to the Law Minister as it was so desired by the Chief Justice of India. Then be proceeds to state that somewhere early in May 1980. one of his colleagues met him and said that he was rather perturbed about information with him to the effect that if a substantial amount was paid to Shri Kumar, suits brought by a particular party against an insurance company would be decided in favour of the party. The Chief Justice states that he did not pay much attention to the earlier reports but when this was brought to his notice and he not being the Chief Justice at that time, he thought that after summer vacation to save Shri Kumar from any embarrassment, he should be put on a jurisdiction other than original jurisdiction and accordingly when he became the Acting Chief Justice and constituted the Benches for the second half of 1980, Shri Kumar was assigned to a Division Bench on the appellate side. He then proceeds to state that even though Shri Kumar was assigned the work of the Division Bench, he carried with him amongst others, three suits Nos. 1409 of 1979, 1417 of 1978 and 1408 of 1979 filed by Jain Sudh Vanaspati Ltd. and Jain Export Pvt. Ltd. against the New India Assurance Co. Ltd. He further states that in August 1980 the same colleague talked to him and another colleague joined saying that doubts were being expressed about the integrity of Shri Kumar vis-a-vis the aforesaid cases and some others. As the Chief Justice was an Acting Chief Justice, he did not want to take any precipitate action but he, however, made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations. This impelled the Chief Justice to look into the allegations more carefully when it transpired that it was not only the three suits mentioned hereinabove but other single Bench matters were also

retained by Shri Kumar on his board despite being put in the Division Bench. He points out there was a long list of such suits carried by Shri Kumar with him and that some of the parties in the suits were rich and influential parties including some former Princes. He proceeds to state that in January, 1981, he looked into the matter a little more deeply and made further inquiries and even though some lawyers were noncommittal, others however asserted with some force that Shri Kumar's reputation was not above beard. This led to his discussing the matter with some of his colleagues besides the two who had earlier spoken to him, and they also said that unconfirmed reports have been circulating in the Bar which were not very complimentary to Shri Kumar. This made the Chief Justice to conclude that reputation for integrity of Shri Kumar was not what should be for a Judge of the High Court'. He then proceeds to refer to the complaint of Shri Sabir Hussain against Shri Kumar in which he exonerates Shri Kumar. He deals with the quantum of work disposed of by Shri Kumar, an aspect which is not relevant for the present purpose. There is some reference to the conduct of Shri Kumar in his work as a judge in the Court. He concludes the letter by saying that he has already expressed his view that Shri Kumar should not be continued but it is for the Government to decide whether it would like Shri Kumar to continue as a Judge of the Delhi High Court. Undoubtedly, this letter has not been brought to the notice of the Chief Justice of India.

773. Thereafter the Law Minister wrote to the Chief Justice of India on May 21. 1981, enquiring from him whether he had completed his inquiry in regard to the complaints regarding Shri Kumar's integrity and general conduct which the Chief Justice of Delhi High Court had discussed with him as mentioned by him in his letter dated March 28, 1981. He requested the Chief Justice of India to forward the advice in regard to the continuance or otherwise of Shri Kumar and Shri S.B. Wad. To this letter the Chief Justice of India replied by his letter dated May 22, 1981, in which after referring to the three points made by the Chief Justice of Delhi High Court in his first letter dated February 19, 1981, for not recommending continuance of Shri S.N. Kumar, he proceeded to state that the Chief Justice of Delhi High Court met him on March 26, 1981, and amongst others, he stated that he doubted the integrity of Shri Kumar because even though his assignment was changed he still continued to hear part-heard cases on the original side. The Chief Justice of India then proceeds to state that he has made the most careful and extensive enquiries in regard to both these matters and he was satisfied that there was no substance in any one of them. He proceeded to state that he made enquiries not only from the members of the Bar but from the sitting Judges of the Delhi High Court which allowed that it is a common practice in the Delhi High Court that even after the allocation of a judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. In his view, therefore, Shri Kumar did nothing out of the way or unusual in taking up part-heard cases after the allocation of his work was changed. He specifically disagreed with the view of the Chief Justice of Delhi High Court for non-continuance of Shri Kumar and further proceeded to assert that not one member of the Bar or of the Bench doubted the integrity of Shri Kumar, and on the other hand several of them stated that he is a man of unquestionable integrity. He concluded the letter by saying that Shri Kumar's term should be extended by a further period of three months. I have not been able to appreciate the last line of this letter as to why a further three months' extension is recommended. If Shri Kumar's integrity in the opinion of the Chief Justice of India was beyond reproach, the fact whether he was slow in the disposal of work or other minor considerations should not have come in the way of the Chief Justice of India recommending a full term extension. It appears, however, that this three months' extension was recommended because some reports of the intelligence branch in respect of Shri Kumar were also forwarded to the Chief Justice of India and probably the Chief Justice of India was to respond to the same. That the Chief Justice of India did by his letter dated May 29, 1981, and after having expressed his opinion with regard to the details of the report -- not disclosed to the Court --the Chief Justice of India recommended a full term extension for Shri Kumar.

774. The sole contention raised by Shri R.K. Garg in this behalf is that the consultation envisaged by Article 224 read with Article 217(1) must be full and meaningful and if that is the criterion, failure of the Law Minister, may be on the request of Chief Justice of Delhi High Court, to disclose the letter dated May 7, 1981 of the Chief Justice of Delhi High court or its contents to the Chief Justice of India would unmistakably show that the process of consultation was not complete and, therefore, the consequent decision not to appoint Shri Kumar by not giving him any extension beyond June 6, 1981, is violative of the constitutional mandate and, therefore, invalid. Keeping aside for the time being the propriety of the request made by the Chief Justice of Delhi High Court that his letter dated May 7, 1981, should not be shown to the Chief Justice of India, what is required to be determined is whether the contents of the letter and more particularly the reasons and materials which prompted the Chief Justice of Delhi High Court to come to the conclusion that the reputation for integrity of Shri Kumar was not what should be for a Judge of the High Court, were brought to the notice of the Chief Justice of India at any point of time and whether he had a chance to think and deliberate over it. And if the answer is in the affirmative, mere failure to show the letter dated May 7, 1981, would not invalidate the decision. Without going into the further details in this behalf it clearly transpires that at the meeting between the Chief Justice of India and the Chief Justice of Delhi High Court on March 26, 1981, there was a specific discussion of all the three points, including one of lack of integrity of Shri Kumar. Once the question about the integrity of Shri Kumar came up for discussion between these two high constitutional functionaries with a specific reference to the view of the Chief Justice of Delhi High Court not to recommend Shri Kumar for further continuance, the conclusion is inescapable that all aspects bearing upon the integrity of Shri Kumar must have been discussed between the two high constitutional

functionaries. That is why the Chief Justice of Delhi High Court says in his letter dated March 28. 1981, that he had discussed the entire matter in detail with the Chief Justice of India. This is further borne out by what the Chief Justice of India writes in his letter dated May 22, 1981, that at the meeting between them on March 26. 1981, the reasons which prompted the Chief Justice of Delhi High Court not to recommend continuance of Shri Kumar were discussed and this discussion included the complaint of Chief Justice of Delhi High Court about Shri Kumar's integrity. There is a specific reference to Shri Kumar keeping to himself the part-heard cases after his assignment was changed, in the letter of the Chief Justice of India. This clearly indicates that there was threadbear discussion on this point and the discussion would include the material which the Chief Justice of Delhi High Court had and which he would necessarily refer to, to justify the view taken by him. There is another internal evidence to bear out this conclusion, Shri Kumar himself filed an affidavit on July 17, 1981, much before the hearing commenced in this case and much before disclosure of the relevant correspondence was ordered by this Court. In this affidavit he clearly refers to his retaining some of the part-heard cases after his assignment was changed and this, list includes the three suits referred to in the letter of the Chief Justice of Delhi High Court dated May 7 1981. What has prompted this explanation about the aforementioned three suits by Shri Kumar much before the disclosure was directed and he had a chance to look into the correspondence would be self-evident. The only permissible inference is that in his meeting with the Chief Justice of India which he refers to in para 18 of his affidavit he must have been informed by the Chief Justice of India that with reference to his handling of the aforementioned three suits and his tugging on to it after his assignment was changed gave rise to the belief that it was being done with some ulterior motives and the Chief Justice of India could have only gathered this information from the Chief Justice of Delhi High Court at their meeting on March 26, 1981. This is further internal evidence to buttress the conclusion that everything including all details set out in the letter dated May 7, 1981, concerning Shri Kumar's integrity was the subject-matter of discussion between the Chief justice of Delhi High Court and Chief Justice of India at their meeting on March 28, 1981. If that be so, the conclusion is inescapable that the consultation is complete. Consultation need not take any particular form. The essence of consultation is deliberation. And if the two high constitutional functionaries met for the avowed object of discussing continuance of Shri Kumar with specific reference to the doubt about his integrity, it would be reasonable to hold that all aspects were considered, gone into and thrashed out. In this view of the matter non-showing of the letter dated May 7, 1981, to Chief Justice of India would not detract from the fullness of consultation as required by Article 217. For these reasons and some more discussed by Bhagwati, J. with whom I agree, it must be held that, there was full and effective consultation on all relevant points including those set out in the letters dated May 7, 1981, and the submission must accordingly be rejected.

775. Before I conclude, I would like to record by disapproval of the request made by the Chief Justice of Delhi High Court to the Law Minister for not showing the letter dated May 7, 1981, to the Chief Justice of India. If independence of judiciary is likely to be threatened it may or may not emanate from the executive or from some outside agency but it would be corroded by the action of the members of the judiciary itself, by internal corrosion, and if proof for this were needed, it is demonstratively supplied by a very improper request made by the Chief Justice of Delhi High Court to the Law Minister not to show the letter dated May 7, 1981, to the Chief Justice of India. I am unable to conceive a situation where in the correspondence, assertions, statements, expression of doubts concerning a high judicial functionary like a judge of the High Court can be made by the Chief Justice of a High Court which he is not willing to show to the Chief Justice of India. I am not implying any hierarchy. I put them on par and accord status and dignity to the high offices occupied by both. They may differ. Healthy difference is the life blood of honest opinion. But it is unthinkable albeit wholly improper for a Chief Justice of a High Court to write to the Law Minister something which he is not prepared to show to the Chief Justice of India. This conduct, if allowed to pass uncensured, would give rise to such fissiparous tendencies which would wholly undermine the independence of judiciary.

776. I also feel that the way in which the Chief Justice of Delhi High Court has dealt with the case of Shri O.N. Vohra leaves much to be desired. The Chief Justice of Delhi High Court seems to be completely unaware of his duty and obligation while recommending or refusing to recommend a colleague for extension. He holds no position superior to a High Court Judge functioning in his Court. He is only first amongst equals enjoying the status not on merits but on accident of seniority. He is not supposed to sit in judgment over the decisions of his colleagues. Where does he get this authority passes comprehension ? Mr. O.N. Vohra took a dignified stand and did not participate in this squabble, undignified as the whole episode appears to be. Had he come and participated, may be the Chief justice of Delhi High Court would have found his position so untenable that there would have emanated a strong censure about the method and manner of his dealing with his colleagues. These may appear to be strong words but they still fail to express my feelings adequately. I say no more.

777. There was one more submission which may be noticed in passing and I refer it only for future purpose. If a Chief Justice of a High Court gats information reflecting upon the character and integrity of a colleague or complaints about his behaviour in the Court, fair play in action demands that before relying upon it and taking a step of far-reaching consequence concerning the career and dignity of the colleague, he should in confidence talk to the colleague, in these days v/hen relations between the Bench and the Bar have sunk abysmally low, that rumours, canards, character

assassination flourish in the grapevine, if credence is to be given to such rumours because about integrity usually fool proof facts are not available, but reputation for integrity being relevant, apart from any principle of natural justice which does not surface in this discussion, fair play in action demands that they should first be brought to the notice of the colleague not for his explanation but even for future rectitude. If the whole thing stops the decisive action can be deferred. If it continues to floorish the Chief Justice of a High Court in discharge of his constitutional duty of recommending or not recommending continuance of an additional judge may proceed to act as he considers befitting the high dignity of the office he holds; but to make assertion in secret and confidential letters without giving the slightest inclination to the colleague and then to shrink back to the extent of not permitting the same to be shown to the paterfamilias in the judiciary scales the height of impropriety. Let the past be buried and bygones be bygones but in future, a conduct and approach commensurate with the high office held by the Chief Justice of High Court must inform his action. Fair play in action is the watchword of judiciary and if it is extended to all others, a colleague in the High Court should not be at a comparative disadvantage.

778. I would, therefore, like to recall what happened in the course of hearing of these matters. At one stage the Bench unanimously suggested to the learned Attorney-General that even accepting his contention that the consultation was full and meaningful and there was no defect or deficiency in it a person who has worked as a Judge of a High Court for two years and three months should not be made to leave the institution with a wrench that a raw deal has been done to him and, therefore, Government of India may show the letter dated May 7, 1981. to the Chief Justice of India, request him to give his commen's on the same and after considering the same in the light of the comments of the Chief Justice of Delhi High Court may mould the final decision concerning Shri Kumar. The learned Attorney-General replied that the Government of India has no objection to showing the letter dated May 7. 1981, to the Chief Justice of India. That is poor solace because the letter since disclosure had become public property, the media having published the same. But the learned Attorney General informed us that the Government of India was not prepared to reconsider the decision, Apart from the judiciary and the public, Government of India must be equally sensitive and considerate about maintaining both the dignity and independence of judiciary. It would add to the stature of the Government of India and reject unsubstantiated criticism that unwarranted attacks are made On the judiciary by the executive if the letter dated 7th May 1081 is shown to the Chief Justice of India and his comments are invited and then a decision is taken whether or not to reappoint Shri Kumar as an additional Judge.

779. While holding that there was full, effective and meaningful consultation, and on this account the petitions in this group are liable to be dismissed, I suggest that the Government of India may show the letter dated May 7, 1981, to the Chief Justice of India, request him to give comments and after receiving the comments, decide whether Shri Kumar should or should not be appointed as an additional judge of Delhi High Court. This is not a direction but merely a suggestion for the acceptance of the Government if thought fit.

780. In the second group of cases the first is writ petition No. 274/81 filed by an Advocate practicing in the Supreme Court, Miss Lily Thomas, impleading therein the Union of India represented by the Secretary, Ministry of Law as the sole respondent and in which the only prayer in the last paragraph is that this Court may be pleased to give true interpretation of Article 222 of the Constitution of India. In the body of the petition it was averred that the President of India in exercise of the power conferred by Article 222(1) of the Constitution has made an order transferring Mr. Justice M.M. Ismail, the then Chief Justice of the Madras High Court as Chief Justice, Kerala High Court. The question posed was whether the powers to transfer a Judge of a High Court conferred on the President under Article 222 can be used to defeat the right of puisne judges of the High Court to be considered for the post of Chief Justice of the High Court wherein a vacancy may have occurred. It was averred that on the elevation of Mr. V. Balakrishna Eradi, the then Chief Justice of Kerala High Court to the Bench of the Supreme Court of India, the office of Chief Justice. Kerala High Court has been rendered vacant and other considerations being equal, the next seniormost puisne judge who should legitimately occupy the same office is Mr. Justice Subramania Poti or any other judge of the Kerala High Court. It was contended that the expression 'judge' in Article 222 does not comprehend Chief Justice and, therefore, the transfer of Chief Justice M.M. Ismail as Chief Justice of Kerala High Court is ex facie illegal. It was also contended that this power to transfer was to be exercised in public interest and the power has not been conferred for the purpose of providing the executive with a weapon to punish a judge who does not toe its line and that exercise of such power would be subversive of the independence - of judiciary. An application for adding parties was made in which 9 other persons were sought to be impleaded as respondents, one of them being Shri K. B.N. Singh, Chief Justice of Patna High Court who was under an order of transfer as Chief Justice Madras High Court. There was also a prayer for urging additional grounds and the whole of the prayer clause was amended and by the amended clause a declaration was sought that Article 222 of the Constitution is illegal and unconstitutional. A further declaration was sought that the transfer of Chief Justice M.M. Ismail and Chief Justice K. B.N. Singh as Chief Justice of Madras and Kerala respectively being not in public interest and also because Article 222 does not confer any power to transfer a Chief Justice, is unconstitutional. By an order made by this Court on February 4, 1981, from amongst those sought to be arrayed as respondents, the prayer to join Mr. M.M. Ismail and Mr. K.B. N. Singh alone was granted and in respect of

others the application was rejected. Rule was issued after recording a statement that the petitioner will not press ground No. 5 challenging the constitutional validity of Article 222 of the Constitution.

781. One Shri D.N. Pandey, Advocate, filed C. W. J. C. No. 2224/81 in the High Court of Patna impleading the Union of India, Chief Justice of India, Shri K.B. N. Singh, Chief Justice of Patna High Court, Registrar of Patna High Court as respondents, praying for an appropriate writ or order directing the respondents to forbear from giving effect to the order of the President dated January 19. 1981, transferring Shri K. B.N. Singh, Chief Justice of Patna High Court as Chief Justice, Madras High Court with effect from the date he assumed charge of his office. By an order made by a Bench of the Patna High Court, Shri Thakur Rampati Sinha, President, Bihar State Socialist Lawyers Association, was permitted to be added as petitioner No. 2. Various contentions have been raised in this petition and they will be dealt with at the (sic) place. By an order made by this Court the petition stood transfer and to this Court and numbered as Transfered Case No. 24/81. After the petitioner was transferred to this Court, shri K. B.N. Singh applied for transposing him from the array of respondents as petitioner and the same having been granted, Shri K.B. N. Singh is now petitioner No. 3. in this case and he is (sic) by counsel Dr. L.M. Singhvi. In this petition Shri K.B. N. Singh has filed a short affidavit on September 7, 1981, followed by a detailed affidavit on September 16, 1981. Shri K.C. Kankan, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs, filed the counter-affidavit on September 24, 1981. Shri K.B. N. Singh filed a rejoinder affidavit on September 28, 1981. The Chief justice of India filed his counter-affidavit on September 29, 1981, to which a reminder affidavit was filed by Shri K.B. N. Singh on October 16, 1981. A rejoinder affidavit was also filed by Thakur Rampati Sinha on behalf of petitioners 1 and 2 on October 16. 1981.

782. One P. Subramaniam filed Writ Petition No. 553 of 1981 in the Madras High Court challenging the constitutional validity of Notification dated January 10, 1381, by which Shri M.M. Ismail, Chief Justice, Madras High Court Was transferred as Chief Justice. Kerala High Court. In this petition Union of India represented by the Secretary, Ministry of Law, Justice and Company Affairs was impleaded as the sole respondent. Union of India moved this Court under Article 139A(1) requesting the Court to withdraw to itself the aforementioned Writ Petition pending in the Madras High Court on the ground that petitions raising identical questions have already been transferred to this Court. This Court having granted the request, the writ petition stood transferred to this Court and numbered as Transferred Case No. 6/81.

783. One A. Rajappa. an Advocate of Madras, filed Writ petition No. 390/81 in the Madras High Court questioning the constitutional validity of the Notification transferring 'Chief justice Ismail to Kerala High Gout, inter alia, contending that Article 222 does not comprehend power to transfer a Chief Justice. In this petition he impleaded the Union of India, Registrar of the Madras High Court, Registrar of the Kerala High Court and Registrar of the Patna High Court as respondents. An application to transfer this petition to this Court under Article 139A was moved. This Court accepted the transfer application by its order dated February 3, 1981, and accordingly the case stood transferred to this Court and numbered as transferred Case No. 2/81.

784. One Ripudaman Prasad Sinha had filed C. W. J. C. No. 312/31 in the Patna High Court for a writ of quo warranto seeking information as to how after the Notification dated January 19, 1981, transferring Shri K.B. N. Singh, Chief Justice, Patna High Court as Chief Justice. Madras High Court, he continued to occupy the office of Chief Justice, Patna High Court. This petition came up for admission before a Bench of the Patna High Court. At the oral hearing a question was posed to the petitioner why he had not produced the presidential notification and on this short ground the writ petition was rejected. An oral prayer for a certificate to appeal to the Supreme Court was also rejected. Hence he filed Special Leave petition (Civil) No. 1509 of 1981. He has impleaded Shri K.B. N. Singh, Union of India and the Chief Justice of India as respondents.

785. Mr. K.C. Kankan filed his counter affidavit in Transferred Case No. 24/ 81, inter alia, contending that the fact that the mother of Shri K.B. N. Singh is aged about 85 years and is ailing and bed-ridden for last two years was present to the mind of the Chief Justice of India. The Chief Justice of India can certainly be presumed to have knowledge not only about this fact but the other fact that Tamil language is freely used in Tamil Nadu and Shri K.B. N. Singh is not conversant with it. It is stated that Shri K.B. N. Singh had an effective opportunity to represent his case before the Chief Justice of India. Then it is further averred that chief Justice of India had visited Patna as mentioned by Shri K.B. N. Singh himself. It is further stated that the Chief Justice of India while making recommendations for transfers pointed out that he had met several lawyers and judges of the concerned High Courts and expressed the view that of the basis of data which he collected and which he bad considered with greatest objectivity. Shri K.B. N. Singh should be transferred, it is not disputed that for misbehaviour as adumbrated in Article 124, transfer is not the. remedy and that transfer can only be ordered in public interest without regard to any complaint of misbehaviour. Denying the averment of Shri K.B. N. Singh that transfer was based on considerations which are not genuine and germane, it was stated that Shri Singh has given no basis for his averment that the transfer order is likely to have been made because either the Hon'ble Chief Justice of India or the President of India or both of them have been misled by interested parties. It was

asserted that considerations relevant to transfer were taken into account by the Chief Justice of India as also by the President of India. The request of Shri K.B. N. Singh for disclosure of documents bearing upon his transfer was resisted by Shri T. N. Chaturvedi Secretary Department of Justice. Ministry of Law, Justice and Company Affairs, claiming privilege against disclosure of documents.

786. Transferred Case No. 24/81 arising from the writ petition filed by Shri D.N. Pandey in which Mr. K.B. N. Singh at his request was transposed as petitioner No. 3, was heard as the main case and other petitioners and their learned Counsel were permitted to intervene at the hearing of this case.

787. Dr. L.M. Singhvi who led, ably supported by Shri H.M. Seervai and Shri Soli Sorabjee, put in the forefront the contention that the power to transfer a judge of the High Court is an extraordinary power vested in the President, the highest executive in the country, which has to be exercised according to the advice of the council of ministers, if not properly controlled and adequate safeguards provided, would render independence of judiciary a myth, Keeping aside, therefore the facts of the case. it would be advantageous at this stage to find out the purpose for which such power is conferred on the President under Article 222, the circumstances in which the power can be exercised highlighting the constraint or limitations on the exercise of power which would be safeguards against arbitrary exercise of power.

788. To repeat, on the quest on of construction of Article 222 we are not breaking a fresh ground. It was the subject-matter of a very intelligent and enlightened debate in the Gujarat High Court wherein Mr. S.H. Sheth, a judge of the Gujarat High Court challenged his transfer to Andhra Pradesh High Court, This debate continued unabated in the appeal against the decision of a special bench of the Gujarat High Court to this Court. Barring some additional submissions the arguments covered the familiar ground. I say familiar because I had the privilege of hearing arguments at the time of admission of the Special Civil Application filed by Mr. S.H. Sheth in the Gujarat High Court and also when the petition was finally heard. The appeal against the decision of the Gujarat High Court quashing the order of transfer of Mr. S.H. Sheth and issuing a mandamus to the Union of India directing it to forbear from giving effect to the transfer order was heard by a Constitution Bench of this Court presided over by Shri Y.V. Chandrachud, who, as the quirk of fate shows, in his capacity as Chief Justice new is one of the respondents in this group of cases. As we are to a considerable extent on a familiar ground, in order to avoid mere repeat performance, it would be conducive to proper adjudication of issues raised, to recall what has been the view of the Constitution Bench of this Court in Mr. Sheth's case MANU/SC/0065/1977, After briefly referring to the position thus established, I would refer to additional contentions and also a fervent appeal for accepting the minority view in Mr. Sheth's case because very persuasively it was argued that this larger Bench must re-examine the issue in its entirety. The emotional appeal was founded on the submission that since the decision in Mr. Sheth's case disturbing trends have appeared in the Indian polity and even though once thwarted a claim to naked and arbitrary exercise of power for transfer having been made on behalf of the Union of India and is being further shown that the safeguard which appealed to the majority view in Mr. Sheth's case having been found to be of slender strength, the Court should further insulate the Judiciary from continuing threats emanating from powerful executive quarters.

789. In constitutional interpretation while value system may have a fair sprinkling, emotions, sentiments, unfounded suspicions, wild apprehensions and imaginary threats have no place. Equally, a possible chance or abuse of power would not permit denial of power if it is conferred. We will have to be all the more circumspect, Imbued with wisdom and restraints because let it not be said by the posterity that the judges interpreting the judiciary provisions in the Constitution have rewritten the Constitution for their own total and absolute insulation from any quarter so that an otherwise irremoveable elitist institution may become so entrenched as to be impervious to the realities of the situation. We wish to steer clear of what professor Friedmann stated, between the scylla of subservience to Government and the charybdis of remoteness from constantly changing social pressures and economic needs (see Law in a Changing Society by W. Friedmann).

790. Let us then first recapitulate what has been the majority view in Mr. Sheth's case MANU/SC/0065/1977).

791. Mr. S.H. Sheth, a judge of the Gujarat High Court was transferred as per the Presidential Notification dated May 7, 1976 as Judge of the High Court of Andhra Pradesh. Mr. Sheth challenged the order of transfer in a petition that he filed in Gujarat High Court on June 16, 1976, in which he impleaded Union of India and the then Chief Justice of India as respondents. This petition was heard by a special Bench of Gujarat High Court which by a unanimous order dated November 4, 1976, voided the order of transfer. An appeal by certificate was preferred by the Union of India to this Court which was heard by a Constitution Bench of this Court.

792. Let me recapitulate the contentions canvassed on behalf of Mr. S.H. Sheth in his petition questioning the validity of the order made under Article 222(1) by which, he was transferred from the office of the judge of the High Court of

Gujarat to the office of the judge of High Court of Andhra Pradesh, The constitutional validity of the order of transfer was challenged on the following grounds:

(i) The order was passed without his consent, such consent must be necessarily implied in Article 222(1) of the Constitut ion and, therefore, the transfer of a judge from one High Court to and other High Court without his consend is unconstitutional:

(ii) The order was passed in breach of the assurance given on behalf of the Government of India by then LAW Minister Shri A.K. Sen who, while moving the Constitution (Fifteenth Amendment) Act, 1963, said in the Lok Sabha that "so far as High Court Judges are concerned they should not be transferred except by consent." Mr. Sheth having accepted judgeship of Gujarat High Court on April 23, 1969, on the faith of the Law Minister's assurance, the Government of India was bound by that assurance on the doctrine of promissory estoppel;

(iii) The order of transfer militated against public interest. The power conferred by Article 222(1) was conditioned by the exigencies and requirements of public interest and since his transfer was not shown to have been made in public interest it was ultra vires; and

(iv) The order was passed without effective consultation with the Chief Justice of India. 'Consultation' in Article 222(1) means 'effective consultation' and since the pre-condition of Article 222(1) that no transfer can be made without such consultation was not fulfilled, the order was bad and of no effect.

Though the Full Bench of the Gujarat High Court by a unanimous order struck down the order of transfer they arrived at this conclusion by different processes of reasoning. One judge took the view that in not consulting or informing Mr. Sheth of even the proposal of transfer, it being an administrative executive action in violation of the principles of natural justice and hence the order was bad. The second judge took the view that the order was unconstitutional because it was passed without Mr. Sheth's consent and secondly because it was passed for a collateral purpose. The third judge took the view that the mass transfers of 16 judges which were effected with one stroke though each judge may have had peculiar personal difficulties to contend with and considering that the Union of India had failed to disclose the nature and content of the consultation with the Chief Justice of India, the consultation was not meaningful and that the pre-condition for exercise of power in Article 222(1) was not satisfied and, therefore, the order was void. All the three judges unanimously rejected the challenge to the order of transfer on the ground of promissory estoppel.

793. In the appeal preferred by the Union of India only two contentions were examined by the Constitut ion Bench of this Court. They were; (i) the independence of judiciary being the basic and fundamental feature of the Constitution, power of non-consensual transfer to be exercised by the executive, a litigant before the judge in large number of cases, would be subversive of the independence of judiciary and, therefore the Court must read in Article 222(1) that the power to transfer can only be exercised with consent of the judge proposed to be transferred; and (ii) that the power to transfer High Court judge having been conferred on the President it can only be exercised in public interest and that before exercise of such power there must be full, effective and meaningful consultation between the President and the Chief Justice of India. Under the second submission, the scope and content of the consultation necessary to satisfy the stringent requirements of Article 222 have been fully thrashed out.

794. The leading judgment of majority view by Chandrachud, J. after referring to various articles, of the Constitution held that the provisions set out in the judgment indisputably, are aimed at insulating the High Court judiciary and even officers and servants of the Court from the influence of the executive. The observation of Krishna Iyer, J. in Shamsher Singh's case MANU/SC/0073/1974 that fearless justice is a prominent creed of our Constitution and the independence of judiciary is the fighting faith of our founding document, was affirmed. It was also held that power to transfer the High Court Judge is conferred by the Constitution to public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who for some reason or other has fallen from its grace. Thirdly, it was held that the two-fold limitation on the power of the President to transfer a High Court Judge namely that it can be exercised in public interest and that it can only be exercised after full, effective and meaningful consultation with the Chief Justice of India would provide sufficient safeguards against arbitrary exercise of power and accordingly the contention that in order to insulate the judiciary from executive interference the Court should read into Article 222 the words 'with his consent' was rejected. What constitutes meaningful, effective, full and substantial consultation has been succinctly set out in a paragraph at p. 453 of 1978-1 SCR: at p. 2347 of AIR 1977 SC which has been extracted hereinbefore. Briefly to recapitulate in the present context, the President must make relevant data available to the Chief Justice of India on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice of India, he must ask for them because in casting on the President the obligation to consult the Chief Justice of India, the

Constitution at the same time must be taken to have imposed a duty on the Chief Justice of India to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfillment by the President of his constitutional obligation to place full facts before the Chief Justice of India and the performance by the latter of the duty to elicit facts which are 'necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of Justice.' Consultation within the meaning of Article 222(1), therefore, means full and effective, not formal or unproductive consultation. Concluding on this point, it was observed as under:

Article 222(1) postulates fair play and contains built-in safeguards in the interests of reasonableness. In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under an obligation to consult the Chief Justice of India which means and requires that all the relevant facts must be placed before the Chief Justice, Thirdly, the Chief Justice owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before he tenders his opinion to the President. In the discharge of this constitutional obligation the Chief Justice would be within his rights, and indeed it is his duty whenever necessary, to elicit and ascertain further facts either directly from the Judge concerned or from other reliable sources. The executive cannot and ought not to establish rapport with the Judges which is the function and privilege of the Chief Justice, in substance and effect, therefore, the Judge concerned cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed (at p. 456) (of 1678-1 SCR): (at p. 2340 of AIR 1977 SC.

795. Krishna Iyer, J. speaking for himself and & Murtaza Fazal Ali, J., while concurring with this view, observed that the President must communicate to the Chief Justice all foe material he has and the course he PROCESSES. The Chief Justice in turn must reflect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the Administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the Justice system (at p. 496) (of 1978-1 SCR): at p. 2380 of AIR 1977 SC. At another place it was observed as under:

Before giving his opinion the Chief Justice of India would naturally take into consideration all relevant factors and may informally ascertain from the judge concerned if he has any real personal difficulty or any Humanitarian ground on which his transfer may not be directed. Such grounds may be of a wide range including his health or extreme family factOrs. It is not necessary for the Chief Justice to issue formal notice to the Judge concerned but it is sufficient although it is not obligatory -- if he ascertains these facts either from the Chief Justice of the High Court or from his own colleagues or though any other means which the Chief justice thinks safe, fair and reasonable. Where a proposal of transfer of a Judge is made the Government must forward every possible material to the Chief Justice so that he is in a position to give an effective opinion. Secondly, although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Article 222 cannot be exercised whimsically or arbitrarily." (at pp. 501, 502) (of SCR): (at p. 2384 of AIR).

796. The majority view is that it is not possible to read words 'with his consent' in Article 222 and non-reading of these words would not jeopardise independence of judiciary otherwise guaranteed by the Constitution. It was held that a non-consensual transfer is within the purview of Article 222.

797. On the question of policy transfers which loomed large in the present ease, Chandrachud, J. observed that whether it is necessary to transfer Judges from one High Court to another b the interest of national integration is a moot point, but that is a policy matter with which Courts are not concerned directly (see P. 450) (of SCR)- (at p. 2344 of AIR 1977 SC). At another place he held that policy transfers on a wholesale basis which leaves no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution (p. 454) (of SCR) : (at p. 2347 of AIR). Krishna Iyer, J. in this context expressed himself in a forceful way when he said that to promote the community's concern for impeccable litigative Justice, policy oriented transfer of Judges after compliance with constitutionally spelt out protocols may not be ruled out' (see p. 901) (of SCR): (at p. 2383 of AIR) Untwalia. J. after attempting to spell out specific public interest to subserve which a transfer of a High Court Judge can be ordered, ultimately concluded that these are matters of policy decision entirely within the realm of the Governmental power (p. 507) (of SCR): (at p. 2387 of AIR). The minority view of Bhagwati, J. and Untwalia, J. held that non-consensual transfer is outside the purview of Article 222 but both of them reached the conclusion by a different process of reasoning. Bhagwati, J held that having examined various provisions at the Constitution unerringly pointing towards assuring independence of judiciary from executive pressure, to further fortify and insulate it, the Court should give to the expression 'transfer' in Article 222 a limited meaning that it Only comprehends consensual transfer and compulsive transfer is not within the purview of the Article. Untwalia J. held that there may be necessity and Justification on the ground of public interest or policy for the transfer of Judges from one High Court to another, although it may be few and far between of even punitive in character, bat to do so without the consent of the Judge concerned will bring about devastating results and cause damage to the tower of judiciary and

erosion in its independence.' He was, therefore of the view that an additional safeguard is necessary to insulate the judiciary and he found that safeguard by holding that Judge cannot be transferred under Article 822 without his consent. Bhawati, J. agreed with Krishna Iyer, J. on the scope and content of consultation and Untwalia, J. agreed with Chandrachud, J. on the scope and content of consultation under Article 222. Scope and ambit of consultation under Article 222(1) has been dealt with in the earlier part of this judgment and it is unnecessary to repeat it here.

798. The obligation to consult may arise in different contexts and in different circumstances and situations and for different purposes. Duty or obligation to consult inheres full, effective land meaningful consultation. The situation and context and purpose of consultation would define parameters of consultation. Within the parameters all relevant considerations on which consultation to be effective must be focussed, most be precisely laid down. It was admitted on all hands that transfer is likely to cause hardship and inflict injury both private and to some extent public. In Shamsher Singh's case AIR 1974 SC 3192 it is in terms stated that sometimes transfer is more harmful than positive punishment. Before the Judge is made to suffer hardship or he is required to suffer injury, certain relevant questions have & be examined and answered so that even a remote chance of transfer by way of punsihment may be scrupulously avoided and a firm decision is reached that it is for achieving an avowed public interest. In the context of transfer of a Judge from one High Court to another High Court, the questions which must engage the attention of the concerned authorities may be briefly enumerated. They are (i) why this particular Judge is selected for transfer, (ii) what would be the personal difficulties faced by him in the event transfer is ordered, such as whether his wife is gainfully employed, whether his children are taking education or are gainfully employed, whether the old parents dependent on him would be seriously inconvenienced, whether he is being pushed out from a station which is considered good to a station not so good, whether it is likely to attach any stigma, whether he would have to maintain two establishments, and finally; (iii) whether the public interest for which he is required to be transferred would far outweigh his inconveniences, difficulties and even a possible stigma. Selective transfers generally give rise to canards because ordinarily High Court Judges are not transferred and as late as 1963 the then Law Minister Mr. A.K. Sen assured the parliament that a High Court Judge should not be transferred except by consent and this policy is departed from. Once one or the other Judge is specifically selected for transfer, even if it is (proclaimed to be in public interest, such as a senior, experienced and competent Judge is required for other High Court this hardly satisfies anyone and the Judge really suffers character assassination. It is, therefore, absolutely necessary that all these aspects and many more that can be enumerated, must be specifically and individually examined, discussed, deliberated upon and finally a decision must be reached that the public interest for which transfer is proposed would be served by the transfer. Specific public interest must not be left to guess work but must be precisely stated and must be such that it would far outweigh the personal difficulties, inconvenience and the possible stigma.

799. Principal contention canvassed in the High Court and in this Court in Mr. Sheth's case MANU/SC/0065/1977 was that non-consensual transfer is outside the purview of Article 222, This contention would have stood concluded by the majority decision of the Constitution Bench but as the matter is before a larger Bench, Mr. Seervai made a valliant effort to persuade us to hold that in view of the recent disturbing trends surfacing in the J Indian polity, such as continuous denigration of judiciary and experience proving the safeguards spelt out in Mr. Sheth's case against the abuse of transfer power, broken reed, coupled with the claim for naked and arbitrary power, the time has come to consider the majority view in Mr. Sheth's case by further buttressing independence of judiciary and completely insulating it against compulsive transfers by accepting the minority view in Mr. Sheth's case, that a non-consensual transfer is beyond the purview of Article 222. In support of this submission Mr. Seervai drew attention to some observations in the judgment of Chandrachud, J. and Iyer, J. which according to him are factually incorrect and a decision based on such incorrect assumption would render the majority view not sustainable. I remain unconvinced. In my detailed judgment in Mr. Sheth's case (1976) 17 Guj LR 1017 in the Gujarat High Court I have given long and elaborate reasons for rejecting the contention that non-consensual transfers are not within the purview of Article 222. I would not reiterate them because I unreservedly accept the majority view of this Court in Mr. Sheth's case MANU/SC/0065/1977 as correct. I would however, briefly deal with some of the submissions of Mr. Seervai in this behalf.

800. The first error in the majority judgment which, it was contended, would necessitate reconsideration of the majority view that it is not necessary to read the words 'with his consent' in Article 222(1). was that the majority view proceeds on the erroneous assumption that the Government of India Act, 1935, did not contain any provision for transfer of a High Court Judge. Chandrachud, J. has observed that the Government of India Act (1935) did not contain any provision for the transfer of a Judge. That is why it provided that the office of a Judge shall be vacated either on the Judge being appointed to be a Judge of the Federal Court or on being appointed as a Judge of another High Court (p. 448) (of SCR): (at p. 2342 of AIR). Krishna Iyer, J., who concurs with the majority view has in this context observed that it has already been pointed out above that the Government of India Act did not contain any provision for transfer which was effectuated by appointing a Judge of one High Court to be a Judge of another High Court (p. 493) (of SCR): (at p. 2377 of AIR). In this connection it may as well be pointed out that in the minority judgment, Bhagwati, J. who accepted the contention that Article 222(1) comprehends only consensual transfer has also observed that...there was no specific

provision in the Act (Government of India Act, 1935) conferring power to transfer a High Court Judge The power to transfer a High Court Judge was expressly conferred for the first time under the Constitution...(p. 473) (of SCR): (at p. 2362 of AIR). Therefore, the assumption that the Government of India Act, 1935, did not contain a provision for transfer which on further examination turns out to be erroneous did not materially affect the outcome because while accepting this position that there was no such provision, the majority reached the conclusion that Article 222(1) does not cater to only consensual, and that non-consensual transfer is within the purview of Article 222(1). The minority reached an exactly opposite conclusion relying on this very aspect. It would therefore appear that the assumption is not so material as to necessitate reconsideration of the majority view. Even otherwise let me see whether presence or absence of the provision to transfer a Judge in the Government of India Act, 1935, has any bearing on the question, of construction of Article 222(1).

801. Section 220 of the Government of India Act, 1935, provided for Constitution of High Courts. Sub-section (2) of Section 220 provided that 'every Judge of a High Court shall be appointed by his Majesty by warrant under the Royal Sign Manual and shall hold office untill he attains the age of sixty years There is a proviso to this sub-section (sic) paragraph (c) of which state that the office of a Judge shall be vacated by his being appointed by His Majesty to being Judge of the Federal Court or of and other High Court. It was assumed (sic) the course of arguments in his Sheth's case before this COURT that paras graph (c) of the proviso to Section 22 of formed part of the Government of India Act, 1935, as originally enacted. On investigation that does not appear to be correct. It is now pointed out that paragraph (c) of the proviso to Sub-section (2) of Section 220 was introduced by Section 2 of the India (Miscellaneous Provisions) Act, 1944. By Section 6 of the 1944 Act retrospective operation was given to the amendment introduced by Section 2 from the commencement of the Government of India Act, 1935. The marginal note to Section 2 of the 1944 Act reads: "Judges to vacate office on transfer." Referring to this provision it was urged that the word 'appointed' in paragraph (c) also comprehends transfer and it was spelt out that the office of a Judge of the High Court would be vacated not only on his appointment as a Judge of the Federal Court but also on his being transferred to another High Court. Earl of Munster during the debate on the provision pointed out that a Judge of a High Court on being appointed to the Federal Court or on being transferred to another High Court would not retain his office of the Judge of the High Court from which he was transferred. In this context he made reference to Section 10 of the Supreme Court of Judicature Act, 1925, which provided that the office of any Judge of a High Court shall be vacated on his being appointed as a Judge of the Court of Appeal. Mr. pethick Lawrence explaining the provision pointed out that the transfer of a High Court to another High Court was implicit in the provision itself and that the proposal is merely intended to be beyond question what was certainly the intention in regard to it. In this context the provision contained in Section 103 of the Government of India Act, 1915-19 was recalled. In Section 103 provision was made for rank and precedence of the High Court Judges inter se according to the seniority of their appointment unless otherwise provided in the patents. This provision was omitted from the Government of India Act, 1935, but it was said that it makes no difference because a similar provision existed and continues to exist in the High Courts Act or the Charter Act of 1861. At this stage it would be worthwhile to recall that in the draft Constitution there was no specific and positive provision for transfer of a High Court Judge. Draft Article 193(1) proviso paragraph (c) had almost bodily incorporated paragraph (c) of Sub-section (2) of Section 220, Government of India Act, 1935, in that it was provided that the office of a Judge shall be vacated on his being appointed by the President to be a Judge of the Supreme Court or of another High Court. And recalling the amendment made to Section 220, paragraph (c) of the proviso by the 1944 Act while retaining the word 'appointed' in the body of the paragraph, the marginal note set out the word 'transfer' meaning that the expression 'appointed' in the context of a Judge of a High Court from one High Court to another High Court obviously comprehends his transfer. However, when the drafting committee forwarded the revised draft Constitut ion as passed by the Constituent Assembly at the second reading, it recommended certain amendments and changes. One such amendment was present Article 222. The Drafting Committee while forwarding its report with a draft Constitution as revised by it, stated that it has 'proposed the insertion of Article 222 to enable the President to transfer a Judge of a High Court from one High Court to another. The proposed provision of the Constitution would not permit of any compensatory allowance being given to Judges on such transfer, power has accordingly been reserved to parliament to determine by law the compensatory allowance to be paid in case they are so transferred, and, until, parliament so determines, to the President to fix by order the quantum of such allowance.' This insertion of Article 222 was accepted by the Constituent Assembly and simultaneously Clause (c) of the proviso to Article 217(1) was amended to read the word 'transfer' in place of the word 'appointed.' It thus transpires that there was a provision in the Government of India Act, 1935, since its commencement for transfer of High Court Judges from one High Court to another High Court and to that extent the assumption of absence of such a provision as stated in Mr. Sheth's case is erroneous. What is the sequester? If there was power to transfer a High Court Judge in 1935 Act, logically the argument that our Constitution has adopted the basic scheme of that Act must inevitably lead to the conclusion that the Constitution makers wanted such power to be conferred and made an explicit provision in Article 222. Whether on transfer a fresh appointment is made so as to necessitate the consent of the transferred Judge will be presently examined. But presence or absence of a power to transfer a Judge in the Government of India Act. 1935, would not be decisive of the matter because the Constituent Assembly demonstrably expressed its intention to confer power on the President to transfer a Judge as indicated in Article 222(1). The statement, therefore, in the judgments of Chandrachud, J., Bhagwati, J, and Krishna Iyer, J. in Mr. Sheth's case MANU/SC/0065/1977 that the Government of India Act, 1935, did not contain any

provision for transfer of a Judge would not in any manner detract from the binding character of the ratio of the majority judgment, nor on this account a re-examination becomes necessary.

802. It was urged that transfer of a Judge of one High Court to another High Court constitutes fresh appointment and, therefore, if initially a man cannot be appointed without his consent because if such a power was to be conferred on any one it would be a conscription or we may be thrown back to the days of slavery and, therefore, if transfer of a Judge of the High Court amounts to a fresh appointment, ipso facto it cannot be done without his consent. The majority view in Mr. Sheth's case has rejected this contention and in my opinion for very cogent and valid reasons. Briefly, the reasons for accepting the majority view may be stated.

803. Submission is that on transfer a High Court Judge ceases to be a Judge of the High Court where he was functioning and is appointed a Judge of the High Court to which he is transferred and, therefore, it is a fresh appointment and that it can only be with his consent, When it was pointed out that the framers of the Constitution used the words 'appointment' and 'transfer' in Article 217(1) proviso (c), in collocation, they must be aware that the connotation of the two words are different and the word 'transfer' in itself does not involve a fresh appointment, it was said that the words have been used inters changeably and recourse was taken to the definition of 'actual service' set. out in Clause (11) to Second Schedule which includes joining time on transfer from a High Court to the Supreme Court or from one High Court to another. It was submitted that the word 'transfer', if it does not include appointment is inappropriate when used in the context of a transfer from a High Court to the Supreme Court because that is unquestionably an appointment which cannot, be made without consent of the person concerned. Proceeding further it was said that it is well recognised that use of different words does not necessarily produce a change in the meaning (sea Maxwell's Interpretation of Statutes, 11th Edn.. pp. 286 239). Reliance was placed on State of Bombay v. Heman Alreja MANU/MH/0026/1952 which decision was referred to with approval in Kesvananda Bharati's case MANU/SC/0445/1973 by Chandrachud J. (at p. 966). Attention was also invited to Edward Mills v. Ajmer. MANU/SC/0106/1954 where this Court did not find any material difference between two expressions 'existing law' and 'Law in force', While defining the expression 'actual service' the word 'transfer' is used in the context of physical movement, that is, leaving one place and going to another place and the time spent in the process. But the expression 'transfer' is used in Article 222 to mean transfer from one High Court to another High Court, the person so transferred continuing to be a High Court Judge with continuity of service and there is no break. Undoubtedly the oath to which a Judge of the High Court must subscribe provided that ha takes oath as Judge on being appointed to a designated High Court and. therefore, on transfer when he goes to another High Court he has to subscribe to a fresh oath as being appointed to that High Court. But in service jurisprudence appointment by transfer is a well recognised concept involving continuity of office without break. Thus fresh oath does not imply that his appointment as High Court Judge comes to an end. What comes to an end is his appointment as a Judge of a particular High Court and not the holder of the constitutional office of High Court Judge and Article 217(1) provides for appointment of it High Court Judge and not Judge of a particular High Court. He continues to hold office even when transferred. But when he reaches the other High Court he subscribes to an oath to be a Judge of that High Court, not that he subscribes to an oath to be a Judge, The jurisdiction to function as a High Court Judge is not ambivalent but the Judge functions as a Judge of a particular High Court and enjoys the jurisdiction of a High Court judge in relation to the High Court to which he is thereby attached.

804. Same conclusion inevitably follows when viewed from another angle, Article 217(1) prescribes consultation with three constitutional functionaries before appointing a person as a High Court Judge while Article 222(1) obligates consultation only with Chief Justice of India while transferring a Judge from one High Court to another High Court, If transfer were to mean a fresh appointment and yet it can be carried out by mere recourse to Article 222(1), the only limitation on the power of the President while ordering transfer is to have consultation with the Chief Justice of India, while if the President is making an appointment of a High Court Judge within the contemplation of Article 217(1) the President is under a constitutional obligation to consult not only the Chief Justice of India but the Chief Justice of High Court to which appointment is being made as also the Governor of the State in which the High Court is situated, Mr. Seervai in this context urged that the two articles must be harmoniously construed and to achieve the harmonious construction he submitted that even though in the case of a transfer under Article 222(1) the Chief Justice of India is not bound to consult the Chief Justice of the High Court but normally it is his duty to do so as a responsible person and that Article 222(1) does not preclude such consultation. One cannot read into an article what is not prescribed because if consultation is obligatory it cannot be left to the discretion of the Chief Justice of India to consult someone as a responsible person. Maybe, that the field of consultation, i, e. the aspects to be taken into consideration in the process of consultation for Article 217(1) and Article 222(1) are different but the difference cannot be wished away by merely suggesting something as a matter of prudence. This is inherent evidence suggesting that transfer of High Court Judge does not mean a fresh appointment,

805. But the most insurmountable impediment I find in the suggested construction is that the court is not merely called upon to construe the word 'transfer' but re-write the Article in the name of construction, Is it permissible? Should the Judges constitute themselves a Constituent Assembly? To answer it in the affirmative would be a dangerous proposition. In fact, in this context the caution administered by Mr. Seervai himself in his Constitutional Law of India, 2nd Edn,, Vol. III, while, commenting upon the decision of this Court in Manohar v. Maruti Rao MANU/SC/0350/1979 may be profitably referred to, He says at p, 1878 'that no doubt there to a limited sense in which hi interpreting the law the Judge may make law in the sense of adopting one of two or more alternatives, if such alternatives are open, or evolving a new principle to meet a new or unusual situation. But it is not given to him to write his own theories, likes and dislikes into the Constitution and the law.' The further comment is that 'the personal views of a Judge are irrelevant in the matter of interpretation of a constitutional provision,' A further warning was administered that no scientific theory propounded in a book can form the basis of a Judgment, for it is opinion evidence, and such an evidence is admissible on condition that the scientific witness goes into the box and is crosseaxmined. The serious objection is to the Judge writing philosophical and social thesis. Now, interpretation of a constitutional provision is both an art and a science but while resorting to well-known cane one of construction unwittingly the pet theory that the independence of judiciary is prized so high that in order to achieve it if it becomes a compelling necessity the provision of a Constitution may be re-written, no canon of construction permits this to be done. We must always remember that we are called upon to construe the Constitution, the fundamental law of the land. No doubt a broad and liberal spirit should Inspire those whose duty it is to interpret it, but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errOrs. In re: The Central Province and Berar Act, 1938, 1939 FCR 18 at p. 37 : AIR R 1939 FC 1 at p. 4), The Constitution makers clearly envisaged a power to transfer a High Court Judge and conferred it on the President and howsoever we may disapprove this power we cannot wish this power away by re-writing the Article. There is no power in the Court to re-write the Article, Dr. Ambedkar who piloted the Constitution in his speach on November 25, 1949, on the motion that the Constitution as settled by the Constituent Assembly be passed, adopted the following observation with approval:

Courts may modify, they cannot replace. They can revise earlier interpretations as new arguments, new points of view are presented, they can shift the dividing line in marginal cases, but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another.

(Underlining mine)

If we read the words 'with consent' not only the power of the President is totally taken away but the power is reallocated to the Judge who is to be transferred, namely, he cannot be ordered to be transferred but he can be requested, a request which can be finally turned down.

806. The suggested construction is contrary to jurisprudential concept of power. It was never disputed that Article 222(1) confers power on the President to transfer a Judge from one High Court to another High Court. The only limitation on the power is a prior consultation with the Chief Justice of India, Now, if the power to transfer vested in the President can only be exercised with the consent of the Judge who is to be transferred, does there remain any power in the President to discharge his constitutional function entrusted to him by Article 222(1)? When power is vested in a person or a constitutional functionary there ought to be the subject and object of power. Power is generally defined as 'ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. powers are classified either as public or private. Power is said to be public when it is vested in a person as an agent or instrument of the functions of the State. Amongst others, it contains executive authority.' The correlative of power is liability. This connotes the presence of power vested in someone else, as against the person under liability. It is the position of one whose legal rights may be altered by the exercise of a power. Hopefield describes power and disability as jural contradiction. Now, if the power is in the President, there is a liability as jural correlative in the Judge who can be transferred. And that power remains power if the liability can be imposed without consent. The moment the concept of consent is imported the power ceases to be power and becomes disability. It either becomes immunity or disability, more appropriately disability, in the sense of lack of power. (See for this discussion pages 229 and 230 of Salmond on Jurisprudence by Fitzgerald. 7th End.). Is it open to the Court by a process of interpretation to neutralise the power and thereby remove the disability which was constitutionally provided? I consider it impermissible and, therefore, also the contention that the Court should read the words 'with his consent' in Article 222(1). must be rejected.

807. What then is the check against arbitrary exercise of power conferred by Article 222(1) once the argument that it can only be exercised with the consent of the Judge to be transferred is rejected. This power to transfer a High Court Judge has rightly been described as an extra-ordinary power. The question then is, unless a positive check on its

arbitrary exercise emanating from judiciary is found, this extra-ordinary power is likely to undermine independence of judiciary. It was said that the best check would be if this power can be hedged in with condition that it can only be exercised with the consent of the Judge, a submission which has not commended to me. Now, if this safeguard of reading consent in Article 222 is rejected, is there any other safeguard against arbitrary exercise of power? We were repeatedly reminded that this power was positively abused in 1976 when 16 Judges were transferred en masse and it is well recognised that what has been once done, if not restrained or checked, may be done again. In Mr. Sheth's case MANU/SC/0065/1977 the first safeguard against arbitrary exercise of power was found in the obligation cast on the President to consult the Chief Justice of India and, therefore, the parameters of consultation were drawn very wide so that the power may not be exercised to the detriment of the Judge for a collateral purpose. The second safeguard was found in reading into Article 222 that the power to transfer a High Court Judge can only be exercised in public interest, Chandrachud, J. held that the power to transfer a High Court Judge is conferred by the Constitution in public interest and not for purposes of providing the executive with a weapon to punish a Judge who does not toe its line or who for some reason or the other has fallen from its grace. At another place it was observed that if the power of the President who is to act on the advice of Council of Ministers to transfer a High Court Judge under Article 222(1) is strictly limited to cases in which the transfer becomes necessary in order to subserve public interest, in other words, if it be true that the President has no power to transfer a High Court Judge for reasons not being in public interest but arising out of whim, caprice or fancy of the executive, or its desire to bend a Judge to its own way of thinking, there is no possibility of any interference with the independence of judiciary if a Judge is transferred without his consent. The same view is shared by Krishna Iyer, J. in his concurring judgment. Therefore, the majority declined to read the words 'with his consentt in Article 222(1). The majority, therefore, concluded that non-consensual transfer is within the purview of Article 222(1). Even the minority does not question the view that the power to transfer a Judge can only be exercised in public interest.

808. The public interest like public policy is an unruly horse and is incapable of any precise definition and, therefore, it was urged that this safeguard is very vague and of doubtful utility. It was urged that these safeguards failed to checkmate the arbitrary exercise of power in 197G. This approach overlooks the fact that the Lakshman Resha drawn by the safeguards when transgressed or crossed, the judicial review will set at naught the mischief. True it is that it is almost next to impossible for individual Judge of a High Court to knock at the doors of the Courts because access to justice is via the insurmountable mountain of costs and expenses. This need not detain us because we have seen that in time of crisis the Bar has risen to the occasion twice over in near past though it must be conceded that judicial review is increasingly becoming the preserve of the high, mighty and the affluent. But the three safeguards, namely, full and effective consultation with the Chief Justice of India, and that the power to transfer can be exercised in public interest, and judicial review, would certainly insulate independence of judiciary against an attempt by the executive to control it.

809. There was a lively debate as to whether transfer of a Judge who has to some extent become obnoxious in a High Court would be in public interest, Chandrachud, J. observed that "experience shows that there are cases, though fortunately they are few and far between, in which the exigencies of administration necessitate the transfer of a judge from one High Court to another. The factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest of rare occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites. The voice of compassion is heard depending upon who articulates it. Though transfers in such cases arc preeminently in public interest, it will be impossible to achieve that purpose if a Judge cannot be transferred without his consent. His personal interest may lie in continuing a Court where his private interest will be served best, whereas, public interest may require that his moorings ought to be served to act as a reminder that 'the place of justice is a hallowed place'". This approach mixes up two independent problems. While transfer in public interest is conducive to independence of judiciary, such power when exercised with a view to punishing a Judge becomes counter-productive. To punish a High Court Judge by an impermissible method is not in public interest, And if a judge is uprooted from one place because he has made himself obnoxious, the transfer itself may inflict punishment, In the whole controversy in this case this is the grey area and it is difficult to give precise answer either way.

810. Public interest is an expression Incapable of any precise definition nor what constitutes public interest is capable of specific enumeration. A negative definition was attempted by learned Attorney-General when he said that if a Judge is guilty of misbehaviour or is suffering from incapacity he ought to be removed and not transferred but if the Judge is not guilty of any misbehaviour but because of activities of some others has become ineffective his transfer could be said to be In public interest, One can visualise a situation when a judge having an expertise in some specialised branch of law may be required to be transferred to another High Court where it becomes necessary to strengthen that department, Transfer in such a situation would indisputably be in public interest. Unquestionably such transfer may cause some Inconvenience or hardship to the transferred Judge, but by no stretch of imagination it can be said to cast either a slur or that the order was passed with a view to punishing him. Such a situation in our vast country with number of High Courts can be easily envisaged. A transfer of this nature even if it involves to the Judge concerned some hardship, some inconvenience, some pecuniary loss, yet his outstanding merit which necessitated 'his transfer for

strengthening another High Court would far outweigh the personal considerations, If it is recognition of merit, the judge would himself hardly make any grievance about it To question such a transfer as not being in public interest by illustration that there are three Judges of same eminence in three High Courts, what basis can be adopted for the transfer of a Judge, is too hypothetical to need an answer. No rule can be framed to meet with such a situation. A threat of a resignation by such a judge is inconceivable. One can visualise a number of situations where a transfer can be in public Interest and when a transfer is effected in public interest and when questioned, the authority exercising the power of transfer must make good the claim of public interest. To say that public interest is not a sufficient safeguard is to deny what is being day in and day out done in Court, viz., that a certain action being in public interest is upheld.

811. But the serious and fairly difficult question is, whether a Judge can be transferred on account of complaints against him or on account of anything in his conduct or behaviour. Let us put the negative in the majority view in the forefront Chandrachud, J, has in most unequivocal terms stated that 'the power to transfer a High Court judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a judge who does not toe its line or who, for some reason or the other, has fallen from its grace (at p. 444) (of 1978-1 SCR) : (at p. 2339 of AIR 1977 SC), At another place he said that he has taken the view that a High Court Judge cannot be transferred as a matter of punishment as for example the views which he bona fide holds and that his transfer, being conditioned by the requirements of public interest, cannot be effected for an extraneous purpose (at p. 446) : (of 1978-1 SCR) : (at p. 2341 of AIR 1977 SC). Bhagwati, J. observed that it would be gross abuse of power to displace him from his High Court and transfer him to another High Court by way of punishment because he has decided cases against the Government, It is a power conferred on the President to be exercised in furtherance of public interest and not by way of victimisation for inconvenient decisions given by a High Court Judge (at p. 460) (of SCR) I (at p, 2352 of AIR). Krishna Iyer, J. in this context has observed that 'the nature of Judicial process is such that under coercive winds the flame of justice flickers, faints and fades, The still small voice is smoothened by subjective tribulations and anxieties and, if coerced, trembles to objectify law and justice. The true Judge is one whose soul is beyond purchase by threat or temptation, popularity or prospects'. At another stage it is observed that 'environmental protection of the judicial echelons from executive influence, by transfer or other deterrent, is in public interest'. Coupled with this is the view expressed that 'considering the great in convenience, hardship and possibly a slur which transfer from one High Court to another Involves the better view would be to leave the Judges untouched and take other measures to achieve the purpose pleaded, namely, national integration'. Transfer thus casts slur. If, therefore, a Judge is transferred because he is involved in local factious atmosphere or has a circle of favourites' and disfavourites it would be obviously by way of punishment and would cast a slur and stigmatise the Judge. Mr. Seervai pointed out that while conceding in the majority view that transfer involves a slur, the illustrations given by Chandrachud, J., clearly show that transfer in such situations would be by way of punishment, Power conferred by Article 222(1), frankly, cannot, be exercised with a view to punishing the Judge. It can only be exercised in public interest for achieving some larger public good, But it was urged that if a Judge is not guilty of high misdemeanour sufficient to impeach him but behaves in a manner which brings administration of justice into disrepute a transfer which with a view to uprooting him from an atmosphere in which he has become inconvenient, would be to the good of that judge and in the interest of purity of administration of justice and such a transfer cannot be said to cast a slur or stigma on the Judge concerned. On an earlier occasion this view appeal to me. In my Judgment in Mr. Sheth's case (1076) 17 Guj LR 1017, I observed in this behalf as under:

I specifically asked Mr. Seervai, taking cue from his Sir Chimanlal Setalvad Lecture titled "Tipping the Scales' where he refers to 'reigning favourite' that there is a judge in the High Court He is a very competent judge. But he has developed certain local angularities which have vitiated the Court's atmosphere. He is a good judge and the drawback is not so grave to call for his impeachments what was required was to free him from local peculiar undesirable influence. Would not his transfer solve the problem to the satisfaction of all. He was asked whether he would not mind being transferred. He candidly said 'no'. How is the problem to be solved? Transfer of such a Judge is in public interest, cannot be gainsaid. He is not willing to be transferred and he would not give his consent, If the power to transfer is further limited by reading into Article 222 the words "with his consent' by process of interpretation, Article 222 becomes a constitutional deadwood. He cannot be transferred. He cannot be continued at that place, and there is no tangible sufficient proof for impleachment, Law Commission in its Fourteenth Report, Vol. I, p. 99 rejected a transferable cadre of High Court Judges. But Mr. Seervai in his lecture observed that the Commission did not consider separately whether the power to transfer a Judge would not in the last resort be used as a remedy for an admitted evil (p. 118), Then there must be power in some one to transfer the Judge albeit 'without his consent. And if we read down the Article as suggested there is no way out. Mr. Seervai said that the resultant situation is that there are two public interests in the field and they appear to be in conflict with each other, to wit (i) transfer of a Judge without his consent by a litigant, namely, executive would undermine judicial independence which is a cardinal feature of the Constitution; and (ii) image of dame justice would be tarnished unless the Judge is transferred so as to save him from the undesirable environmental influence affecting his integrity. The answer is that the Court, in such a situation, must determine the dominant public interest and give precedence to it over the conflicting subservient interest which must give way, Said Mr. Seervai, tolerate the situation rather than undermine judicial independence by compulsory transfer by the Executive. It often happens that the principles when pushed to logical end lead to two irreconcilable positions. In such a

conflict choice has to be made. Cardozo in his Nature of Judicial Process (pp. 40-41) vividly describes this conflict by saying that force of logic of one should prevail over the other and the choice is made by the judicial mind born of its conviction that the one to be selected would lead to justice. In the end, the principle which is thought to be most fundamental to represent the larger and deeper social interests must put its competitors to fight. Approaching from this angle, he said, if you cannot impeach the judge, tolerate but you cannot transfer him without his consent because that would impinge upon the higher public interest, namely, independence of judiciary and would nullify the cardinal feature of the Constitution.

But on deeper thinking I believe that selective transfer of individual Judge for something improper in his behaviour or conduct would certainly cast a slur or attach a stigma and would leave such indelible mark on the character of the Judge that even in the High Court to which he is transferred he would be shunned and the consumers of justice would have little or no faith in his Judical integrity. This is an inevitable outcome of selective transfer on the ground of some improper streak in the conduct or behaviour of the Judge. It is true that the procedure for impeachment is rather very cumbersome and it ought to be so because the ultimate power to impeach rests with the Parliament, And in a Parliamentary democracy the executive which controls a majority in Parliament would be able to carry out the threat of Impeachment It may be, as was urged, that the Judge may behave in an impeccable manner but there are others functioning in the Court who would render judge's task of judicial justice impossible. I fail to see how transfer of such a weak and indecisive Judge unable to control his relations, friends or associates would be better of by transfer. Society would dub him a weak and imbecile Judge. One thing is, therefore, certain that the power conferred by Article 222(1) cannot be exercised with a view to punishing the Judge for anything improper in his behaviour or conduct. What a deep resentment and consequential character assassination a High Court Judge suffers by such selective transfer can be gauged from the reaction of Shri M.M. Ismail. former Chief Justice of Madras High Court who resigned only because according to him the transfer was by way of punishment and casts stigma on his judicial poise and bearing. Law Minister in his highly controversial circular dated March 18. 1981, has stated that 'to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations', some fresh steps are required to be taken. Transfer to achieve such objects may apparently be in public interest. Therefore, whenever the transfer answers to some objective norms even if it causes personal inconvenience and hardship, it can be said to be in public interest But the transfer of a judge not answering to any objective norms but selectively made and founded upon complaints and grievances relatable to the conduct or behaviour of the judge would certainly cast stigma or slur and would be by way of punishment and that cannot be inflicted by exercise of power under Article 222(1). It transfer can be effected because there are complaints and grievances against a Judge of a High Court on account of his behaviour or conduct it would permit the executive after going through the process of consultation to rotate inconvenient Judges and this rotation causes such character assassination on one hand and hardship and inconvenience on the other that it will be sufficient to drive out even a strong willed Judge. Therefore, a transfer on account of any complaint or grievance against a Judge referable to his conduct or behaviour is impermissible in exercise of powers under Article 222(1).

812. One more submission may be examined here. It was contended that upon a true construction of Article 222(1), a proposal for transfer cannot be initiated by the Chief Justice of India, it can only be initiated by the President because the Chief Justice of India is the 'consultee'. The power of transfer is conferred on the President and it can be exercised after consultation with the Chief Justice of India. Chief Justice of India is thus the constitutional functionary to be consulted. Would initiation of a proposal for transfer emanating from the Chief Justice of India, a constitutional functionary required to be consulted, by itself vitiate the proposal? In other words, can it be said that Article 222(1) envisages proposal for transfer to be initiated by the President alone and after due deliberation and consultation with the Chief Justice of India the proposal can be carried out if deemed, proper or be dropped? Undoubtedly the power is in the President to transfer and as a pre-condition the Chief Justice is required to be consulted. But on that account alone it cannot be said that the Chief Justice of India cannot initiate the proposal. Where power to do a thing is vested in a certain constitutional functionary it is immaterial who draws the attention of the constitutional functionary, the repository of power, for exercise of the same. If the power is exercised after fulfilling all the pre-conditions, the mere fact that somebody invited the repository of power to exercise power which may tantamount to saying that someone initiated the proposal for exercise of the power, such initiation of proposal would not be unconstitutional or contrary to the constitutional mandate. The only caution that must be required to be administered is and it has assumed importance in this case, that if Chief Justice of India who is the authority to be consulted in respect of a proposal for transfer himself becomes the initiator of the proposal, the whole process of consultation must move in such a manner as to ensure that the President who is invited to exercise the power at the instance of the Chief Justice of India has to apprise himself of all relevant considerations and has to fully inform himself of all the aspects of the matter and then the power is to be exercised. When in Mr. Sheth's case MANU/SC/0065/1977) it was said that while consulting the Chief Justice of India the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion, the process would have to be reversed when the Chief Justice of India is the initiator of the proposal for transfer. It would be the constitutional obligation of the Chief Justice of India to place all relevant data and, material having an impact on the final verdict before the President and the President in his turn must apprise himself of all the relevant considerations. If there are either grey or blurred areas, it would be the constitutional

obligation of the President to call for necessary information from the Chief Justice of India who being the initiator of the proposal must have considered all of them and having brought to bear upon the subject his mature consideration must have initiated the proposal and after all the relevant data thus supplied, including the missing links, if any, as required by the President, the President may either exercise the power or on mature consideration may decline to exercise the power. Collection of relevant material, public interest involved, and the decision recommending transfer must precede the proposal and the same must accompany the proposal. A bald proposal unaccompanied by relevant material and the reasons for proposing transfer and total absence of public interest sought to be served by the proposal would certainly not satisfy the constitutional mandate of Article 222(1). The fulfillment of the constitutional obligation in this background would be on the Chief Justice of India and the performance by the President, of his duty to elicit all facts which are necessary to arrive at an appropriate conclusion are parts of the same process and are complementary to each other. But with this precaution, who initiates the proposal is irrelevant. In this context, however, my attention was drawn to a passage in my judgment in Gujarat High Court in Mr. Sheth's case 1976-17 Guj LR 1017 which gives an impression that the President alone can initiate the proposal. In paragraph 140 it is staled that 'it is not for a moment suggested that the proposal for transfer must emanate from the Chief Justice. That is not expected and it is bound to emanate from the President. The process for inception of the proposal is not to be reversed. Such a thing may also be open to objection and the reason is apparent'. At first blush this passage gives an impression that upon its true construction Article 222(1) precludes anyone except the President of India to initiate the proposal for transfer and that in any case the Chief Justice of India cannot initiate the proposal. The observation was in the context of a submission that exercise of power of transfer by the executive would be subversive of independence of judiciary and that in order to eliminate arbitrary exercise of power conferred on the President the Court must so construe Article 222(1) that the proposal for transfer must originate with the Chief Justice of India. The submission presently examined is exactly the converse but answering the submission before the High Court it was observed that in order to ensure independence of judiciary it is not obligatory that a proposal for transfer must emanate from the Chief Justice of India. The passage, therefore, must be read in this light.

813. Summing up the discussion, following propositions emerge both on principle and authority. While testing the validity or otherwise of an order of transfer of a High Court Judge made by the President in exercise of the power conferred by Article 222(1), below mentioned tests will have to be applied:

(i) power to transfer a Judge of High Court is conferred on the President which as part of the executive function of the President he would, in view of Article 74, discharge according to the aid and advice received by him from the Council of Ministers:

(ii) the power to transfer a High Court Judge thus is in the executive which is the litigant in a very large number of cases coming before a Judge of a High Court;

(iii) the power to transfer a High Court Judge is extraordinary power;

(iv) the limitation on the exercise of power is full, effective and meaningful consultation with the Chief Justice of India;

(v) the power to transfer can be exercised only in public interest and not according to the whim, caprice or fancy of the executive or to remove an inconvenient judge not toeing its line;

(vi) the consultation to be effective must be focussed upon very personal factors as the family problems of the judge, which include the position of his wife and children and parents, the reasons for transfer whether the transfer is actuated on account of anything in the conduct or behaviour of the judge, whether the injury, inconvenience and difficulties experienced by the judge consequent upon his transfer are such as to be inconsequential in view of the larger public interest for which the transfer is being ordered;

(vii) would the transfer cast a shir or stigma on the judge proposed to be transferred;

(viii) the policy universally followed till 1976 of not transferring a judge of High Court without his consent is being shelved for achieving some larger public interest or the so-called public interest is a cloak or device to strike at an inconvenient judge;

(ix) is the transfer intended to inflict punishment for misbehaviour not of adequate magnitude to invoke proceedings analogous to impeachment as contemplated by Article 124(4) and (5) read with Article 218 and Judges (Inquiry) Act, 1968.

814. The allegations made and countered in this group of petitions may be examined on the touchstone of aforementioned well settled propositions so as to reach an affirmative conclusion one way or the other, whether the order dated January 19, 1981, transferring Shri K.B. N. Singh, Chief Justice of Patna as Chief Justice, Madras, is constitutionally valid or otherwise.

815. Factual averments are set out in petitions as well as numerous affidavits filed in the course of hearing of these petitions, Two important affidavits are of Shri K.B. N. Singh, dated Sept., 16, 1981, and counter affidavit of the Chief Justice of India dated Sep. 29, 1981, Shri K.B. N. Singh filed on October 16, 11981, an affidavit in reply to the affidavit of the Chief Justice of India. It is rather unfortunate that there is divergence between the affidavits of Shri Singh and the affidavit of the Chief Justice of India but the painful and agonising task of searching where the truth lies is spared by the stand taken by Shri Singh's learned Counsel, Dr. Singhvi, that he would not refer to any, divergence between these affidavits and base his submissions on the points on which they converge. The only difficulty we experienced is that in the course of discussion some queries emerged and had to be left at that stage because Mr. Para-saran, learned Solicitor-General to whom we addressed our queries, frankly confessed his inability to help because he did not appear for the Chief Justice of India. In Mr. Sheth's case MANU/SC/0065/1977 the Chief Justice of India appeared through counsel but did not file his affidavit, In this case Chief Justice of India filed his affidavit but did not appear through counsel to assist the Court. We are, therefore, left to fend for ourselves. But let it be made distinctly clear that the affidavit of Chief of India would be looked upon an setting out the truth, and is entitled to undiluted respect befitting the dignity of his office.

816. Shri K.B. N. Singh has filed as many as four affidavits. It is not necessary to recapitulate the averments in these affidavits, The broad allegations which have a bearing on the issues under discussion may be briefly stated.

817. In his first affidavit dated September 7, 1981, the only averment worth referring to is that he had not at any time consented to his transfer to Madras and that no reasons, ground, questions or materials necessitating or justifying his transfer from Patna to Madras were ever disclosed to him or discussed with him by the President of India or the Government of India or by the Chief Justice of India. He also states that it was not possible for him to give consent to his transfer on account of a compelling personal problem, namely, that his mother of advanced age is staying with him and she is seriously ailing and bed-ridden for over two years and who is not in a position to be moved out of Patna without risk to her life and he is not in a position to leave her alone. Coupled with this affidavit there was a request that from the array of respondents he may be transposed as petitioner 3, which request was granted.

818. Consequent upon transposition of Shri K.B. N. Singh as petitioner 3, den tailed amendments to the petition preferred by two advocates, would have been inevitable. With a view to avoiding the same, Shri K.N. B. Stash was given liberty to file a detailed affidavit setting out therein all his contentions. Pursuant to this liberty reserved in his favour he has filed a detailed affidavit dated September 16, 1981, inter alia, contending that in February 1980, the Chief Justice of India visited Patna for inaugurating International Rotaty Conference. The fact that such a conference was held on 23rd & 24th Feb., 1980 and that it was inaugurated by the Chief Justice of India is not disputed but what is controverted is that the visit was not specifically for the purpose of inaugurating the Conference but it was an official visit incidental to which the invitation to inaugurate the conference was accepted. Shri Singh then proceeds to state that during this visit the Chief Justice of India did not give him any inkling of a proposal to transfer him. This is admitted by the Chief Justice of India saying that at that time no proposal for transfer of Shri Singh was even mooted and, therefore, there was no question of giving him any inkling in this behalf. Shri Singh then proceeds to state that on January 5, 1981, for the first time he received a telephonic message from the Chief Justice of India that as Shri M.M. Ismail, the then Chief Justice of Madras was proposed to be transferred to Kerala, in the consequential vacancy in the office of Chief Justice, Madras, Shri Singh was proposed to be, transferred, Shri Singh enquired why he was being transferred to Madras and the Chief Justice of India said that it was 'Government policy'. The fact that there was such a telephonic conversation between Shri Singh and the Chief Justice of India on January 5, 1981, is admitted and also that during this conversation there was reference to 'Government policy' bearing on the question of transfer was also referred to. What is disputed is that for the proposed transfer 'Government policy' was not the only reason given by Chief Justice of India and the Chief Justice of India in his counter-affidavit has stated that over and above referring to Government policy, Shri Singh' was Informed that it was proposed to transfer Chief Justice M.M. Ismail from Madras and it was necessary to appoint an experienced and senior Chief Justice in his place. Shri Singh then asserts that he informed the Chief Justice of India that his mother who lives with him was seriously ill and bed-ridden and was not In a position to be moved from Patna without risk to her life. This is admitted. The additional averment of Shri Singh that fee also stated certain other compelling and personal circumstances and difficulties was disputed and denied. Undoubtedly the further averment of Shri Singh that despite all these difficulties, If his transfer is insisted upon he might be compelled to resign and such a statement having been made by him in the telephonic conversation is admitted by the Chief Justice of India. Shri Singh was also informed that the Chief Justice of India has taken note of the difficulties mentioned by him and that it would be taken into consideration before a final decision was taken. The Chief Justice of India also requested Shri

Singh during this conversation to come over to Delhi to discuss the question of his transfer, Shri Singh further avers that he reached Delhi three or four days after this telephonic conversation and according to Chief Justice of India Shri Singh came to Delhi on Jan., 8, 1981, and met him at his residence. There is some divergence on the question as to the duration of time for which Shri Singh was with the Chief Justice of India. According to Shri Singh he was with Chief Justice of India for 10 to 15 minutes while according to Chief Justice of India he was with him for a period much longer than 10 to 15 minutes. During this discussion according to Shri Singh the Chief Justice of India was non-committal in the matter of Shri Singh's transfer. Shri Singh proceeded to tell the Chief Justice of India during this conversation at the residence of the latter that it was possible that baseless complaints which are the bane of Bihar might have been made to him and if so, he would like to remove any wrong impression that might have been created. Even after this suggestion, according to Shri Singh, the Chief Justice of India did not put any question or material to him which necessitated or justified his transfer, The version given by the Chief Justice of India in his counter-affidavit is that the question of Shri Singh's mother's illness was discussed and the Chief Justice of India disclosed his inability to agree with Shri Singh that there were ho other dependable persons in his family who could look after his mother and it was pointed out that Shri S.B. N. Singh, the brother of Shri Singh who was a practising advocate in the Patna High Court was quite capable of looking after the mother. The Chief Justice of India admits that during this Discussion Shri Singh pointed out that is was possible that some baseless complaints may have been made to him (Chief Justice of India) and that he (Shri Singh) would like to remove any wrong impression which those complaints may have created. On this reference being made by Shri Singh the Chief Justice of India told him that he did not go by baseless complaints, that he did not believe that his (Shri Singh's) conduct was blameworthy, but that if he wanted to explain any matter, which according to him had created dissatisfaction about the working of the High Court he was free to do so. The Chief Justice of India further states that during this conversation Shri Singh told him how certain persons connected with the High Court were influenced by communal considerations and how he, on his own part, did not permit communal or any other extraneous considerations to influence him administratively or judicially. The Chief Justice of India further states that he (Chief Justice of India) assured Shri Singh that he did not hold that he (Shri Singh) himself was to blame but that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. Number of grounds have been stated by Shri Singh in this affidavit but those of which notice may be taken are that the transfer is without consent which according to him is impermissible, and that the consultation was not full, effective and meaningful in that the relevant considerations were not taken into account, no verification of facts was made and there was no relevant consideration for coming to a fair and considered conclusion that such a transfer would be in public interest. One additional ground is that the impugned order of transfer is punitive in character. Further, the transfer caused injury and the injury is inflicted without following the principles of natural justice, and the transfer is not shown to be in public interest.

819. Chief Justice of India filed his counter affidavit dated Sept, 29, 1981. Shri Singh filed reply to the counter-affidavit on Oct., 16 1981. In between there are two affidavits, one of Shri K.C. Kankan, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs, being counter-affidavit on behalf of the Union of India, and the other by Shri T.N. Chaturvedi, Secretary, Department of Justice, Government of India, specifically claiming privilege against disclosure of certain documents called for by Shri Singh.

820. By an order made by this Court, the Union of India was called upon to disclose all relevant documents, nothings, etc. bearing on the question of transfer of Sri K.B. N. Singh. Pursuant to this order a file was submitted to this Court containing the correspondence between the Chief Justice of India and the Law Minister, Chief Justice of India and the Prime Minister, and a letter from Shri M.G. Ramchandran Chief Minister of Tamil Nadu to Law Minister.

821. The evidence furnished by the correspondence may have to be evaluated, appreciated, analysed and examined along with the averments made in various affidavits. The correspondence has to be read in juxtaposition with the averments in the affidavits so that the clear picture of fact situation may emerge which may assist in disposing of the contentions raised by Shri Singh.

822. The Chief Justice of India wrote to the Law Minister on December 7, 1980. This is a fairly long letter, part of which refers to filling in the vacancies in the Supreme Court which may be ignored as being wholly irrelevant for the present purpose. The next subject discussed is confirmation of Acting Chief Justices one of whom is Shri K.D. Sharma, then Acting Chief Justice of Rajasthan High Court and the recommendation is that he should be confirmed. There is a reference to Justice Mufti Bahauddin Farooqi, then Acting Chief Justice of Jammu and Kashmir. The recommendation bearing on the question of confirmation of Justice Farooqi as Chief Justice is not relevant but as we are dealing with the transfer and as the proposal has emanated from the Chief Justice of India, what were the relevant considerations present to the mind of the Chief Justice of India on the question of transfer have a vital bearing on the final outcome and, therefore, that part of the letter which recites a recommendation for transfer of Justice Farooqi can be taken into account. This is being referred to for a very limited purpose as to the overall view of the letter, the approach of the Chief Justice of India, the permeating flavour in the letter that the transfer is consequent upon some inquiries in respect

of complaints against various Chief Justices and this has a vital bearing on the topic of transfer. Viewed from this angle, the statement in this letter that several complaints have been received against Mr. Farooqi, some of which, on verification, seem well-founded, has a direct nexus to the recommendation that Mr. Justice Farooqi, then Acting Chief Justice of Jammu and Kashmir should be transferred as a puisne Judge of the Punjab and Haryana High Court. As would be pointed out later, indisputably the transfer was a direct consequence of complaints found well-founded on verification and, therefore, the transfer was directly and Irrevocably related to the conduct of Justice Farooqi.

823. The Chief Justice of India then proceeds to state in unmistakable terms as under which is very relevant:

Though I am firmly opposed to a wholesale transfer of the Chief Justices of the High Courts, I take the view, which I have expressed from time to time, that such transfers may be made in appropriate cases for strictly objective reasons. Personal considerations must, in the matter of such transfers, be wholly kept out. The transfer of some of the Chief Justices has been engaging my attention for the past few months. I have made personal inquiries in this behalf and have met several lawyers and many judges of the concerned High Courts. On the basis of the data which I have collected and which I have considered with the greatest objectivity, I am of the opinion that the following transfers may be made.

Proceeding further in the letter the Chief Justice of India recommends transfer of Shri K.D. Sharma, Acting Chief Justice of Rajasthan as Chief Justice of Kerala consequent upon the vacancy caused in the office of Chief Justice of Kerala by elevation of the then inoumbent of office to the Supreme Court of India. In the vacancy caused by the transfer of Shri K.D. Sharma in the Rajasthan High Court, the recommendation was that Shri K.B. N. Singh, Chief Justice of Patna High Court be transferred and posted as Chief Justice of Rajasthan High Court and Shri Syed Sarwar Ali, senior-most puisne Judge of the Patna High Court should be appointed as Acting Chief Justice of Patna High Court. On the transfer of Shri Farooqi, Acting Chief Justice of Jammu and Kashmir High Court, Mr. Justice Mohammad Hamid Hussain of the Allahabad High Court was to be promoted and posted as Chief Justice of Jammu and Kashmir High Court. Then follows a paragraph which must be extracted:

That leaves for consideration the question of appointment of permanent Chief Justice of the Allahabad High Court. I am fairly satisfied that Chief Justice Satish Chandra should be transferred from the High Court of Allahabad, but I do not want to express any final opinion on this question until I ascertain for myself the state of affairs in Allahabad. For that purpose I will be going to Allahabad on December, 31. During my three days' stay at Allahabad, I will be meeting various members of the Allahabad Bar as also the Judges of that High Court. In case I advise the transfer of Justice Satish Chandra, he can be appointed as the Chief Justice of the Patna High Court. That will create a vacancy in the office of the Chief Justice of the Allahabad High Court for which a suitable recommendation can be made later. Justice Satish Chandra's transfer to Patna, in case it is necessary, may be made any time after January 15, 1981". This letter thus involves the transfer of Acting Chief Justice Mr. Farooqi, Mr. Justice M.H. Hussain, Acting Chief Justice Mr. K.D. Sharma, Chief Justice Mr. K.B. N. Singh and a near certain transfer of Chief Justice Mr. Statish Chandra.

824. Leaving aside others, one incontrovertible fact may be noticed here that prior to December 7, 1980, when a firm proposal was made for transfer of Shri K.B. N. Singh from Patna to Rajasthan High Court, there was neither a whisper or discussion between Chief Justice of India and Shri Singh concerning his transfer. The proposal to transfer Shri Singh is a firm proposal not a tentative one because the tentative suggestion couched in a different language is in respect of Shri Satish Chandra, Chief Justice of Allahabad. As far as Shri K.D. Sharma, Acting Chief Justice of Rajasthan, Shri K.B. N. Singh, Chief Justice of Patna, Shri Farooqi, Acting Chief Justice of Jammu and Kashmir, and Shri M.H. Hussain, Judge of Allahabad High Court, are concerned, there was a firm proposal and it would mean that before making such a firm proposal the Chief Justice of India must have taken all aspects bearing on the question of transfer into consideration because transfer of such high constitutional functionaries as Judge or a Chief Justice of a High Court is to be made after collecting relevant material, cool deliberation, mature consideration and as an absolute necessity. If the proposal to transfer Shri Singh was thus a firm proposal which if the President had accepted without further question as it was coming from the highest in the judiciary, the Chief Justice of India, and Shri Singh was transferred, ex facie the validity of the transfer would be open to serious question in view of the ratio in Mr. Sheth's case, Within 24 hours before the ink was dry on the first letter the Chief Justice of India, whose attention was drawn to a serious error in proposing transfer of Acting Chief Justice K.D. Sharma from Rajasthan to Kerala High Court by telephonic conversation, immediately went back on the proposal. It transpires from the correspondence that the Law Minister drew the attention of the Chief Justice of India that if Shri K.D. Sharma, Acting Chief Justice of Rajasthan was transferred as Chief Justice of Kerala High Court, he would become Chief Justice over six Judges of Kerala High Court who were senior to him by length. It was pointed out that Shri Sharma was inducted as a Judge of the Rajasthan High Court in 1973 while the seniormost puisne Judge in Kerala High Court Shri P. Subramonia Poti was inducted in the High Court in 1969 and that there were five other Judges along with Mr. Poti who were inducted into the High Court prior to 1973. If the proposal of the Chief Justice of India was implemented, a fairly junior Judge would become Chief Justice over his seniors, a thing which would be seriously resented as the imposition would be utterly unjustified, destroying

ruthlessly the natural expectations of Judges who had accepted High Court judgeship between 1969 and 1973. It appears this very relevant aspect was completely overlooked while making the recommendation for the transfer of Shri K.D. Sharma to Kerala High Court, This faux pau on being brought to the notice of the Chief Justice of India was rightly accepted saying that the Chief Justice of India "did not realise that as many as six Judges of the Kerala High Court are senior to Justice K.D. Sharma and that makes it necessary to think about the matter afresh", and, therefore, by letter dated December 8, 1980, the proposal to transfer Shri K.D. Sharma as Chief Justice of Kerala was cancelled and in supersession of that proposal a fresh proposal was submitted that Shri K.D. Sharma be transferred to Sikkim and Shri M.M. S. Gujral, the then Chief Justice of Sikkim be transferred as Chief Justice, Kerala Even Mr. Gujral was inducted as a High Court Judge five months later than Mr. Poti, This fact was not considered important enough in making the proposal, The other proposals contained is the letter dated December 7, 1980, were -reaffirmed which would imply that Shri K.B. N. Singh's proposed transfer from Patna to Rajasthan High Court was to be ordered.

825. The next letter dated December 18, 1980, by Chief Justice of India to Law Minister reveals one more fact that before the letter dated December 8, 1980, intimating the cancellation of proposal of transfer of Shri K.D. Sharma to Kerala High Court reached appropriate quarters, the proposal was already processed to the Prime Minister who appears to have approved the same and this becomes evident from a recital in the letter dated December 18, 1980, that having communicated one proposal to the Prime Minister in regard to the appointment of Kerala Chief Justice (Shri K.D. Sharma) consequent upon the impending elevation of the then Chief Justice to Supreme Court, it was somewhat awkward to withdraw that proposal especially since the Prime Minister was inclined to agree to that proposal.

826. Possibly with a view to apprising the Prime Minister as to the circumstances necessitating withdrawal of the proposal, on the same day a letter was addressed by the Chief Justice of India to the Prime Minister in which it was stated that while recommending transfer of Shri K.D. Sharma as Chief Justice of Kerala High Court he had overlooked that Justice K.D. Sharma is junior to as many as six Judges of the Kerala High Court and, therefore, his transfer to that High Court was bound to invite a great amount of public criticism and it would also create administrative problems in the way of Justice Sharma himself. One other aspect in this letter worth noticing is that the Chief Jusice of India informed the Prime Minister that he was trying to explore the possibility of recommending the appointment of the senior-most puisne Judge of the Karnataka High Court, Shri K. Bhimiah, as Chief Justice of Kerala High Court, In the penultimate paragraph of the letter the Chief Justice of India reiterates that the other proposals, for example, the proposal of transfer of Shri K.D. Sharma, Acting Chief Justice of Rajasthan High Court to Sikkim and the transfer of Shri K.B. N. Singh, Chief Justice of Patna High Court to Rajasthan High Court may await further consideration. The underlined portion of the letter extracted herein would show that the proposal to transfer Shri K.B. N. Singh to Rajasthan was likely to be reviewed and reconsidered and, therefore, the proposal itself may become tentative, But the next letter to which presently a reference would be made would show that the transfer of Shri K.B. N, Singh was certain, only the station may be reconsidered.

827. The Chief Justice of India wrote to the Law Minister on December 20, 1980, that is, two days after the letter to the Prime Minister that having given the matter his most anxious consideration, he proposed, in supersession of the previous proposals made by him, that Shri M.M. Ismail, Chief Justice of Madras High Court should be appointed as the Chief Justice of the Kerala High Court and in the consequential vacancy caused in the office of Chief Justice of Madras High Court Shri K.B.N. Singh, Chief Justice of Patna be transferred as Chief Justice of Madras. A further proposal was that Shri Syed Sarwar Ali, seniormost puisne Judge in the Patna High Court should be appointed as Acting Chief Justice of the Patna High Court. There ends the correspondence.

828. The correspondence bearing on the question of transfer of Shri K.B.N. Singh, commencing from Dec., 7, 1980 and ending with the letter dated December 20, 1980, has been disclosed. There is no contemporaneous written evidence bearing on this topic either in the form of memorandum or notings. This becomes explicit from the following paragraph in the statement made on behalf of Union of India by the learned Solicitor-General on Nov. 12, 1981, Relevant paragraph in the statement reads as under:

Except the material brought on record by the various affidavits filed on behalf of the Government of India in the easel, the correspondence already disclosed and the notings submitted to this Hon'ble Court with a claim of privilege, there are no minutes recorded as to any conversation between the Chief Justice of India and the Union of India. No other data is available except what is in the above records.

(Underlining mine)

829. Affidavits refer to telephonic conversation of Chief Justice of India with Mr. Singh on January 5, 1981, and the meeting between the two on January 8, 1981. File of noting was shown to the Court, Dr. Singhvi submitted that if there

is any relevant material bearing on the question of transfer of Shri Singh it must be disclosed and consistent with our order for disclosure we would have been duty bound to disclose it, The fact that after perusing the file we did not direct disclosure permits the irresistible inference that the notings did not contain any relevant material. Therefore a fortiori it follows that except the correspondence disclosed there is no contemporaneous written record; nor notings of minutes of telephonic communication relevant to transfer of Shri Singh, And it would be imprudent to hold that such serious issue with forebodings of resignation is left to oral discussion between two high constitutional functionaries to be conjured up by tapping memory as to what transpired. Such an approach would expose high constitutional functionary like Chief Justice of a High Court without remedy, reprieve and relief,

830. Disclosed correspondence thus being the only source of what happened during two weeks commencing from December 7, 1980, and ending with the letter dated December 20, 1980, has to be minutely albeit dispassionately and objectively scanned, During the fateful period five Chief Justices and one puisne Judge were proposed to be transferred. They include Chief Justices K.D. Sharma (Rajasthan), K.B. N. Singh (Patna), M.M. S. Gujral (Sikkim), Acting Chief Justice Farooqi (J&K), Chief Justice M.M. Ismail (Madras) and Justice M.H. Hussain, a puisne Judge of the Allahabad High Court who was to be promoted, transferred and posted as Chief Justice, Jammu and Kashmir. And notice the rotational movement. Shri Sharma was first proposed to be moved from Jodhpur to Ernakulam, i. e. Rajasthan to Kerala, from the Hindi speaking belt to an area where Hindi is hardly welcome. Shri Gujral moves from Sikkim to Ernakulam, that is, from Sikkimese to Malayalam and from- extreme north to down South. Within 24 hours the wheel turned almost 180 degrees when Shri Sharma instead of going to extreme south, i.e. Ernakulam in Kerala, is pushed to extreme north, Sikkim in the foothills of Himalayas. Shri Singh is first proposed to be sent from Patna to Jodhpur, Rajasthan, both in Hindi speaking belt and then actually shifted to Madras, Hindi to Tamil, seriously objected to by Mr. M.G. Ramchandran, Chief Minister of Tamil Nadu, Shri Ismail moved from Madras to Kerala not very far away though from Tamil to Malayalam language area. Shri Farooqi who was first in Kashmir, then sent to Allahabad, brought back to Kashmir, is proposed to be demoted and sent to Chandigarh. Shri Mohammad Hamid Hussain moves from Allahabad to Jammu and Kashmir. The chequered history of this rotational movement spreading over hardly 13 days would hardly satisfy the rigorous test of a mature, objective, dispassionate consideration of the various factors involved in the transfer. This is all the more so because as it will be pointed out a little while later that the Government of India possibly out of deference to Chief Justice of India, which ought to be the right attitude, had simply abdicated itself and accepted the proposals not for the reasons for which they were made but for entirely contrary and opposite reasons.

831. Transfer of Shri Singh is sought to be sustained on the ground that it is not by way of punishment nor on account of misbehaviour or objectionable conduct on his part nor with a view to casting a stigma on him but in larger public interest, namely, that he being an experienced senior Chief Justice, such a person was required to man a premier High Court like the Madras High Court. Does the correspondence bear out this submission?

832. The letter dated December 7, 1980, read as a whole, piecemeal or linewise hardly indicates that Shri Singh was proposed to be transferred because he was the senior experienced man and a premier High Court like the Madras High Court would require a senior experienced person. All High Courts are of equal importance, save that some High Courts have a span of more than a century and others were formed after the independence. When the submission that transfer of Shri Singh was not in public interest is considered, it would be pointed out that when transfer was first mooted, there was not even a remote possibility of Madras High Court requiring a senior experienced Judge.

833. With this background, if the letter dated December 7, 1980, is read as a whole, an indelible impression is formed on the mind that the governing consideration for recommending transfers was that one or the other Chief Justice had made himself obnoxious on account of complaints against him. Mr. Justice Farooqi's case is an instance in point and it is incontrovertible that in his case it was proposed that he be demoted and transferred from Jammu and Kashmir to Chandigarh because several complaints had been received against him some of which on verification seem well founded. And this is the undertone of the whole letter because it is with reference to Justice Farooqui that the proposals for transfer commenced in the letter. And this is reinforced when one reads the case of Shri Satish Chandra, Chief Justice of Allahabad because it a suggested by the Chief Justice of India that he is fairly satisfied that Shri Satish Chandra should be transferred but that he will formulate the proposal by reaching a decision after a visit to Allahabad when he proposed to meet various members of the Allahabad Bar as also Judges of the High Court to ascertain the state ,of affairs in Allahabad. If Shri Satish Chandra is the senior experienced Chief Justice, that aspect is not to be collected by a visit to Allahabad. If some other public interest requires transfer of Shri Satish Chandra, a visit to Allahabad would hardly be enlightening. If the state of affairs at Allahabad is required to be ascertained a visit is inevitable. That such a visit was in contemplation is clearly stated and during this visit what was contemplated to be done was a meeting with various members of the Allahabad Bar as also Judges of the Allahabad High Court And this meeting was for the avowed object of ascertaining the state of affairs in Allahabad which will have a bearing on the proposal to transfer Shri Satish Chandra, Carr it be said in all humility that the sequence of events herein set out would not unmistakbly

show that the complaints against Shri Satish Chandra have to be examined, the truth or otherwise of it has to be ascertained, the degree of his unaccept-ability at Allahabad has to be determined and upon all these considerations flowing invariably from complaints against Shri Satish Chandra, a transfer proposal would be submitted, Add to this the statement in the letter dated December 7, 1980, when the chapter on transfers opens that transfers be made in appropriate cases for strictly objective reasons. In this connection Chief Justice of India states that he has made personal enquiries in this behalf and has met several lawyers and many Judges of the concerned High Courts and on the basis of the data collected during such visit and enquiry which he has considered with greatest objectivity, he proposed transfers including that of Shri Singh. Therefore, the transfer is the outcome of enquiries from lawyers and Judges, about local atmosphere qua a Judge necessitating his transfer. The transfer in such a case would be clearly relatable to the alleged misbehaviour, if any, or conduct of the Judge.

834. Read the letter as a whole and the permeating flavour emerging from it is that the Chief Justice of India believed, truthfully and honestly, but impermissible according to the ratio in Mr. Sheth's case that the transfer in each case was to remove the Judge from a certain place because he had made himself obnoxious and that this cannot be for any other reason except punishment because it has already been pointed out that transfer is more harmful than even punishment. This conclusion is reinforced by a specific, unambiguous assertion extracted herein-above that the Chief Justice of India was opposed to the wholesale transfer of Chief Justices of High Courts and that his approach was that transfer may be made in appropriate cases for strictly objective reasons. Personal considerations must be wholly kept out in such cases'. Analysing this sentence it would mean that wholesale transfer of Chief Justices referable to an objective norm that the Chief Justices shall always be from outside is not acceptable to the Chief Justice of India, That is his view and he strictly adheres to it. He is, therefore, certainly not proposing transfers as and by way of policy. It would be so because in his leading judgment in Mr. Sheth's case he has expressed in no uncertain terms that policy transfers on a wholesale basis which leave no scope for considering the facts of each particular case and which are Influenced by one-sided governmental considerations are outside the contemplaion of our Constitution. The Chief Justice of India is thus opposed to policy transfers. Therefore, he is not proposing these transfers by way of policy transfers. The Chief Justice of India is of the view that the transfer may be made in appropriate case, meaning thereby selective transfers. Then he says that it must be for objective reasons, These objective reasons may include complaints against the Judge concerned and the complaints, if found to be of substance, transfer may be ordered pursuant to, the complaints. Transfers on such complaints can be made and would not be made punitive is also his view in the leading judgment in Mr. Sheth's case. To recall his observation that the 'factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest of rare occasions which can be counted on the fingers of a hand, if becomes necessary to withdraw a Judge from a circle of favourites and non-favourites', Transfer for these reasons would, according to the, view expressed by Chandrachud, J, in Mr. Sheth's case MANU/SC/0065/1977, be in public interest. This itself is a moot point, Transfer in appropriate cases not answerable to any objective norms would be selective transfer. But in view of the majority decision in Mr. Sheth's case, the more objectionable part is that personal considerations in the matter of such transfers be wholly kept out, If by personal considerations it is meant the complaints against Judge then it becomes tautologous because objective reasons remain unexplained. If by personal considerations what is meant is personal difficulties, in conveniences and hardships of the Judge consequent upon the transfer and if these are to be kepi out of consideration, the transfer order becomes bad in view of the ratio in Mr. Sheth's case. Therefore, summing up the whole approach underlying the letter by which transfers were first proposed show that all the relevant aspects, were not taken into consideration, to wit, proposal to transfer Shri K.D. Sharma to Kerala, that these were not policy transfers because the Chief Justice of India was wholly opposed to policy transfers; that these were selective transfers in appropriate cases meaning complaints against Mr. Justice Farooqi and the future investigation of complaints against Chief Justice Satish Chandra, and the data collected in course of enquiry with lawyers and Judges in respect of other Judges whose transfer was proposed, that the personal considerations, i.e, the personal inconveniences, hardships and difficulties were to be kept out of consideration, and that the transfers were to be for objective reasons, namely, complaints against the concerned Judges, were the governing considerations of the letter and this was operating on the mind of the Chief Justice of India while proposing the transfers. It may also be recalled here that while deciding the transfers the station to which the man is sent has a relevant consideration because as has been pointed out that some stations are good and some are not so good. And while deciding the station it is necessary that the personal considerations of the Judge may have an important bearing, to wit, education of his children, environmental considerations, availability of medical facility, health of his parents, if any, etc. and all these have to be kept in view in deciding the station to which the Judge is proposed to be transferred. Now, here this aspect seems to have been taken for granted because on December 7, 1980, Shri Sharma was proposed to be sent to Kerala and on the next day he was shifted to Sikkim. Is there anything comparable between Ernakulam and Sikkim save and except that they form part of India? Shri Singh was proposed to be transferred first to Jodhpur and then he was shifted to Madras. Now, nothing transpires from the record as to what relevant considerations about selecting the station qua a Judge have weighed with" the Chief Justice of India while making proposal for transfer.

835. One additional fact which I only propose to mention and not comment upon is that all the relevant considerations were not thoroughly examined and analysed before making the proposal and this becomes apparent from the fact that a

very vital consideration that a junior may not be imposed over a senior was wholly overlooked when Mr. K.D. Sharma was proposed to be sent to Kerala because there were six Judges senior to Mr. Sharma who would be Puisne Judges and over whom he would be the Chief Justice. And this is admitted when it is stated that that aspect while making the proposal was overlooked. This is such a vital consideration that if the proposal had been carried out, it would hare admittedly invited a great amount of public criticism and would have resulted in administrative problems in the way of Mr. Justice Sharma himself.

836. It may be fairly assumed here that at one stage the Chief Justice of India considered it necessary in public interest to transfer Mr. Justice Gujral from Sikkim but that proposal was eventually dropped.

837. The most serious contention raised by Dr. Singhvi may now be examined. Urged Dr. Singhvi, that before a transfer of a Judge is contemplated it is necessary to keep in view his personal problems and it must be weighed in relation to the reasons for his transfer. When a high constitutional functionary like the Chief Justice of India makes a proposal it is not conceivable that the proposal would be made first and the relevant facts bearing on the subject may be collected afterwards and examined and evaluated later on, on a proposition that if it becomes so necessary the proposal may be withdrawn. This is not how high constitutional functionaries discharge their constitutional obligations. Article 222 provides for a minimum safeguard of a consultation with the Chief Justice of India. What constitutes meaningful, purposive and substantial consultation has been set out earlier. It includes within its fold an inquiry into the personal factors of the Judge such as the position of his wife, children, parents, other inconveniences and difficulties that he might experience on transfer. This can be gathered either from the Judge concerned or from other reliable sources. But personal inconveniences at best can be gathered from the person himself.

838. There is not a little of evidence that before proposing the transfer of Shri K.B. N. Singh from Bihar to Rajasthan on December 7, 1980, he had been given even a glimpse of his proposed transfer. That is an admitted position. Nothing was whispered to him, neither in February 1980 when the Chief Justice of India paid an official visit to Patna, nor at any time till December 7, 1980, when a firm proposal emanated from the Chief Justice of India and was handed in to the Government of India for being implemented. In this connection it is stated in the affidavit of the Chief Justice of India that the mother of Shri K.B. N. Singh is old and is not keeping good health was a fact known to him since Feb., 1980. The age and health of the mother, an objective fact if known would by itself hardly be relevant. The real question, would be, what is the position of the mother qua the son and how much is she in her old age dependent on the son, and what would be the result of bringing about an estrangement between the two. That is a vital consideration not the fact of her age and present health. Till January 5, 1981, during which period two independent proposals emanated from the Chief Justice of India for transfer of Shri K.B. N. Singh, first to Rajasthan and next to Madras, not a whisper was made to Shri Singh about the proposed transfer. After-all, when a high constitutional functionary like the Chief Justice of India makes a proposal how speedily it is processed at the highest level becomes discernible from the fact that the proposal dated December 7, 1980, passed through the Law Minister to the Prime Minister by December 9, 1980, and was approved by the Prime Minister and embarrassment was felt as disclosed by the letter of the Chief Justice of India dated December 18, 1980, while withdrawing the proposal. The incontrovertible fact situation that emerges from reading the correspondence is that the Chief Justice of India made the proposal for transfer of Shri K.B. N. Singh in the letter dated December 7, 1980, reaffirmed it in the letter dated December 8, 1980, described it as tentative by saying that the proposal concerning Shri K.B. N. Singh may wait further consideration by the letter dated December 18, 1980, and affirmed it to be a firm proposal by letter dated December 20, 1980, without whispering a word to Shri K.B. N. Singh. The proposal is unaccompanied by necessary relevant facts evidencing the relevant public interest, and it is inevitable that it must be so. Public interest which necessitates transfer is not stated. There is not the slightest reference to the problem of mother of Shri Singh. May be, Chief Justice of India may consider it irrelevant from his stand-point, But President is entitled to know every relevant fact. And barring making proposal till that day no relevant fact is collected and even if Chief Justice of India had the facts, none were stated in the proposal. Would the Chief Justice of India accept this proposal emanating in this form from President without further inquiry? He would send for all relevant material which must be the source and foundation for transfer. Should the President be denied the same considerations? And President says he had no discussion with the Chief Justice of India, It was for the first time in a telephonic talk in the evening of January 5, 1981, the Chief Justice of India conveyed the proposal for transfer to Shri K.B. N. Singh. By that time two firm proposals, one a tentative and another final were pending with the Government of India. It would be stretching one's credibility to limit to hold that Chief Justice of India postponed talking to Shri Singh to a date later than the proposals. Chief Justice of India is an authority to be consulted but instead of being consulted he initiated the proposal. The minimum that is excepted of him is that he collects all relevant facts, also collects the relevant personal problems of the Judge to be transferred, examines, appraises and evaluates them from all objective standards keeping in view the possible inconvenience and hardship likely to be caused to the Judge and comparable public interest which necessitates transfer and thereafter puts forward the proposal. While discharging such a high constitutional function of either initiating the proposal for transfer or for being consulted for transfer it would be a failure to perform the constitutional duty if the proposal is made first, processed right up to the Prime Minister in one case and collecting of the data is postponed to a later date. This is contrary to what Chandrachud, J. has

stated in his judgment in Mr. Sheth's case MANU/SC/0065/1977. To recall, he said that there can be no purposeful consideration of a matter in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and a right decision taken. The decision to be a right decision must follow the collection of material and be based on the material and that collection of evidence is not an empty formality for the record only.

839. It was, however, said that before the proposal was finally implemented by the Presidential notification transferring Shri K.B. N. Singh there was a full and effective consultation between the Chief Justice of India and the President and that by that time the Chief Justice of India was in possession of all the relevant and material facts, Attention in this context was invited to a statement in the affidavit of the Chief Justice of India that there was a full and effective consultation between me and the President of India on the question of Shri K.B. N. Singh's transfer from Patna to Madras as Chief Justice of Madras High Court. Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer'. What reference to the statement in affidavit a question was put to Mr. Parasaran, learned Solicitor-General as to whether the discussion involved in consultation was personally with the President of India or the expression 'President of India' means the Government of India and the consultation was through proper channel as laid down in the rules of business. A statement was read over to the Court by Mr. Parasaran, possibly as instructed by the President of India, that at no time the Chief Justice of India had any personal discussion with the President, Therefore, one has to fall back on the discussion, if any, Chief Justice of India may have either with the Law Minister who as Minister of Justice according to the rules of business would be the proper person to deal with the problem of transfer. It appears more or less the discussion has been by correspondence. Even a perfunctory knowledge about official correspondence would convince anyone that if there is a continuous correspondence on the subject, every letter would have a reference to the prior letter bearing on the subject. Turning to the first letter dated December 7, 1980, in which a proposal is made for transfer of Shri K.B. N. Singh from Patna to Rajasthan, there is not the slightest reference to any earlier discussion oral or in writing between the Law Minister and the Chief Justice of India on the question of transfer of Shri K.B. N. Singh, It may be that there was some public debate about the transfer of all Chief Justices of High Courts pursuant to a policy which was sought to be evolved that the Chief Justices of all High Courts must be from outside the State. This evolving proposal was not acceptable to the Chief Justice of India when he said in the first letter that he is firmly opposed to a wholesale transfer of Chief Justices of High Courts. Then he proceeded to point out transfers may be effected in appropriate cases for strictly objective reasons, Having settled what ought to be the governing form for transfer, the Chief Justice proposed transfer of Acting Chief Justice K.D. Sharma, Chief Justice K.B. N. Singh, Acting Chief Justice M.B. Farooqi and Justice M. H. Hussain, Recalling the statement in the affidavit that there was full and effective consultation with the President of India prior to transfer, it has to be evaluated in the light of the contemporaneous written evidence in the form of the letter of the Chief Justice of India dated December 1, 1930. And in the statement on behalf of Union of India dated November 12, 1981, it is specifically made clear that except the disclosed correspondence and notings for which privilege is claimed there are no minutes or notes of discussion. I have shown above that there is no other contemporaneous written record except the correspondence. The first proposal to transfer Shri K.B. N. Singh finds its place in letter dated December 7, 1980. It is an admitted position that prior to that there was no discussion between the Chief Justice of India and the Law Minister. Equally it is an admitted position that Shri K.B. N. Singh was not even whispered that it was proposed to transfer him. It is also an admitted position that it was on January 5, 1981, that the Chief Justice of India talked with Shri K.B. N. Singh for the first time in which he broached the subject of transfer of Shri Singh. The inescapable conclusion is that a firm proposal for transfer was submitted to Government as late as December 20, 1980, and about 15 days thereafter Shri Singh was told for the first time about his proposed transfer and was invited to inform The Chief Justice of India about his personal difficulties and Inconveniences, Now, the order of transfer is dated January 19, 1981. In between Shri Singh met the Chief Justice of India on January B, 1981. and till the order of transfer was notified there is nothing in the correspondence which shows that there was any further discussion. The firm decision was reached on January 8, 1981 itself because it was stated to the court that the Prime Minister approved the proposal of transfer of Shri Singh on January 9, 1981. It is reasonable to believe that Law Minister must have processed the proposal on January 8, 1981. The meeting between Chief Justice of India and Shri Singh took place in the evening on January 8, 1981, This would establish that a firm proposal for transfer was made, processed and approved before collecting all the relevant material which would considerably detract from the validity and efficacy of the proposal. Even if subsequently gathered facts were communicated to the President, one could have overlooked this apparent defect but the written record does not bear out that the President was informed of all the relevant facts.

840. One would have expected in this connection that while making the proposal for transfer, the very letter would, in respect of each Judge proposed to be transferred, set out therein as to what were the personal difficulties, what necessitates the transfer, which public interest was likely to be served by the transfer and all these should find their relevant place in the proposal itself, Oral or telephonic conversation while discharging important constitutional function affecting character and dignity of such high constitutional functionary as Chief Justice of a High Court is entirely out of place, The only reference to the transfer of Shri K.B. N. Singh in the first letter is as under:

The transfer of Justice K.D. Sharma will create a vacancy in the office of the Chief Justice of the Rajasthan High Court. I recommend that Justice K.B. N. Singh who is the Chief Justice of the Patna High Court, should be transferred as the Chief Justice of the Rajasthan High Court.

We struggled hard to find out from this long letter as to what public interest prompted the Chief Justice of India to propose transfer of Shri K.B. N. Singh to Rajasthan The later suggestion that Shri Singh's transfer was proposed to subserve the public interest, namely, that he is a senior, experienced Chief Justice needed to preside over a premier High Court will not help because there was no question of sending a senior, experienced Chief Justice to Rajasthan High Court and at the relevant time there was no proposal for transfer of Shri M.M. Ismail. Chief Justice of Madras High Court, Therefore, some other public interest must have informed the Chief Justice of India to propose transfer of Shri Singh to Rajasthan. What inevitably transpires is that the transfer of Shri Singh from Patna is certain, reasons and place and public interest may fill in the gap as situation demands. This is neither consultation nor appreciation of relevant facts to satisfy the rigorous test laid down in Mr. Sheth's case.

841. There is a further lacuna in the process of consultation and it may be briefly mentioned here. While laying down the parameters of the scope of consultation under Article 222(1), Chandrachud, J., in his leading judgment of the majority view in Mr. Sheth'g case MANU/SC/0065/1977' approved and affirmed the passage in Chandramouleshwar Prasad MANU/SC/0495/1969 extracted earlier, Approving the statement of law contained in the extracted passage, it was said in Mr. Sheth's case that in order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision, If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer, the direction to give effect to the counter proposal without anything more cannot be said to have been issued after consultation (pp. 674-675) (of SCR): (at p. 375 of AIR). The question is, whether this test is satisfied.

842. Chief Justice of India unmistakably asserts that he is opposed to policy transfers or Wholesale transfers of Chief Justices of the High Courts. He is of the view that transfers may be made in appropriate cases for strictly objective reasons. In other words, selective transfers. Pursuant to this view held by him he proposed amongst others the transfer of Shri K.B. N. Singh, This proposal was to be processed by the executive. It was incumbent upon the executive to have requested the Chief Justice of India to put all the materials and relevant facts collected by him for consideration of the President, Obviously, pursuant to a caution voiced by Chandrachud, J. in Mr. Sheth's case that as a high constitutional functionary like the Chief Justice of High Court was involved all the necessary relevant facts bearing on the question of transfer must be collected by the Chief Justice of India as this is founded on the principle that in a matter which concerns the judiciary vitally, no decision ought be taken by the executive without obtaining the views of the Chief Justice of India who, by training and experience, is in the best position to consider the situation fairly, competently and objectively. In order to consider every relevant fact in the discharge of this constitutional obligation the Chief Justice of India would be within his right and indeed it is his duty wherever necessary to elicit and ascertain further facts either directly from the judge concerned or from reliable sources, but thereafter he has voiced a caution that 'the executive cannot and ought not to establish rapport with the judges which is the function and privilege of the Chief Justice', Consistently with this weighty judicial pronouncement the Chief Justice of India alone will have to gather all material and the executive would be well advised to keep hands off the judiciary, Therefore, whatever material the Chief Justice of India will have, has to be placed before the President. The correspondence manifests a woeful lack of any such material being placed before the President. That apart, the Chief Justice of India proposed selective transfers in appropriate cases strictly for objective reasons. Now, look at the performance of the executive. The executive appears to have accepted the proposal not on merits but out of reverence for the Chief Justice of India which constitutes a complete abdication of its function. This becomes discernible when in the course of hearing in response to a query made by the Court, the learned Solicitor-General made a statement on November 12, 1981, which is material for the decision on this point and, therefore, may be extracted hereunder:

Throughout the Government had been of the view that as a policy the Chief Justices of the various High Courts should be from outside their States. It is this policy view that was put across to the Chief Justice of India. The Chief Justice of India expressed that he was opposed to all the Chief Justices of the High Courts being from outside and was keen on transfers to be made in appropriate, cases strictly for objective reasons. It is in pursuance of the view propounded by the Chief Justice of India that he suggested the transfers covered by the letters which in his view were desirable. Government acceded to the transfers proposed by the Chief Justice of India as (1) it was felt that not agreeing to these transfers may be construed as though the Government is departing from the view of having Chief Justices from outside; (2) the policy aspect could still be Dressed into service later.

(Emphasis supplied)

At a later stage of the hearing to a further query by the Court Mr. Parasaran in terms stated that the Government accepted the proposal for transfer not for the reasons which prompted the Chief Justice of India to propose transfers but for its own reasons. Recalling the test of consultation at this stage set out just hereinabove that 'if one party makes a proposal to other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation', the proposal was for a selective transfer definitely not in consonance with any policy Government of India may have in contemplation which was firmly opposed and the counter proposal was for policy transfer and giving effect to the counter proposal without anything more cannot be said to be after consultation. The test of consultation certainly is not satisfied because not only two minds have not been able to confer and produce a mutual effect but each did not have full and identical facts and, therefore, the final decision cannot be said to be the product of consultation and deliberation.

843. A very emotional and passionate appeal was made by Mr. Parasaran to consider these transfers as policy transfers. In the light of the statements hereinabove quoted, the appeal must fall on deaf ears, for, the Government of India had a policy in embryonic stage and the Chief Justice of India was firmly opposed to any such policy because he is firmly committed to the view as laid down in his majority judgment in Mr. Sheth's case that policy transfers on a wholesale basis which I have no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution. He reasserts this in his letter dated December 7, 1981. Apart from this, it is impossible to uphold this transfer as a policy transfer, It is no doubt true that laying down of a policy is the function of the executive. If that policy relates to ludiciary, ordinarily the executive would be well advised to have full and effective consultation with the Chief Justice of India, the highest constitutional functionary in the judiciary, The policy has to be evolved and firmly laid, Views expressed do not constitute policy, Now the Question is. was there any policy to which these transfers can be related? The view of the Government as expressed by the Law Minister is that Chief Justice of every High Court shall be from outside his jurisdiction. Maybe, the Government may lay down such a policy and as and when laid down its constitutional validity may have to be examined, But one cannot accord the status of policy to a view expressed by the Law Minister, may be the official spokesman for the Department of Legal Affairs and Justice of the Government of India. We were not told how a policy is framed and firmly laid down. But a view occasionally expressed does not have the trappings of a firmly laid down policy. And it is not in dispute in this case. In the statement extracted hereinabove made on behalf of the Government of India, the policy question was to be examined at a later stage. A reference to the statement of the Law Minister in the Lok Sabha on July 24, 1980. upon a calling attention motion on the resolution of the Bar Council of India disapproving Government proposal to appoint seniormost judge of a High Court as Chief Justice of another High Court in the country, may be made, The Law Minister stated as under:

The Government has, however, received representations from various quarters urging that as a matter of policy the Chief Justice of a High Court should be appointed from outside the Jurisdiction of that High Court. This matter is actively encaging the attention of the Government. Even though Government's thinking has not taken a final shape in the matter the Government is prima facie of the view that the proposal by and large merits favourable consideration in the interest of sound judicial administration and also the independence of the judiciary.

(Emphasis supplied)

This statement would at once reveal that till July 24. 1980, the matter was under consideration of the Government and that the Government's thinking had till then not taken a final shape in the matter. Then as late as September 3, 1981, the Law Minister informed the Consultative Committee of the Ministry of Law, Justice and Company Affairs that he had sought views of the Chief Justice of India on the policy of having Chief Justices from outside as that by itself would considerably improve the functioning of the High Courts. The Law Minister further apprised the members of the approach of the Chief Justice in the matter of transfers and appointments of outsiders, He proceeded to state that a final decision in the matter of a policy of transfers was still to be taken. (underlining mine). At any rate, this unmistakable, unambiguous statement of the Law Minister on September 3, 1981, much after the commencement of hearing in this case in the Court, would remove any vestige of doubt that a decision on policy transfers was yet to be taken. There was a view expressed but no policy in July 1980, there was no such policy in January 1981 when Shri K.B. N. Singh was transferred, there was no policy as late as September 3, 1981. when the case was being heard and the statement made to this Court on November 12, 1981, that the policy aspect could still be pressed into service later on, leave no room for doubt that the impugned transfer was not a policy transfer. Therefore, the transfer of Shri Singh cannot be upheld as a policy transfer. It is rather in this context surprising that the Chief Justice of India while firmly opposing policy transfers in letter dated December 7. 1980, should tell Shri Singh on January 5, 1981 that it was Government policy to transfer judges. And there is nothing to show that between December 7. 1980, and January 5, 1980, Chief Justice of India has veered round to the view of Law Minister because if he had, he could have proposed transfer of a large number of Chief Justices and not confined, himself to two only.

844. It may be mentioned In passing that there was a very lively debate about the power of the executive to lay down policy. It is a well recognised epithet of constitutional wisdom that in constitutional matters the Courts do not decide what is not brought before it nor would it prefer advice except in a reference under Article 143, on the wisdom or validity of a future action. If there is no policy till today it would be unwise to pronounce upon a future policy without knowing what form and shape it would take, No carte blanche can be given in this behalf. How dangerous it would be can be illustrated by observing that if the policy were to be laid down by the executive that a Judge of the High Court who decides the matter against the Government will be transferred it would be an objective norm because it can be easily ascertained whether a judge has decided a matter against the Government, Such a policy, if at all laid down, would be complete antithesis of the independence of judiciary, Therefore. I refrain from saying anything on the wisdom or validity of what is being proposed as a policy that every Chief Justice must be from outside the State because there is no such policy and as and when it is laid down, if questioned, its validity will have to be examined.

845. One more infirmity urged and likely to invalidate the order of transfer may now be examined, The power to transfer a High Court judge can be exercised only in public interest, In the proposal forwarded to the Government by the letter dated December V, 1980, and the letter dated December 20 1980, for transferring Shri K.B. N. Singh first to Rajasthan and then to Madras, it is nowhere stated what public interest is sought to be served by this transfer. This assumes importance because both the constitutional functionaries involved in the process of consultation are operating on different wave lengths, to writ Chief Justice of India for selective transfers. President to buttress the position to evolve a policy in future, In the affidavit it is stated that consequent upon the transfer of Shri M.M. Ismail from Madras to Kerala it was necessary to appoint a senior, experienced Chief Justice in the Madras High Court, Permanent and senior, experienced Chief Justice from outside to man a High Court seems to be a phenomenon of recent origin, Ordinarily the seniormost puisne judge is appointed as Chief Justice. There were of course, some cases in which the Chief Justice was brought from outside and the cases pointed out were of Mr. Justice Das sent to Karnataka, Mr. Justice Sars (sic) Prasad going to Rajasthan, and our esteemed colleague Mr. Justice R.S. Pathak going to Himachal Pradesh, But these cases are few and far between. The normal rule of succession has been the seniormost puisne judge becoming the Chief Justice unless he was otherwise found to be unsuitable, And the Chief Justice of India accepts unreservedly just and rightful expectations of the seniormost puisne Judge to be promoted as Chief Justice when he suggests that Mr. Poti. seniormost puisne judge in Kerala High Court will be deprived of his just and rightful expectation to become Chief Justice on the transfer of Sri K.D. Sharma, and therefore, further suggested that Mr. Poti be appointed in a suitable vacancy as Chief Justice but outside Kerala, thereby, of course, denying rightful expectation of the seniormost puisne judge in that High Court. Now, Mr. P.R. Gokulakrishnan is the seniormost puisne judge of the Madras High Court, Nothing is pointed out why he would be considered unsuitable for being promoted as Chief Justice if it becomes necessary to transfer Mr. Ismail. Mr. M.M. Ismail who was seniormost puisne judge was promoted as Chief Justice, Madras, on retirement of Mr. Ramaprasada Rao in the year 1979 who had by that time to his credit experience of 12 years of High Court judgeship HOW it became a compelling necessity not to promote Mr. Cokulakrishnan even if Shri M.M. Ismail was to be transferred, left us guessing. Mr. Gokulakrishnan was appointed as permanent judge of Madras High Court on July 7, 1969 Mr. Poti was appointed as Additional Judge of Kerala High Court on March 20, 1969. If a judge of a High Court after twelve years of High Court judgeship is not suitable for being promoted as Chief Justice. he would ordinarily never become suitable for that post. But Mr. Poti is good enough to be appointed Chief Justice but unsuitable for Kerala, for which Mr. Sharma an inductee of 1973 was considered good enough to be permanent Chief Justice. Again, Mr. S. Sarwar Ali inducted as High Court Judge on July 6, 1970. was recommended to be posted as Acting Chief Justice of Patna High Court on the transfer of Mr. Singh, If Madras High Court has a life span over a century, so also Patna High Court has a life span over a century. But Mr. Ismail, a senior experienced Chief Justice is transferred to Kerala High Court, a High Court which came into existence as late as 1956 and just celebrated its Silver Jubilee, Delhi High Court has a permanent Chief Justice who is an inductee of January 1969, Every attempt to find an objective norm or yardstick related to, proclaimed public interest by which these transfers can be measured or Judged and for which they were ordered has led me to a blind alley. For over 30 years with some few exceptions the seniormost puisne Judge was always promoted as the Chief Justice except in the case of Himachal Pradesh when on setting up the High Court for the first time Mr. M.H. Beg was transferred from Allahabad and promoted as Chief Justice and posted at Simla. And also again when someone had not put in five years of High Court judgeship before his turn to be elevated as Chief Justice arrived, It is quite well-known that next in line of succession to the Chief Justice is always being trained by being normally associated with administration so that when the elevation as Chief Justice bar comes due he has already his grip over the administration. In most of the High Courts seniormost puisne judge is always entrusted with a large chunk of administrative work and therefore, he is probably well acquainted and trained to take over the responsibilities of a Chief Justice, There is no material on record which would show that Mr. Gokulakrishnan would not compare favourably with Mr. Singh for being appointed as Chief Justice of Madras High Court. Mr. P.S. Poti the seniormost puisne Judge of Kerala High Court and who is functioning as Acting Chief Justice since the elevation of the then Chief Justice of Kerala High Court to Supreme Court has been a Judge of the High Court since 1969. If 12 years of High Court Judgeship does not make the incumbent mature for Chief Justice one would be left guessing when he would become one, And yet Mr. M.M. Ismail was transferred to Kerala reverting Mr. Poti as puisne fudge, it thus appears that the transfer of Shri Singh on the ground that he is the seniormost experienced Chief Justice which would be in public interest, fails to carry conviction.

846. Dr. Singhvi, learned Counsel for Shri Singh also contended that the transfer of Shri Singh is punitive in character. The Chief Justice of India specifically denies this charge And further it is stated that when Mr. K.B. N. Singh brought up the question of some baseless complaints against him, the Chief Justice of India assured him that he did not go by baseless complaints and he did not believe that his (Mr. Singh's) conduct was blameworthy. And the Chief Justice of India further assured him that he did not hold Mr. Singh was to blame but that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. Thus the answer of the Chief Justice would certainly show that the complaints against Mr. Singh did not provoke the transfer. Shri Singhvi however, tried to persuade us by putting in fuxtaposition certain events which would permit an inference that the complaints against Shri Singh formed the foundation for the order of transfer. It was pointed out that when in February 1980 the Chief Justice of India visited Patna he met lawyers and Judges which may permit an inference that the complaints against Shri Singh must have been voiced by those lawyers. This feeling was uppermost in the mind of Shri Singh because he himself broached the subject at a meeting with the Chief Justice of India on January 8, 1981. and even though the Chief Justice of India assured Shri Singh that he did not go by baseless complaints and that he did not believe that his conduct was blameworthy but yet pointed out that certain persons were exploiting their proximity with him which had created needless misunderstanding and dissatisfaction. Drawing sustenance from this statement it was contended that inferentially speaking the situation has come at Patna to such an impasse that Shri Singh was required to be uprooted from that atmosphere and, therefore, the transfer and this being a selective transfer it would attach stigma or slur. While accepting what the Chief Justice of India says that the complaints did not form the foundation for transfer and that the Chief Justice was actuated by the sole desire to subserve the public interest in proposing the transfer of Shri Singh. selective transfers always give rise to canards and the transferred Judge suffers character assassination. From this limited point of view one cannot escape the conclusion that such transfer in the background stated would cast a slur and, therefore, punitive in character and that would also vitiate the order of transfer.

847. Having examined all the relevant considerations, regrettable as it may appear the conclusion is inevitable that the order of transfer of Shri K.B. N. Singh is vitiated for want of effective consultation and the selective transfer would cast a slur or stigma. Add to this that the public interest pleaded fails to carry conviction in the facts and circumstances of this case and. therefore, the transfer does not appear to be in public interest. For all these reasons the order of transfer is vitiated and must be declared void.

848. In the course of hearing petitioners requested the Court that the correspondence that passed between the Chief Justice of India, the Chief Justice of Delhi High Court and the Law Minister in regard to the non-appointment of Shri S.N. Kumar as additional Judge be disclosed, The Union of India through the affidavit initially of Shri S.M. H. Burner, Secretary, Ministry of Justice and subsequently by the affidavit of Shri T.N. Chaturvedi, holding the same post, claimed privilege on the ground that doctrine of candour demands that the correspondence bearing on the question of appointment Or non-appointment of high constitutional functionaries should not be disclosed. There was a similar request for disclosure of correspondence that passed between the Chief Justice of India and the Law Minister with reference to the transfer of Shri K.B. N. Singh, Chief Justice of Patna High Court to Madras High Court. After hearing both sides at considerable length and first perusing the documents ourselves to ascertain whether disclosure of it would or would not be in public interest, we directed disclosure and deferred giving our reasons for the same. I would, however, briefly say what I feel to be the fairly antiquated notion about the seerecy in administration. Privilege was claimed wider Section 123 of the Indian Evidence Act, 1872. Section 123 was enacted in the hey-day of the colonial regime. And more thin a century after when the Raj has disappeared and a republican form of Government under a liberal Constitution is ushered in. we are told that the principle enunciated in Section 123 holds good, What is impermissible under Section 123 is giving evidence derived from unpublished official records relating to affairs of the State. It was said that appointment to high offices is such a sensitive subject that the expression 'affairs of the State' would be wide enough to comprehend the same and therefore, correspondence, notes notings connected therewith forming part of unpublished official record cannot be disclosed to the Court except at the cost of injury to public interest. Add to this the prohibition enacted in Article 74 that the court cannot inquire whether, if any, and if so what, advice was tendered by the minister to the President, privilege was claimed and disclosure was opposed On the above mentioned ground. It was very passionately urged that no public interest would be served by washing the linen, dirty if it appears to be, in open and who is going to be benefited by disclosure of such documents. In the State of Punjab v. Sodhi Sukhdev Singh MANU/SC/0006/1960. Gajendragadkar, J, speaking for Sinha, C. J. and Wanchoo, J., referred to Duncan v. Cammell Laird & Co. Ltd. 1942 AC 624, wherein Viscount Simonds L.C. deduced the principle which has to be applied in such cases in the following words:

Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest must as a class be withheld from production.

The question was whether the objection to production taken was valid one or not. The House of Lords in the aforementioned case held that an objection validly taken to production on the ground that this would be injurious to public interest is conclusive. Having referred to this observation, the majority decision further proceeded to state that the decision in the case before it wherein privilege was claimed against disclosure must ultimately rest on the relevant statutory provisions contained in Indian Evidence Act The Court then referred to Sections 123 and 162 of the Indian Evi. Act. Referring to the expression "affairs of the State" in Section 123, the majority judgment observed that in the latter half of the Nineteenth Century affairs of State may have had a comparatively narrow content, but with the State to pursuit of its welfare activities which were formerly treated as purely commercial and documents in relation to such commercial activities undertaken by the State in pursuit of public policies of social welfare are also apt to claim the privilege of being documents relating to the affairs of State. It is in the latter Class of documents the Court proceeded to determine the claim for privilege in such borderline cases. The Court ultimately upheld the claim for privilege, Duncan's case appear to be hovering over the entire discussion. Then came Conway v. Rimmer 1968 AC 910. This decision moved a step further because it was held therein that the Court can inspect the document to find out whether the claim to privilege is well merited. The view in Sodhi's case was to some extent diluted by reference to Conway. Two subsequent cases, one in Science Research Council v. Nasse 1980 AC 1028 and Burmah Oil Co. Ltd. v. Governor & Company of the Bank of England 1980 AC 1090. were also referred to. The discussion as to what is laid down by the House of Lords in aforementioned cases was so elaborate in the Court that at one time I suspected that these decisions will have to be explained away, otherwise they are binding on us, A specific question was put, should we mould our approach dovetailing it to the changes in the view in the United Kingdom because it is an undeniable fact that on the question of privilege and disclosure commencing with Duncan and ending with the last mentioned case, the view in this country has more or less changed shades with the view expressed by the House of Lords. In my opinion, Section 123 must be construed on its own terms. Undoubtedly, a century old provision enacted to some extent keeping in view the needs of Empire builders must change in the context of the Republican Government and the open society which we have set up. Undoubtedly there must be such affairs of the State involving security of the nation and foreign affairs where public interest requires that the disclosure should not be ordered. It is, however, equally well recognised that fair administration of justice is itself a matter of vital public interest. Therefore, if the two public interests conflict, the Court will have to decide whether the public interest which formed the foundation for claiming privilege would be jeopardised if disclosure is ordered and on the other hand whether fair administration of justice would suffer by non-disclosure and decide which way the balance tilts. Viewed from this angle. it was stated in Conway that the Court should, balance public interest involved where a clash of public interest is brought to its notice. In the ultimate analysis the approach of the Court while deciding the question of privilege would be that it has to balance public interest in just justice and just administration of justice and state affairs at high level in respect of appointment to high constitutional offices and then decide which way the balance tilts. Having formulated this test the answer was that a disclosure in the interest of justice far outweighs the possible embarrassment felt by disclosing certain aspects. I do not propose to deal with the matter further. Justice Bhagwati by a very elaborate discussion has given reasons why the disclosure was necessary and I find myself so entirely in agreement with what has been stated by him that I do not think I can usefully add anything to it.

849 The only point that now remains is whether the petitioners Iqbal M. Chagla and three others in the petition filed in the Bombay High Court, Mr. V.M. Tarkunde. petitioner in the petition filed in the Delhi High Court and other advocates who have filed petitions in Patna and Madras High Courts have a locus standi to maintain the petitions. Learned Attorney General did not raise this question but Mr. P.R. Mridul learned Counsel who appeared for the Law Minister in the first set of petitions seriously contended that the petitioners have no locus standi. In fact the matter has assumed academic importance because in the 1st batch of petitions Shri S.N. Kumar, the learned Judge of the Delhi High Court who was given short term extension and was ultimately not appointed, has questioned the validity and legality both of the circular issued by the Law Minister and the power claimed by the executive not to appoint an additional Judge after the expiry of his initial term. His locus standi is beyond question. Similarly, in the other batch of petitions Shri K.B. N. Singh, the Chief Justice transferred is transposed as petitioner No. 3 in the petition filed by Shri D.N. Pandey and another advocate of the Patna High Court and he has challenged the validity and legality of the order of his transfer. His locus standi is beyond question. Therefore, the contention about locus standi is now of academic interest and I do not propose to deal with it. However, I am in full agreement with my learned brother Bhagwati, J. who has discussed this aspect in meticulous details.

850. That is the end of the journey, To sum up:

(1) An additional Judge can only be appointed in the High Court if the President is satisfied that there is a temporary increase in the work of the High Court or there are arrears and for this purpose it is necessary to increase the number of Judges in the High Court for the time being.

(2) An additional Judge appointed initially for a certain tenure has a right to be considered for fresh appointment on the expiry of the tenure and the consultation must proceed along the same lines as prescribed under Article 217.

(3) Consultation under Article 217 must be full, effective and meaningful and in the case of an additional Judge, if there is any defect, drawback or deficiency in the consultation the decision arrived at is open to judicial review.

(4) Power to transfer a High Court Judge conferred by Article 222 on the President can be exercised after full, effective and meaningful consultation with the Chief Justice of India and this necessitates all the facts in possession of one or the other constitutional functionary being fully exchanged and deliberated upon.

(5) Power to transfer a High Court Judge cannot be exercised with a view to punishing a Judge of for anything in his conduct or behaviour which may cast a slur or stigma on him.

(6) The circular of the Law Minister dated March 18, 1981 does not suffer from any infirmity and is not constitutionally invalid.

851. Accordingly. Transferred Case No. 19/81 arising from the writ petition filed by Shri S.P. Gupta in Allahabad High Court. Transferred Case No. 21/81 arising from the petition filed by Shri J.L. Kalra and others in the Delhi High Court, Transferred Case No. 22-81 arising from the petition filed by Shri Iqbal M. Chagla and three others in the Bombay High Court and Transferred Case No. 20/81 arising from the writ petition filed by Shri V.M. Tarkunde in the Delhi High Court are dismissed There will be no order as to costs in all the matters.

852. Transferred Case No. 24/81 in which Shri K.B. N. Singh, Chief Justice of Patna High Court is transposed as petitioner No. 3 is allowed and the order dated January 19. 1981. transferring him as Chief Justice of Madras High Court is quashed and set aside and a mandamus is issued to the Union of India directing it to forbear from giving effect to the said order. There would be no order as to costs.

853. In view of this decision no specific order is required to be made in Writ Petition No. 274/81 filed by Miss Lily Thomas. Transferred Case No. 6/81 arising from a writ petition filed by Shri P. Subramanium in Madras High Court and Transferred Case No. 2/81 arising from a writ petition filed by Shri A. Rajappa in the Madras High Court and they accordingly stand disposed of There would be no order as to costs.

854. In view of the order quashing and setting aside the order directing transfer of Shri K.B. N. Singh as Chief Justice of Madras High Court the Special Leave Petition No. 312/81 filed by Shri Ripudaman Prasad Singh has become infructuous and would stand disposed of accordingly with no order as to costs throughout.

R.S. Pathak, J.

855. Transferred Case No. 19 of 1981, filed by Shri S.P. Gupta, an Advocate of the High Court at Allahabad, as a writ petition challenges the validity of a Circular letter dated March 18, 1981' issued by Shri P. Shivshankar, Minister for Law, Justice and Company Affairs in the Union Government and addressed to the Governor of Punjab and the Chief Ministers of all the States, except the north-eastern States, requesting them to obtain the consent of additional Judges serving in the High Courts to their appointment as permanent Judges of other High Courts. Such consent was also required from persons who had already been proposed or may in the future be proposed, for initial appointment. He contends also that the President has fail ed to appoint the necessary number of permanent and additional Judges of the High Court of Allahabad in accordance with Article 216 and Clause (1) of Article 224 of the Constitution, and he assails the appointments of some Additional Judges of the High Court for short terms of six months only when, according to him, the additional Judges should have been appointed as permanent Judges. In particular, he has prayed for a declaration that three additional Judges, Mr. Justice Murli Dhar Mr. Justice A.N. Verma and Mr. Justice N.N. Mithal be deemed to have been appointed as permanent Judges and that the Circular letter of the Law Minister is void.

856. Transferred Case No. 20 of 3981 filed by Shri V.M. Tarkunde, a senior advocate of the Supreme Court as a writ petition in the High Court of Delhi, also assails the Circular letter and the appointments of three additional Judges, Shri O.N. Vohra, Shri S.N. Kumar and Shri S.B. Wad for a further period of three months only. The petitioner prays that the Circular letter be declared void and the posts of additional Judges in the several High Courts be converted into permanent posts, Of the three additional Judges specifically named, Shri S.N. Kumar has entered appearance and has supported the case pleaded by the petitioner.

857. Shri J.L. Kalra and a few other advocates filed Transferred Case No. 21 of 1981 as a writ petition in the High Court of Delhi and, inter alia, they have prayed for mandamus to the Union Government to create an adequate number of posts of permanent and additional Judges and to make appointments to those posts.

858. Four advocates practising in the High Court of Bombay, Shri Iqbal M. Chagla, Shri C.R. Dalvi, Shri M.A. Rana and Shri Sorab K.J. Modi filed Transferred Case No. 22 of 1981 as a writ petition in the High Court of Bombay questioning the validity of the aforesaid Circular letter dated March 18, 1981 and have prayed inter alia for a declaration that the Circular letter is ultra vires and void and that the Union Government should be directed not to act on the consent conveyed by the additional Judges.

859. These four cases constitute a group raising substantially common points For consideration.

860. There is a second group, also consisting of four cases, led by Writ Petition No. 274 of 1981 filed by Miss Lily Thomas, an advocate practising in the Supreme Court of India, under Article 32 of the Constitution. She challenges the transfer of Shri M.M. Ismail, Chief Justice of the Kerala High Court, Shri M.M. Ismail has filed an affidavit stating that he has decided not to proceed to Kerala, nor to challenge the validity of the order of the President transferring him, but to proceed on leave preparatory to retirement by resignation of his office. Shri M.M. Ismail has resigned since.

861. An advocate, Shri A. Rajappa, practising in the High Court of Madras, filed Transferred Case No. 2 of 1981. He prays for a declaration that the order of the President transferring Shri M.M. Ismail from the High Court of Madras to the High Court of Kerala and Shri K.B. N. Singh, Chief Justice of the High Court of Patna, to the High Court of Madras is void.

862. Transferred Case No. 6 of 1981 was filed in the High Court of Madras by Shri P. Subramaniam, praying for the same reliefs as Shri Rajappa in Transferred Case No. 2 of 1981.

863. Two advocates, Shri D.N. Pandey and Shri Thakur Ramapati Sinha, filed Transferred Case No. 24 of 1981 in the High Court at Patna challenging the order of transfer of Shri M.M. Ismail from the High Court of Madras to the High Court of Kerala and of Shri K.B. N. Singh from the High Court of Patna to the High Court of Madras. During the pendency of this writ petition, Shri K.B. N. Singh, who had been impleaded as a respondent, was transposed as a petitioner.

864. These cases raise constitutional questions of considerable significance to the judicial system in India. They involve grave issues of fundamental importance respecting the High Courts and the Judges constituting them. They deeply affect the Rule of Law and the administration of Justice.

The Rule of Law and the administration of Justice:

865. India is a sovereign socialist secular democratic republic governed by a written Constitution designed to secure to all its citizens Justice, liberty, equality and fraternity in their various facets. A constitutional democracy to portrayed has its Institutions and values rooted in the Rule of Law, and that is plainly demonstrated by the provisions of our constitutional structure and the constitutional philosophy inspiring it. The vitality of the Rule of Law flows from those roots to the several branches of the constitutional structure, sustaining and nurturing them and giving them life and their intended significance.

The Rule of Law is the Primary Principle of our Constitution, and in its universality and omnipotence it postulates that no one, neither State nor individual, shall act contrary to the law, and nobody shall be denied right and justice. The principal organs of the State, the Executive, the Legislature and the Judiciary are governed by it and operate through it. In its daily task of adjudicating disputes, the judiciary maintains the Rule of Law and enforces it. It does so by interpreting the law and applying it and, in appropriate cases, decreeing its observance. And in adjudging the constitutional validity of legislation and executive acts, it protects the Rule of Law embodied in the Constitution.

866. In securing and promoting the resolution of disputes in a legal forum in accordance with established legal procedure, the administration of justice ensures a peaceful and orderly progress by a people through constitutional methods towards the realisation of their aspirations. And if it is to rule their minds and hearts, the administration of justice must enjoy their confidence, Public confidence in the administration of justice is imperative to its effectiveness, because ultimately the ready acceptance of a judicial verdict alone gives relevance to the judicial system. While the administration of justice draws its legal sanction from the Constitution, its credibility rests in the faith of the people.

Indispensable to that faith is the independence of the judiciary. An independent and impartial judiciary supplies the reason for the judicial institution, it also gives character and content to the constitutional milieu.

867. India's statesmen, political leaders, eminent jurists and representatives of a broad cross-section of our national life were engaged for about three years in forging a Constitution worthy of India's greatness. In the fashioning of the provisions relating to the judiciary, the greatest importance was attached to securing the independence of the Judges, and throughout the Constituent Assembly debates the most vigorous emphasis was laid on that principle. The judiciary in British India had by and large, for a century of British rule, enjoyed the respect and confidence of the people for its high reputation of independence and impartiality. Nonetheless the framers of the Constitution took great pains to ensure that an even better and more effective judicial structure was incorporated in the Constitution, one which would meet the highest expectations of judicial independence. In a land and among a people whose ancient values stemmed from truth as a reality, culminating in the adoption of a national emblem confirming that creed, they could have done no less.

868. It is pertinent to observe that the High Courts under our Constitution have been conferred far wider jurisdiction and powers than the High Courts under the Government of India Act, 1935. They enjoy not only the jurisdiction and powers existing before the commencement of the Constitution but by virtue of Article 226 they have been vested with power to issue directions, orders or writs to any person or authority, including any Government within their territorial jurisdiction, and that power is not limited, as it is in the case of the Supreme Court of India, to the enforcement of the rights conferred by Part III but extends to any other purpose. Moreover, by Article 227 of the Constitution the High Courts have been granted the superintendence not merely over all courts subject to their appellate jurisdiction but indeed over all courts and tribunals throughout their territorial jurisdiction. Further, unlike the Government of India Act the Constitution has not prohibited the High Courts from enjoying original jurisdiction in matters concerning the revenue or concerning any act ordered or done in the collection thereof. The framers of the Constitution evidently intended that the widest amplitude of remedial action should be available to every person throughout the territorial jurisdiction of the High Courts. So great was the anxiety to ensure that the Rule of Law reigned supreme in each State throughout India.

869. It is in this context that the questions raised before us may be considered.

The constitutional scheme concerning the High Courts:

870. The judiciary in India consists broadly of the Union judiciary, the High Courts in the States and the Subordinate Courts in those States. Chapter V of the Constitution deals with the High Courts and its present provisions may be briefly surveyed, Article 214 requires that there shall be a High Court for each State, and Article 216 with the Constitution of every High Court. Article 217 lays down the procedure for appointment of a Judge of the High Court, the circumstances in which the office of Judge is vacated, the qualifications for appointment, and how the age of a Judge shall be determined. Article 218 provides for the removal of a Judge from his office. Article 219 requires a Judge to make or subscribe an oath or affirmation before he enters upon his office. Article 220 places a restriction on practice after a person has been appointed permanent Judge. Article 221 provides for payment to the Judge of his salary and entitles him to certain allowances and rights, and the proviso declares that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment. Article 222 empowers the President to transfer a Judge from one High Court to another in consultation with the Chief Justice of India. Article 223, 224 and 224A enable the appointment of an acting Chief Justice, additional Judges, acting Judges and provide for former Judges to sit and act as Judges. Article 225 defines the jurisdiction of existing High Courts and Article 226 extends the jurisdiction to the issue of directions, orders and writs. Article 227 vests in the High Court the power of superintendence over all courts and tribunals within its territorial jurisdiction. Article 228 empowers the High Court to transfer to itself cases pending in a subordinate court involving a substantial question of law as to the interpretation of the Constitution. Article 229 provides for the appointment of officers and servants of the High Court, and Article 230 for the extension of jurisdiction of the High Court to Union territories. Finally, there is provision by Article 231 for establishing a common High Court for two or more States or for two or more States and a Union Territory.

871. An important point to note is that Chapter V relating to the High Courts embodies a single organic scheme. The provisions of that scheme are inter-related and often inter-dependent, and in order to appreciate the true purpose, scope and content of any provision it is necessary to examine it in the context of the entire constitutional scheme. This is so, whether the question relates to the appointment of an additional Judge, or to the transfer of a Judge from one High Court to another.

The Constitution of the High Courts and the appointment of the Judges:

872. In a modern democracy the supreme power of the State is shared between the three principal organs, the Executive, the Legislature and the Judiciary, Each holds a distinct position in the overall constitutional scheme, and has broadly separate functions and responsibilities from those vested in the other organs, A Constitution deems the simultaneous co-existence and effective functioning of all three organs imperative to the proper working of the constitutional system. It envisages that all three organs should function continuously according to their true nature and responsibilities, so that in the totality the constitutional system is held in constant balance. The constitutional document itself has made full and detailed provisions for the Constitution of each of these primary organs of the State, so that at all times the constitutional system as a whole is in full operation.

873. Article 216 provides that every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. Plainly, while the President is vested with the power to appoint Judges, he is also under a constitutional obligation to ensure that the High Court is fully constituted. It is fully constituted when it consists of Judges sufficient in number to regularly cope with and dispose of the work falling within its jurisdiction. From the terms of Article 216 it is also plain that the constitutional obligation imposed on the president extends to ensuring from time to time that the High Court consists of a sufficient number of Judges. The expression "from time to time" is significant. The responsibility imposed by Article 216 requires the making of a periodic review of the annual institution of cases and the pending strength of arrears resulting in a reasonable assessment of the number of Judges needed in each High Court. It may be observed that serious injury is possible to a constitutional democracy where this is not done, and the Judiciary remains insufficiently manned and pending cases continue to accumulate for long periods. A continuing imbalance in the proper operation of the constitutional system ranging over a long period of time by reason of one of its primary organs remaining ill-equipped to discharge its essential responsibilities cannot but be viewed with grave concern.

874. Article 216 speaks of Judges generally, A study of the constitutional scheme embodied in Chapter V indicates that as a general rule the appointment of permanent Judges is contemplated. They are Judges who are entitled to continue in office until they attain the age of 62 years, and whose tenure is fixed by the Constitution itself. They are appointed with reference to the normal workload of the court. A fixed tenure unaffected by the discretion of the executive safeguards the principle of judicial independence. In special circumstances, however, and in special circumstances only, the appointment of additional Judges or acting Judges is contemplated under Article 224. An additional Judge is appointed under Clause (1) of Article 224 where it appears to the President that by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein the number of the Judges of that court should be for the time being increased. The number of Judges is increased only for the time being, and the appointment of an additional Judge is, therefore, envisaged for a limited period which, by Clause (1) of Article 224 must not exceed two years. An acting Judge is appointed under Clause (2) of Article 224 by the President when any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, a person so appointed can act as a Judge only until the permanent Judge has resumed his duties, Both additional Judges and acting Judges must be appointed from among duly qualified persons, that is to say, the qualifications prescribed in Article 217, and they can not to appointed to hold office after attaining the age of 62 years. It will be seen therefore that Article 216 contemplates Judges who are permanent Judges, additional Judges or acting Judges, permanent Judges as a rule and additional Judges or acting Judges in exceptional or special circumstances. A separate and distinct category is that of former Judges of a High Court who under Article 224-A may be requested by the Chief Justice of a High Court, with the previous consent of the President, to sit and act as a Judge of the High Court, Such a person does not fall within Article 216, for he is not a Judge of the High Court when so sitting and acting. The President does not appoint him, but only gives his consent to the Chief Justice to request the former Judge to sit and act as a Judge of the high Court. The process appointment embodied in Clause (1) of Article 217 does not apply to him. It is for that reason the express provision has been made in Article 224-A itself that while sitting and acting as a Judge of the High Court the former Judge will be entitled to such allowances as the President may, by order, determine and he shall have all the jurisdiction, powers and privileges, but will not otherwise be deemed to be a Judge of that High Court.

875. It may be pointed out that the Constituent Assembly was not in favour of appointing additional or acting Judges, and although in the Draft Constitution prepared by the Drafting Committee provision was made by Article 198 for the appointment of temporary Judges and by Article 199 for the appointment of additional Judges, there was strong opposition to their inclusion and those provisions were omitted when the Constitution was finally enacted.

The Draft Constitution provided by Article 200 that the Chief Justice of a High Court could request a former Judge of that court to sit and act as a Judge of the Court. The provision was retained in the enacted Constitution as Article 224, with this difference that before making such request the Chief Justice had to obtain the previous consent of the President and further his choice extended not only to a former Judge of that High Court but also to that of any other High Court. Apparently, it was felt that by enacting Article 224 there was no need to provide for the appointment of

temporary or additional Judges. It was subsequently found that the arrangement was not adequate, and for that reason the Constitution (Seventh Amendment) Act, 1956 brought in the present Article 224 providing for additional Judges and acting Judges and simultaneously deleted the original provisions respecting former Judges, However, the need for former Judges continued to be felt, and the provision was reproduced by the Constitution (Fifteenth Amendment) Act, 1963 and was numbered as Article 224-A.

876. The procedure for appointing a Judge of a High Court is set forth in Clause (1) of Article 217. A Judge of a High Court is appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. The appointment of a Judge is an executive act. The power to appoint is vested in the President, who by virtue of Clause (1) of Article 74 is required to act in accordance with the advice of the Council of Ministers, The President may require the Council of Ministers to reconsider such advice, either generally or otherwise, but he must act in accordance with the advice tendered after such reconsideration. The nature of the power exercised by the President under Clause (1) of Article 217 being executive in character, it cannot be identified with the power exercised under Clause (3) of Article 217 in regard to the determination of the age of a Judge of a High Court. The power exercised under Clause (3) of Article 217 has been held by this Court in Union of India v. Jyoti Prakash Mitter MANU/SC/0061/1971 to involve a judicial function and which therefore does not fall within the scope of Clause (1) of Article 74.

877. While there can be no doubt that the appointment of a Judge of a High Court lies in the executive power of the President, it is not an absolute and unfettered power. It is conditioned by the obligation imposed on the President to consult the Chief Justice of India, the Governor of the State, and in the case of an appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, The consultation is a constitutional imperative and the process of consultation must precede the appointment. Three, constitutional functionaries are required to be consulted, the Chief Justice of India and the Chief Justice of the High Court, who are judicial functionaries, and the Governor of the State who is the executive head of the State in respect of which the High Court has jurisdiction. In this, Clause (1) of Article 217 makes a marked departure from Section 220, Government of India Act, 1935, Under Section 220, a permanent Judge of a High Court was appointed in the absolute discretion of the Crown, and the additional Judges appointed in the absolute discretion of the Governor General. In practice, of course, the Chief Justice of the High Court was usually consulted, as well as sometimes a few eminent leaders of the Bar who would not be interested in the appointment. But when the Constitution was being drafted there was general agreement that the appointment of a Judge of a High Court should not be left to the unfettered discretion of the Executive Government. The Constitution itself now imposed the obligation to consul Judicial independence under the Government of India Act, 1935 had been assured by prescribing a fixed tenure under Sub-section (2) of Section 220, and a Judge could not be removed from his office except on the ground of misbehaviour or of infirmity of mind or body and on a report by the Judicial Committee of the Privy Council that the Judge ought to be removed. There was the further stipulation by the proviso to Section 221 that neither the salary of a Judge nor his rights in respect of leave of absence or pension could be varied to his disadvantage after his appointment. Now, the independence of the judiciary can be fully safeguarded not by merely conferring security on the Judges during their term of office but by ensuring in addition that persons who are independent, upright and of the highest character are appointed as Judges. Moreover, there is always the fear that appointments left to the absolute discretion of the appointing executive could be influenced by party considerations. The framers of the Constitution apparently had this in mind when they decided to incorporate the prescription of consultation in the terms set forth in Clause (1) of Article 217, As Sardar Vallabhbhai Patel explained in the Constituent Assembly on June 21, 1947 when presenting the Report on the Principles of a Model Provincial Constitution:

With so many checks and counterchecks these appointments place the High Court Judges beyond any influence of the parties or any other influences and beyond any suspicion or doubt of such to nature. There is thus enough guarantee provided for the independence of the Judiciary. (Constituent Assembly Debates Vol. IV p. 694).

878. As has been observed, Clause (1) of Article 217 prescribes that besides the Governor of the State, the Chief Justice of India and the Chief Justice of the High Court must be consulted in the appointment of a Judge of a High Court, Three distinct constitutional functionaries are involved in the consultative process, and each plays a distinct role, and the nature and scope of the role are indicated by the character and status of their respective offices. The Chief Justice of the High Court is the head of the institution to which the Judge will be appointed. He is, therefore, particularly qualified to know the needs of the court in the context of its present Constitution and the work which is pending. Generally, an appointment is made either from the High Court Bar or from the District Judiciary. In both cases, the Chief Justice can be expected to possess an intimate knowledge of the legal ability of the person under consideration and to have a sufficiently accurate estimate of his character, antecedents and reputation, including his integrity, in the context of the legal profession or the judicial service, as the case may be, as well as his potential capacity as a Judge. It is also conveniently possible for him to obtain a fair measure of information in respect of a member of a District Bar, should

such a member be under consideration. In regard to persons practising in other courts or members of judicial tribunals it is not difficult for him to secure adequate information. It is apparently for this reason that the practice which has prevailed for several years in this country postulates that it is the Chief Justice of the High Court who should initiate the process of appointment by suggesting a person for the office of a Judge. But by virtue of his position in the High Court and the State, the Chief Justice is also exposed to local influences, and to prejudice or bias in relation to lawyers appearing before him or judicial officers who meet him. His assessment can be subjectively effected. The Chief Justice of India has been brought in, and it is apparent that, in virtue of the exalted office held by him and the circumstances that he is far removed from the local pull of influences and the temptations of partisanship, he can be trusted to apply a strictly objective approach to the recommendation proceeding from the High Court. Besides, the Chief Justice of India possesses the advantage of viewing the matter from the superior plane of a national perspective, He is seized with knowledge of prevailing standards and trends in the different High Courts, and as the head of the highest court in India exercising appellate jurisdiction over the High Courts by way of the widest power under Article 136 he would be cognizant of the need to ensure that the highest quality was maintained in the appointment, of Judges of the High Courts. Indeed, he is expected by the Constitution to keep himself adequately informed of the affairs of each High Court. For it is not merely for the purpose of appointing a Judge to the High Court under Clause (1) of Article 217 that he is to be consulted. The president is also obliged to consult him before he can transfer a Judge under Clause (1) of Article 222 from one High Court to another High Court, a matter in which the Constitution does not expressly stipulate consultation even with the Chief Justices of the two High Courts concerned, the High Court from which the Judge is to be transferred and the High Court to which his transfer is contemplated. It must also be remembered that in the determination of the age of a Judge of a High Court under Clause (3) of Article 217 it is the Chief Justice of India alone whom the President is required to consult.

879. The part played by the Governor of the State must, it seems, be limited. The State Government possesses the advantage of being able to secure information which may not be within the knowledge of the Chief Justice in regard to the character and integrity of the person recommended and his local position and affiliations. Besides, as the High Court is the highest court of the State and the funds for it flow from the State Exchequer, it is only logical that the State Government should be allowed a voice in assessing the suitability of the person recommended for appointment (Law Commission of India, Fourteenth Report Vol. 1, p. 74). The State Government, however, can have no role in commenting on his legal ability, knowledge of law and judicial potential.

880. The President is obliged to consider the advice tendered by the, three constitutional functionaries under Clause (1) of Article 217, and in the evaluation of the advice from each he must bear in mind that the appointment under consideration is the appointment of a Judge of a High Court, that is to say, a judicial appointment. Once that is kept in the forefront and it is apparent that the person recommended is of desirable personal character and reputation, the greatest value should be attached to the advice tendered by the Chief Justice of the High Court and the Chief Justice of India. The advice tendered by the two judicial functionaries possesses a quality peculiarly pertinent to the appointment of an able and efficient Judge. It is, in a sense, "expert" advice, and where the Chief Justice of the High Court and the Chief Justice of India agree on the recommendation it is within reason to hold that the President will ordinarily accept the recommendation, unless there is strong and cogent reason for not doing so, which must be a reason directly relevant to the purpose of the appointment. It may be reiterated that the departure made by Clause (1) of Article 217 of our Constitution from Section 220 of the Government of India Act, 1935 clearly establishes that the advice tendered by the judicial functionaries was considered to be a safeguard against arbitrary appointments and therefore entitled to the greatest weight, It may be pointed out that appointments in England to the Court of Appeal, to the Judicial Committee of the House of Lords and to the offices of Lord Chief Justice, and President of the Family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor, and the likelihood that the Prime Minister may depart from the recommendations of the Lord Chancellor can be contemplated "only in the most exceptional case." (J.A. G. Griffith; The Politics of the Judiciary, pp. 17, 18).

881. At the same time I am unable to accept the contention that as the Constitution stands today the President is obliged in all cases to agree with a recommendation in which the Chief Justice of the High Court and the Chief Justice of India have concurred. During the Constituent Assembly Debates a proposal was made by a member that the appointment of Judges should require the concurrence of the Chief Justice of India (although that suggestion was made in connection with the appointment of Judges of the Supreme Court), but that proposal was not accepted. The Law Commission of India (Ibid p, 76) surveyed the machinery for appointing a Judge of a High Court and considered it desirable that the provision in Clause (1) of Article 217 should be altered to provide for "not merely consultation with the Chief Justice of India but his concurrence in the proposed appointment", That recommendation has not borne fruit and we are concerned with the position which prevailed then and continues today.

Does the advice given by the Chief Justice of India have primacy over that rendered by the Chief Justice of the High Court?

882. A point has been raised whether on difference of opinion between them the advice of the Chief Justice of India can be said to enjoy primacy over that tendered by the Chief Justice of the High Court, Nothing is laid down on the matter in express terms in Clause (1) of Article 217. If by "primacy" is meant that the opinion of the Chief Justice of India supersedes that of the Chief Justice of the High Court and can alone be considered, it is clearly against the provisions of Clause (1) of Article 217, for the clause intends that the President should consult both Judicial functionaries, besides the Governor, The advice of each, the Chief Justice of India and the Chief Justice of the High Court, has to be considered by the President. The Chief Justice of India does not sit in appellate judgment over the advice of the Chief Justice of the High Court, and the fact that the former has given his advice cannot imply that the advice of the latter must be ignored But it must be remembered that the advice by the Chief Justice of India takes into account not only the primary material before him but also the assessment made by the Chief Justice of the High Court, and therefore when he renders advice the assessment by the Chief Justice of the High Court has also been considered by him. In other words, in forming his opinion and giving his advice, the Chief Justice of India will take all the facts and circumstances into consideration, including the material circumstance that the advice of the Chief Justice of the High Court is the advice of an authority possessing the advantage of direct and intimate knowledge of the requirements of the Court and generally also of the person recommended, and thereafter he will advise whether he endorses the recommendation. In that sense, it can be said that the recommendation of the Chief Justice of the High Court is screened through the assessment made by the Chief Justice of India. The screening is a logical result of the Chief Justice of India being brought in to express his opinion in the recommendation. In passing, it may be observed that if any material comes into the possession of the Chief Justice of India which was not before the Chief Justice of the High Court it should be communicated to the Chief Justice of the High Court for his comments. When the advice of the Chief Justice of the High Court and of the Chief Justice of India is placed before the President, the President will consider both and assess them in the light of the positions held, and the advantages possessed, by the respective functionaries in relation to the recommendation, and also bear in mind that while the Chief Justice of the High Court has the advantage of proximity in relation to the High Court and generally in assessing the ability and efficiency of the person recommended, the Chief Justice of India enjoys the advantageous position of being able to apply a more objective judgment and also of taking into account a national perspective and present standards and trends in other High Courts, In the ultimate analysis, it would be unrealistic to suppose that the advice rendered by the Chief Justice of India enjoys mere parity with that of the Chief Justice of the High Court. If the Chief Justice of India was intended to enjoy equal status merely with the Chief Justice of the High Court in this regard, it is difficult to appreciate why the Chief Justice of India was brought in at all especially when the advice expected of a judicial functionary for appointing a Judge of a High Court could be obtained from the Chief Justice of the High Court alone. The constitutional scheme appears to indicate that in matters concerning the High Courts there is a close consultative relationship between the President and the Chief Justice of India. In matters so serious as transfer of Judges and the determination of the age of judges, the Constitution has appointed the Chief Justice of India as the sole functionary to be consulted by the President. In that capacity, the Chief Justice of India functions under the Constitution as a constitutional check on the exercise of arbitrary power and protects the independence of the Judiciary.

The position relating to Additional Judges specifically:

883. It has been observed earlier that a High Court is intended under Article 216 to consist of permanent Judges as a rule. That would accord with the principle of judicial independence because thereby security of tenure is provided. The permanent Judges must be in sufficient number to cope with the usual work of the High Court. There may, however, be exceptional circumstance, prevailing over a brief period, which may call for a temporary accretion to the number of Judges. Provision is found in Article 224 for meeting the exigency. The President has power to appoint additional Judges and acting Judges depending on the nature of the exigency. Clause (1) of Article 224 deals with the appointment of additional Judges, and it is this provision with which we are immediately concerned. An additional Judge may be appointed where by reason of the temporary increase in the business of a High Court or by reason of arrears of work therein it appears to the President that the number of Judges should for the time being be increased. The two conditions control the exercise of the power, and it neither is satisfied there can be no case for appointing an additional Judge. The increase in the business of the High Court must be temporary and should be capable of being disposed of within a short period. Likewise, the arrears of work should be such that they cannot be expected to endure long. Inasmuch as the period of appointment of additional Judges is prescribed as a maximum of two years, it is only where the disposal of the temporary increase in the business of the High Court or the pending arrears of work is expected to take about two years at the most that a case for appointing additional Judges arises. If the increase in the business of the High Court or the volume of arrears of work is of a magnitude which cannot ordinarily be disposed of within two years, it is a case where the business or work must be regarded as an accretion to the regular business or work of the High Court, calling for an increase in the strength of permanent Judges. A person appointed an additional Judge under Clause (1) must be a "duly qualified" person. He must be duly qualified for appointment as a Judge, the qualifications being those prescribed in Article 217, The appointment of an additional Judge, like the appointment of a permanent Judge, must be made in the manner prescribed in Clause (1) of Article 217, The appointment of the additional Judge like the appointment of the permanent Judge, must be made in the manner prescribed in Clause (1) of Article 217. The process of consultation

contemplated by that clause comes into play, and it is only after his suitability has been determined in accordance with that clause that the additional Judge is appointed. An additional Judge discharges functions of the same character as a permanent Judge, There is no difference whatever between the two in status and the other incidents of office, except that an additional Judge can hold office only for the period specified in the warrant of his appointment. There is nothing in Clause (1) of Article 224 to suggest that the temporary increase in the business of the High Court or the pending arrears of work can alone be entrusted to additional Judges. All that the clause provides is that either or both conditions can constitute a reason for temporarily increasing the number of Judges of the High Court. Which work should be assigned to permanent Judges and which to additional Judges is a matter normally falling within the discretion of the Chief Justice of the High Court. It was observed by this Court in Krishan Gopal v. Prakash Chandra MANU/SC/0249/1973 that "election petitions should ordinarily, if possible, be entrusted for trial to a permanent Judge of the High Court". But that was a mere expression of policy for the court affirmed that they "are legally competent to hear these matters". It may be that despite the appointment of a reasonable number of additional Judges, the temporary increase in the business of the High Court or the pending arrears of work may not be disposed of within a period of two years and may continue for a few more months. There is reason to expect that the person found fit for appointment as additional Judge and who has already gained proficiency and experience will be appointed as a Judge for a further period in order that the work may be disposed of and not allowed to remain pending.

884. In passing, it may be observed that the period prescribed by Clause (1) of Article 224 for the appointment of an additional Judge is put at a maximum of two years, but that does not mean that in every case the appointment must be for two years. The appointment of an additional Judge may be for a period less than two years, and the period will be determined with reference to the time estimated for disposing of the temporary increase in the business or the pending arrears of work which occasioned the appointment. The period of appointment cannot be fixed on the basis of any other factor. Where, as observed earlier, the work or business is not completed within two years and calls for a further appointment of additional Judges, the duration of the further appointment will be conditioned again by the time assessed for disposing of the remaining business or work. But it is to be distinctly borne in mind that additional Judges can be appointed only where the temporary increase in the business of the High Court or the arrears of work can be expected to be disposed of within a period of two years and not very much more. If additional Judges are appointed for successive periods of two years or more it is clearly a case where the increase in the business of the High Court or the volume of the arrears of work does not call for the appointment of additional Judges but for a review of the number of permanent Judges. Appointments of additional Judges for successive periods of two years or more constitute a violation of the safeguard afforded by the appointment of permanent Judges for the protection of the principle of judicial independence.

885. It appears that for several years now a practice has grown, to which both the Executive and the Judiciary have unwittingly subscribed, of maintaining a regular strength of additional Judges and generally appointing a person as an additional Judge of the High Court instead of appointing him directly as a permanent Judge of the High Court. The additional Judge so appointed continues as an additional Judge, until a vacancy in the office of permanent Judge arises, whereupon such person is appointed as a permanent Judge. If no vacancy arises before the expiry of the term of the additional Judge he is appointed an additional Judge for a further term. A regular strength of additional Judges is maintained in almost every High Court which is burdened by a continuing backlog of pending cases. These arrears have assumed enormous proportions and cannot possibly be disposed of for quite some years, let alone a period of two years. A distortion of the constitutional scheme has resulted, and the aberration has persisted by reason of the failure to realise that additional Judges can be appointed only where the temporary increase in the business or the arrears of work can be disposed of ordinarily within two years, and that otherwise it is a case for increasing the number of permanent Judges. The omission has led to a serious state of affairs, which has affected the careers and future of a large number of persons appointed as additional Judges in the High Courts, Having decided to maintain a regular strength of additional Judges on a permanent basis the practice also grew of invariably appointing these additional Judges as permanent Judges as and when vacancies arose. That was principally prompted by the disinclination to permit additional Judges on the expiry of their terms as such, to revert to the Bar. It must be remembered that when the Draft Constitution including Article 199 providing for additional Judges was submitted for consideration there was strong opposition to the inclusion of that provision. Several legal luminaries, including Sir Tej Bahadur Sapru objected to it on the ground that such reversion to legal practice gave them an unfair advantage over their colleagues and was embarrassing to the administration of Justice. Therefore, the Constitution as originally enacted did not contain any provision for the appointment of additional Judges. Subsequently, how ever, because of persisting arrears of cases in most High Courts, the need was felt for making such provision and it was inserted as Clause (1) of Article 224 by the Constitution (Seventh Amendment) Act, 1956. It was thought that the evil of additional Judges reverting to the Bar Could be prevented by absorbing them as permanent Judges, and in some High Courts this was sought to be secured by obtaining from persons appointed as additional Judges an undertaking at the time of such appointment that they would not refuse appointment as permanent Judge if it was offered to them. In a few High Courts a further undertaking was secured to the effect that; in the event of the additional Judge refusing appointment as permanent Judge or resigning before the offer was made he would not practice in that High Court or in any Court or tribunal subordinate to it. It was intended

that this practice should be extended to all High Courts, for a suggestion was made on June 29, 1967 by the then Chief Justice of India, Shri K.N. Wanchoo, when a member of the Bar is appointed Additional Judge, it must be with a view to making him permanent in due course, If that is not possible, additional Judge-ship should not be offered to a member of the Bar. I agree, therefore, that an undertaking should be taken from the members of the Bar that they will accept a permanent Judgeship when offered to them in due course...." The practice of additional Judges being appointed permanent Judges, the seniormost additional Judge being invariably appointed first, has been followed in India almost without exception. Where no present vacancy of permanent Judge was available, the additional Judge was, on the expiry of his term, always appointed for a further term as additional Judge. We are informed that of 400 such appointments pf additional Judges as permanent Judges the practice has been breached in the observance on two or three occasions only. This practice has been uniformly and consistently followed and has crystallised into a positive rule of conduct. It is a rule of conduct followed by the Government regularly and without interruption, almost entirely without exception, and has operated consistently for twenty five years on the basis of precisely defined norms in respect of a general class. And it flows from the power of the State. It prescribes a channel of appointing Judges and is not inconsistent with Clause (1) of Article 217. So long as it is not varied or superseded, it will operate as a binding rule of conduct on the President. On that edifice rests the definite expectation of a large number of additional Judges. It may foe added that during this period direct appointments from the Bar as permanent Judges have numbered 100 only. In the circumstances, the question which arises is: Are the additional Judges entitled to claim appointment as permanent Judges?

886. It is contended that as the volume of arrears of cases pending in the High Courts is so great that they cannot be disposed of within a period of two years, the position is that when the additional Judges were appointed the appointment should have been instead to the office of permanent Judges. Alternatively, it is urged that a direction should be issued to the President to appoint the additional Judges as permanent Judges. Now the warrant of appointment issued by the Prudent recites that the appointment is of an additional Judge for the limited period specified therein. The intention was to appoint an additional Judge and for the period specified. It is not open to the Court to alter the terms of the warrant. Although it may be generally possible to say that the circumstances require an increase in the number of permanent Judges and not the appointment of additional Judges, it is for the President under Article 216 to determine what should be the number of permanent Judges. The Court cannot by Judicial verdict decide how many permanent Judges are required for the High Court, And if it is not competent to do so, it can neither regard the appointment of additional Judges as an appointment of permanent Judges nor can it issue a direction to the Government that the additional Judges should be appointed now as permanent Judges.

887. But while an additional judge may not have a right to be deemed to be permanent Judge or be entitled to a direction that he be so appointed, nonetheless he has, in my view, a right to be considered for such appointment. His case must be distinguished from the case of a person considered for direct appointment as a permanent Judge. The latter has no right to be considered for appointment. The additional judge, however, has accepted office within the framework of a definite and consistent practice practically always followed and leading him to believe that he would be considered for appointment in accordance with that practice, Tha requirement of an undertaking that he would not refuse an offer of appointment as permanent judge may, it is true, be a feature presently in some High Courts only, but it clearly demonstrates how the appointment of additional judges has been regarded by the President. It cannot be said that because the undertaking was required in some High Courts only, these High Courts are to be considered to be distinct from the others where no such undertaking has been required. The undertaking merely confirms the practice on the basis of which the appointments of additional judges have been made in all the High Courts and which has been followed all along. The additional judges are persons who were found to possess the same high order of character, integrity and legal ability as is required in the case of permanent Judge. The standards for making appointment as additional Judge or as permanent Judge are not different. All the additional Judges accepted judicial office on the assumption that the practice clothed with all the status of constitutional reality would operate in their cases and that they would in their turn be considered for appointment as permanent Judges. All of them certainly believed that inspired by that trust, they abandoned their positions at the Bar and law practices assiduously built up over many years. As observed already, there is nothing in the power of appointment vested in the President under Clause (1) of Article 217 to prohibit the appointment of permanent Judges from persons holding office as additional Judges, and in the order of seniority based on the date of such appointment. It has been stated by the learned Attorney General that the Government places great value on the experience already acquired by the additional Judges and would be reluctant to allow them to revert to the Bar if on consideration they were found suitable for appointment as permanent Judges. In my view, having regard to all the circumstances the additional Judges must be held entitled to consideration for appointment as permanent Judges, or to consideration for further appointment as additional Judges in the terms already set forth. That will be so in the case of all additional Judges appointed to that office in the framework of the circumstances to which I have adverted.

888. The next question to be considered is whether the consideration of persons serving as additional Judges for appointment to the office of permanent Judges envisages a fresh application of the process envisaged under Clause (1)

of Article 217 in respect of all the matters to which consideration has already been given at the time of their appointment as additional Judges. On behalf of the petitioners it is contended that the process of consultation must be confined to the question whether a vacancy in the office of permanent Judge has arisen, or, if no such vacancy has arisen, whether the High Court continues to suffer from a temporary increase in its business or by continuing arrears of work inasmuch as suitability for holding the office of Judges was already been determined when they were appointed additional Judges. It is pointed out, and that is conceded by the learned Attorney General, that the additional Judges cannot be considered to be Judges on probation for the purpose of appointment as permanent Judges. Alternatively, it is urged that whatever else may be open to consideration it is not competent for the appointing authority to consider the manner and quality of their work as additional Judges. To my mind, there is no doubt whatever that the provisions of Clause (1) of Article 217 come into play when an additional Judge is to be considered for appointment as permanent Judge or even for further appointment as additional Judge. The process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge, but it may be clearly stated that no account can be taken of the merits of judgments, decrees and orders rendered by him or administrative orders or directions made in the bona fide exercise of his functions as an additional Judge. In the consideration of matters under Clause (1) of Article 217 there will be a somewhat varied approach. The difference, and inevitably there will be a difference because the process has already been applied earlier in the case of that person, will lie in the reduced emphasis with which the consideration will be exercised. Ordinarily, the presumption will be that a person found suitable for appointment as an additional Judge continues to be suitable for appointment as a permanent Judge. But circumstances may arise and events may take place meanwhile which bear adversely on the mental and physical capacity, character and integrity or other matters rendering it unwise to appoint him as a permanent Judge. There must, however, be relevant and pertinent material before it can be said that such a person has forfeited the badge of suitability for appointment as a permanent Judge. There must be material which sufficiently convinces the reasonable mind that the person is no longer suitable to fill the high office of a judge. It is difficult to define precisely the nature and quality of such material. If the reputation of the person is in doubt, the doubt must be rooted in reasonable foundation. It must not be forgotten that it is a case of a person who has a right to be considered for appointment. It is a right to be considered fairly. The exercise of arbitrary judgment is clearly ruled out. While I find it difficult to accept the plea that such a person is entitled as of right to be heard in regard to material discovered against him, I have no doubt that for the purpose of discharging responsibilities involved in the process of consultation the Chief Justice of the High Court and the Chief Justice of India will find it desirable in their discretion to ascertain from him whether there is any substance in what has been conveyed to them. In doing so, the two judicial functionaries will not be conceding a right of hearing to such a person. For a right to be heard involves an enquiry of certain dimensions well known to the law. In doing so, the two judicial functionaries will be acting within the scope of their legitimate duty of giving advice to the President if for that purpose they acquaint themselves fully and truly, so far as they reasonably conceive it necessary to collect all available relevant information. Surely if it is open to them to gather information from other sources there is no valid reason why they should exclude the one person who would be in personal possession of material concerning information operating to his detriment. But much will depend on the circumstances of each case. What needs to be considered is that the constitutional duty to tender advice necessarily involves the obligation of ensuring that the advice, in the judgment of the functionary tendering it, is accurate and proceeds on the basis of reliable material. Whatever verification is possible, there is no doubt that recourse should be had to it There can be no half measures, and in the discharge of that constitutional duty the response must be equal to the responsibility.

889. There is the contention that if the consultative process under Clause (1) of Article 217 applied again in all its comprehensiveness in the case of a person who has already been found suitable for appointment as additional Judge, it must be regarded that while serving as additional Judge he was in fact put on probation. The submission appears to be misconceived. A person is on probation when he is appointed to an office on the understanding that he will be confirmed in that same office if found suitable. No such question arises here. Then, the service of a person on probation can be terminated at will even before the expiry of the period of probation. An additional Judge, however, is entitled to serve for the full period specified in his appointment, and can be removed only under Article 218 read with Clause (4) and Clause (5) of Article 124.

The case of Shri S.N. Kumar:

890. I shall now consider the validity of the decision of the Union Government not to appoint Shri S.N. Kumar as an additional Judge for a further term. It is the admitted position that the volume of work in arrears in the High Court of Delhi continues to be sufficiently large and would nave otherwise justified his appointment. It has been observed already that when, on the expiry of his term, an Additional Judge is considered for a further term in that office his case attracts the provisions of Clause (1) of Article 217, and the President must consult the functionaries mentioned in that clause. In the case of the High Court of Delhi, consultation is called for with the Chief Justice of India and the Chief Justice of the High Court only. The consultative process, it may be reiterated, requires that all the material in the possession of the Chief Justice of the High Court must be placed before the Chief Justice of India as well as the

President. Likewise, all the material in the possession of the Chief Justice of India must be placed before the President and the Chief Justice of the High Court. So also, all the material in the possession of the President must be placed before the Chief Justice of India and the Chief Justice of the High Court. A continuous process of consultation between all three authorities is mandated, resulting ultimately in advice tendered to the President by the Chief Justice of the High Court and the Chief Justice of India. It is not necessary for me to enter into the other questions raised in the challenge directed against the decision of the Union Government not to appoint Shri S.N. Kumar as an additional Judge for a further term. It seems to us sufficient to say, on a review of the material before me, that there was no effective and full consultation between the President and the Chief Justice of the High Court on the one hand, and the Chief Justice of India on the other. The facts may be recounted briefly.

891. Shri S.N. Kumar was appointed an additional Judge of the High Court of Delhi for a period of two years by a notification dated March 6, 1979, and he assumed charge of his office the next day. Shortly before the expiry of that period, the Chief Justice of the High Court of Delhi addressed a letter dated February 19, 1981 to the Minister of Law, Justice and Company Affairs stating that while the pendency of cases in the High Court justified the appointment of additional Judges and normally the extension of the tenure of an additional Judge was recommended in the circumstances, he did not recommend the extension of Shri S.N. Kumar because, he said, serious complaints had been received, both oral and in writing, against him directly by the Minister as well as himself, that he had examined those complaints and found that some of them were not without basis, that responsible members of the Bar and some other colleagues had also complained about Shri S.N. Kumar and that although he had no investigating agency to enquire conclusively into the genuineness of the complaints, the complaints had been persistent. It was also pointed out that Shri S.N. Kumar had also not been helpful in disposing of cases. Finally, it was said, some responsible members of the Bar as well as some colleagues expressed some doubts in regard to Shri S.N. Kumar's integrity. A copy of the letter was sent to the Chief Justice of India. On March 3, 1981, the Chief Justice of India expressed a desire to look carefully into the charges against Shri S.N. Kumar and pointed out that the letter of the Chief Justice of the High Court appeared to be too vague to persuade one that Shri Kumar lacked integrity. The Chief Justice of India recommended that Shri Kumar be appointed for a further period to enable him to make an enquiry into the matter meanwhile. Shri Kumar was reappointed as an additional Judge with effect from March 7, 1981 for a period of three months. On March 19, 1981, the Law Minister wrote to the Chief Justice of the High Court drawing his attention to the observations of the Chief Justice of India that the letter dated February 19, 1981 sent by the Chief Justice of the High Court appeared to suffer from vagueness and it was therefore difficult to accept that Shri Kumar lacked integrity. It appears that the Chief Justice of the High Court met the Chief Justice of India and discussed the case of Shri Kumar with him. On March 28, 1981 he wrote to him confirming that "with regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us." On the same day the Chief Justice of the High Court wrote to the Law Minister enclosing a copy of his letter to the Chief Justice of India and he informed the Law Minister that he had had "an opportunity to discuss the entire matter in detail with the Chief Justice of India." He added:

Perhaps you will consider this to be sufficient 'comments' on my part as desired by you in your letter under reply about the observations of the Chief Justice of India which you have quoted in your letter.

In reply, the Law Minister wrote back on April 15, 1981 to the Chief Justice of the High Court pointing out that "you must have had some material which provided the basis on which you concluded that Justice Kumar's reputation for integrity was not above board and recommended that he may not be continued. In view of the observations of the Chief Justice of India asking for concrete material, it would be necessary for us to have it with your comments." Quite evidently, the Law Minister intended that the material should be available to the Chief Justice of India also, so that all the material should be considered by both of them. Thereafter, the Chief Justice of the High Court wrote a letter D.O. No. 296-HCJ/PPS dated May 7, 1981, bearing the caption "SECRET (For Personal Attention Only)" and- reading as follow:

Dear Mr. Minister,

I am in receipt of your D.O. No. 50/2/ 81-Jus. dated 15th April, 1981.

Hon'ble the Chief Justice of India had made certain observations with regard to my recommendation about Mr. Justice S.N. Kumar and the same were communicated to me by you for my comments in your D.O. No. 50/2/81-Jus., dated 19th March, 1981. The Chief Justice had also written to me a letter dated 14th March, 1981, asking for "details and concrete facts in regard to the allegations against Justice Kumar. As I wrote to you in my D.O. No. 293-HCJ/PPS, dated 28th March, 1981, I discussed the matter with Hon'ble the Chief Justice and as desired by him, in reply to his letter, wrote my D.O. No. 292-HCJ/PPS, dated March 28, 1981 a copy of which was forwarded to you. Accordingly, it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's integrity was not above board, I give below some facts.

In the first half of 1980, Justice Kumar was sitting singly and was doing mostly Original Side matters but also some Appellate Side matters. Chance remarks came to my knowledge about his conduct in Court as well as about his integrity* Somewhere early in May, 1980 one of my colleagues met me and said that he was rather perturbed about information with him to the effect that if a substantial amount was paid to Justice Kumar, suits brought by a particular party against an insurance company would be decided in favour of that party. I had not paid much attention to the earlier reports but when this was brought to my notice, and I was at that time not the Chief Justice, I thought to myself that after the summer vacations, to save Justice Kumar from any embarrassment, he should be put on a jurisdiction other than original jurisdiction. Therefore, when as Acting Chief Justice I constituted the Benches for the second half of 1980 I put Justice Kumar in a Division Bench to sit on the Appellate Side and Writ Jurisdiction. In my view this was a safe way to finish the rumours if the same were incorrect and thus safeguard the reputation of a Judge. Surprisingly enough, Justice Kumar did not release the original suits, regarding which allegations had been made, from his board and continued to deal with these suits even in the second half of 1980. These suits were Suit No. 1409 of 1979, Suit No, 1417 of 1978 and Suit No. 1408 of 1979 filed by Jain Sudh Vanaspati Ltd., and Jain Export Pvt. Ltd., against the New India Assurance Co. Ltd. In August, 1980, the same colleague of mine who talked to me earlier and another colleague mentioned that doubts were being expressed about the integrity of Justice Kumar vis-a-vis the aforesaid cases and some others. Since I was only acting as Chief Justice at that time, I did not want to take any precipitate action. I, however, made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations, This made me look into the matter more carefully when to my astonishment I found that it was not only the three suits mentioned above but that there were other Single Bench matters also which had been retained by Justice Kumar on his board despite being put in the Division Bench. There is fairly a long list of these cases. In some of these the parties involved were rich and influential including some former princes. After I was appointed Chief Justice early in January, 1981, I looked into this matter a little more deeply and made further inquiries. Some of the lawyers were non-committal and understandably so. Others, however, asserted with some force that Justice Kumar's reputation was not above board. I talked to some of my other colleagues besides the two who had earlier spoken to me. They also said that unconfirmed reports have been circulating in the Bar which were not very complimentary to Justice Kumar, This made me conclude that the reputation for integrity of Justice Kumar was not what should be for a Judge of the High Court, To my mind, reputation of a integrity is fust as important as person actually being above-board.

Then followed reference to a complaint made by one Mr. Sabir Hussain, advocate and some data concerning the disposal of cases by Shri S.N. Kumar as well as allegations about some incidents in his Court concerning his conduct towards counsel.

892. Some days after receiving this letter of May 7, 1981 from the Chief Justice of the High Court, the Law Minister recorded a note on May 19, 1981 mentioning therein that before issuing the letter the Chief Justice had requested him to treat it as a secret document confined to his personal attention, and that he had given certain reasons for wanting it treated so. The Law Minister sought advice from his Secretariat whether the communication of the letter to the Chief Justice of India was unavoidable. This indicates that the Law Minister was not decided, when he received the letter, whether he should withhold it from the Chief Justice of India. It is not apparent what advice he received from his Secretariat, but it seems that he ultimately decided to honour the request of the Chief Justice of the High Court to keep the document secret. It appears that neither the Law Minister nor the Chief Justice of the High Court did ever inform the Chief Justice of India of this letter Of May 7, 1981 and of its contents. A perusal of the subsequent correspondence confirms that to be so, and indeed that was affirmed by the Law Minister in his letter of May 29, 1981 addressed to the Chief Justice of the High Court.

893. On May 27, 1981 the Law Minister recorded a note in which inter alia he said:

I presume that when C.J., Delhi and the C.J. of the Supreme Court met, the former must have informed the latter about the details that he had mentioned to me in his letter dated 7-5-81. This presumption is raised on the basis of the letters from the Chief Justice, Delhi.

He went on to observe that on the question of the integrity of Mr. Justice Kumar, the views of the Chief Justice of the High Court be preferred because he had the advantage of watching the work and conduct of the Judge.

894. The first point to consider here Is whether the information contained in the letter dated May 7, 1981 of the Chief Justice of the High Court was ever made known to the Chief Justice of India. There is no dispute that the Law Minister, in deference to the wishes of the Chief Justice of the High Court, did not communicate that information to the Chief Justice of India. The dispute centres on whether the Chief Justice of the High Court had ever conveyed the particular information to the Chief Justice of India. In my view, he never did so. There were no doubt meetings between the Chief Justice of India and the Chief Justice of the High Court when the question relating to the integrity of Shri. S.R. Kumar was discussed. Originally, the Chief Justice of the High Court had spoken in the most general terms of complaint

against the Judge. It seems that subsequently on March 26, 1981 the Chief Justice of the High Court told the Chief Justice of India that he doubted the integrity of Shri S.N. Kumar because "even after Justice Kumar's allocation was changed from the original side to the appellate side, he still continued to hear the part-heard cases on the original side." This was mentioned in the letter dated May 22, 1981 written by the Chief Justice of India to the Law Minister. The Chief Justice of India understood the allegation in its limited scope, that is to say that Shri S.N. Kumar was committing an irregularity in retaining original jurisdiction, part heard cases before him when he was now sitting on the appellate side. In the same letter he said:

As regards the complaint of the Chief Justice that Justice Kumar's integrity was doubtful since he continued to take old part-heard matters even after the allocation of his work was changed, I have made enquiries....

and observed that it appears to be common practice in the Delhi High Court that even after the Judge was moved from the original side to the appellate side he continued to take up part-heard cases on which a substantial amount of time had already been spent. The Chief Justice of India concluded that in the circumstances Shri Kumar could not be said to have done anything out of the way in taking up part-heard cases even after the allocation of work was changed. The affidavit of Shri S.N. Kumar discloses that an enquiry was made of him by the Chief Justice of India on why he continued to deal with original work while sitting on the appellate side, and in this connection he specifically refers to the three suits clearly mentioned in the letter dated May 7, 1981 of the Chief Justice of the High Court. There is nothing to suggest that the Chief Justice of India was ever apprised of the much more serious allegations contained in the letter of May 7, 1981 insinuating that the parties in these suits and in certain other cases, which as part-heard cases were said to have been retained by Shri Kumar for hearing, were rich and influential persons and that the Chief Justice of the High Court had "made discreet enquiries from some of the leading counsel and they in strict confidence supported tha allegations and that this was the material which led to doubt on the integrity of the Judge. This material was certainly very grave, much more than the mere allegation that the Judge was continuing to hear part-heard suits which, without anything more, could have been regarded at the worst as a mere irregularity. It took on a different complexion when considered in the light of the more damaging allegations made in the letter of May 7, 1981. I do not find anything on the record from which it can be presumed that this material was ever conveyed by the Chief Justice of the High Court to the Chief Justice of India. When all the correspondence and the affidavits on the record before us are considered together, that appears to be the only conclusion. It is strengthened by the insistent request of the Chief Justice of the High Court to the Law Minister that the letter of May 7, 1981 should not be disclosed to the Chief Justice of India.

895. What is the effect of that omission? It is clear that the Chief Justice of India had, for the purpose of rendering his advice in the process of consultation, decided to make enquiry from Shri S.N. Kumar concerning the allegations against him. He had enquired, and Shri Kumar had explained, about the Judge continuing to hear part-heard cases even after he had been moved to the appellate jurisdiction of the court. Had the allegations contained in the letter of May 7, 1881 been communicated to the Chief Justice of India, he would have been in a position to determine for himself by necessary enquiries, either from Shri Kumar or from other sources, whether there was any substance at all in those allegations. Such an enquiry was material to enable the Chief Justice to decide whether there was any substance in the allegations now made against Shri Kumar, and in case on enquiry he was of opinion that the allegations were baseless he would have, while maintaining his recommendation for a further term as additional Judge to be given to Shri Kumar, communicated his views to the Law Minister in respect of this further material. It must be remembered that the Government was deciding against a further term to Shri Kumar solely on the ground of doubtful integrity, and clearly the allegations contained in the letter of May 7, 1981 were strongly influencing that decision. That is apparent from the note drawn up by the Law Minister on May 27, 1981 where he says: "The Chief Justice of India in his, advice proceeds from the premises that taking up part-heard cases after the allocation of work a changed does not amount to lacking in integrity. If it were that simple I would not have joined issue, but the details furnished by the Chief Justice of Delhi High Court in his letter dated 7-5-81 go farther", It is an open question whether the Law Minister would have continued to prefer the views held by the Chief Justice of the High Court if the Chief justice of India had been informed of the allegations contained in the letter and on subsequent enquiries had found that there was no substance whatever in them. So long as the possibility remains, the conclusion must be that the process of consultation with the Chief Justice of India was not full and effective and the withholding of important and relevant material from the Chief Justice of India has vitiated the process. In my view, there was a violation of the constitutional requirement mandated by Clause (1) of Article 217. It follows that the question whether Shri S.N. Kumar should be given a further term as additional Judge has to be reconsidered, and a decision taken only after full and effective consultation as envisaged by the constitutional many date.

The power to transfer a High Court Judge under Clause (1) of Article 222:

896. The most strenuous debate before us has been raised over the scope and content of the power to transfer a Judge from one High Court to another under Clause (1) of Article 222. The issues raised are of great importance to the administration of justice and undeniably can produce far-reaching consequences.

897. The matter has already received the attention of this Court in Union of India v. Sankalchand Himatlal Sheth MANU/SC/0065/1977 and the majority opinion expressed therein is that the consent of the Judge is not essential to his transfer. It is urged that the view requires reconsideration and that we, as a larger Bench, are competent to do so.

898. It is desirable in the first place to trace the history of the provision. Almost from the inception of the High Courts in India, Judges appointed to one High Court were thereafter appointed to another High Court. The practice continued under the Government of India Act, 1935. The Government of India Act did not contain any provision corresponding to Article 222 of our Constitution, But by Section 2 and Sub-section (1) of Section 6 of the India (Miscellaneous Provision) Act, 1944 statutory recognition was given to the practice by enacting with retrospective effect Clause (c) in the proviso to Sub-section (2) of Section 220, which said:

(c) The office of a Judge shall be vacated by his being appointed by His Majesty to be Judge of the Federal Court or of another High Court.

That was the only provision in the Act which could be said to constitute evidence of the practice of moving a Judge from one High Court to another court. The clause was included as Clause (c) of the proviso to Clause (1) of Article 193 of the Draft Constitution, and there was a suggestion that another clause be added as follows:

(d) Every Judge shall be liable to be transferred to other High Courts. (B. Shiva Rao: The Framing of India's Constitution, Select Documents Vol. IV, p. 165).

The peremptory nature of the suggested clause may be noted. The Drafting Committee considered the amendment unnecessary and pointed out that there was no bar under Article 193 to a Judge of one High Court being appointed a Judge of another High Court, and drew attention to the existing Clause (c) providing that the office of the Judge would be vacated on the Judge being appointed to any other Court. In regard to another suggestion that a convention should be established whereby a proportion of Judges in every High Court could be recruited from outside the Province, the Drafting Committee observed that there was no bar to such recruitment or to the transfer of a Judge of a High Court to another High Court. It seems, however, that subsequently the Drafting Commit-tee changed its mind and on reconsideration decided to incorporate an express provision for the transfer of High Court Judges. The provision empowered the President to transfer a Judge from one High Court to any other High Court. This provision was amended subsequently by including therein an obligation to consult the Chief Justice of India in the matter. Consequently, Clause (c) of the proviso to Clause (1) of Article 217 was altered so that in place of the word "appointed" the word "transferred" would be read in conjunction with the words "to any other High Court". The reasons given by Dr. B.R. Ambedkar in the Constituent Assembly for proposing this provision may be mentioned:

The Drafting Committee felt that since all the High Courts so far as the appointment of Judges is concerned form now a central subject, it was desirable to treat all the Judges of the High Courts throughout India as forming one single cadre like the I.C.S. and that they should be liable to be transferred from one High Court to another. If such power was not reserved to the Centre the administration of justice might become a very difficult matter. It might be necessary that one Judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talent which may not be locally available. Secondly, it might be desirable to import a new Chief Justice to a High Court because it might be desirable to have a man who is unaffected by local politics and local jealousies. We thought therefore that the power to transfer should be placed in the hands of the Central Government.

We also took into account the fact that this power of transfer of Judges from one High Court to another may be abused, A Provincial Government might like to transfer a particular Judge from its High Court because that Judge had become very inconvenient to the Provincial Government by the particular attitude that he had taken with regard to certain judicial matters, or that he had made a nuisance of himself by giving decisions which the Provincial Government did not like. We have taken care that in effecting these transfers no such considerations ought to prevail. Transfers ought to take place only on the ground of convenience of the general administration. Consequently, we have introduced a provision that such transfers shall take place in consultation with the Chief Justice of India who can be trusted to advise the Government in a manner which is not affected by local or personal prejudices.

The only question, therefore, that remained was whether such transfer should be made so obligatory as not to involve any provision for compensation for loss incurred. We felt that that would be a severe hardship.... The Drafting

Committee felt therefore justified in making provisions that where such transfer is made it would be permissible for Parliament to allow a personal allowance to be given to a Judge so transferred.

The statement gave reasons for making the express provision conferring power to transfer and proceeded on the basis that the transfer could be made obligatory on the Judge concerned, and that he should be relieved to some degree against the hardship occasioned thereby provision was made for payment of compensation. Incidentally, the statement also shows that the Drafting Committee was under the impression that the Judges of the High Courts throughout India should be treated as constituting a single cadre like the Indian Civil Service. The statement can be regarded as of historical relevance only. In so far as it records the impression that the Judges of the High Courts form a single cadre it proceeds on an impression which, as I shall presently show, is totally erroneous. But it does mention the reasons which prompted the Drafting Committee to include the provision for transfer and compensation. The clause providing for the payment of compensatory allowance to a transferred Judge during the period he served as a Judge of the other High Court was omitted by the Constitution (Seventh Amendment) Act, 1956 but thereafter was reinstated in appropriate language by the Constitution (Fifteenth Amendment) Act, 1963.

899. The present Article 222 reads:

222 (1). The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determine, by Parliament by law and, until so determined such compensatory allowance as the President may by order fix.

I think it is necessary to remove the impression that the Judges of the High Courts constitute a single All-India cadre. The constitutional scheme embodied in Chapter V envisages each High Court as a distinct entity from every other High Court. It is a complete, self-contained and self-sufficient institution, independent of the others and not related to them in any manner. Every High Court draws its own powers and jurisdiction from the provisions of the Constitution, and in no way does it share them with the other High Courts. When a Judge is appointed to a High Court, he is appointed to that High Court only, It is for that reason Clause (c) of the proviso to Clause (1) of Article 217 enacts that the office of a Judge shall be vacated by his being transferred to any other High Court. He is the holder of a distinct office, that of a Judge of the High Court to which he is appointed. It will be noticed that the consultative process envisaged in Clause (1) of Article 217 involved in his appointment requires the President to consult the Chief Justice of the High Court to which his appointment is proposed and the Governor of the State concerned, besides the Chief Justice of India, The Chief Justice of the High Court is consulted because, as has been observed earlier, he is intimately concerned with the appointment of a competent Judge to meet the particular requirements of his Court. The Governor of the State likewise is consulted because he is concerned about the quality of the administration of justice at its highest level in the State. In the case of both functionaries, they are involved with the appointment in order to ensure that the Judge appointed is most suitable in relation to that High Court. The interests and needs of that High Court alone occupy the mind of these two functionaries. A person may be found unsuitable, by reason of association or other links, for being a Judge of the particular High Court, while he may be free from that embarrassment in respect of the other High Courts. It may be observed that the Presidential warrant appointing the Judge specifically mentions that the appointment is as a Judge of the High Court named therein. Moreover, the prescribed Form itself of the oath, which the Judge must make and subscribe before entering upon his office shows clearly that the appointment is confined to that High Court. We have been referred to Hira Singh v. Jai Singh AIR 1937 All 588, where a Full Bench of the Allahabad High Court held that an additional Judge of that court who had already taken oath on such appointment was not obliged to take oath again on his appointment as a permanent Judge. The case is clearly distinguishable, for it was one where the Judge continued to be a Judge of that Court, He had not been transferred to another High Court. Under our Constitution, the Form reads:

1. A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of)... do swear in the name of God solemnly affirm that I will bear a true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws. (Form No. VIII in the Third Schedule of the Constitution).

There is no All India Service of High Court Judges. Article 215 speaks of a High Court for each State, and Article 216 plainly declares that the High Court shall consist of a Chief Justice and other Judges. The Chief Justice is a Chief Justice of that High Court only and so are the other Judges. The Judges of a High Court owe their responsibilities and

discharge their functions in relation to that High Court only. They have no constitutional connection and no legal relationship with the body of Judges of any other High Court. This position, in my view, cannot admit of any doubt.

900. That being the position how then can the transfer of a Judge from one High Court to another High Court be viewed in law? A Judge appointed to a High Court is entitled to continue as a Judge of that High Court until he attains the age of 62 years, unless of course he resigns his office or is removed from it. His transfer to another High Court involves the vacation of his office in that High Court, that is to say, his appointment as a Judge of that High Court stands terminated. This is confirmed by Clause (c) of the proviso to Clause (1) of Article 217. Simultaneously, without anything more the transfer affects his appointment to the other High Court to which he is being sent. An order of transfer under Clause (1) of Article 222 therefore, is a transaction in two parts, the termination of the appointment as a Judge of the original High Court and the simultaneous appointment as a Judge of the other High Court. That view is supported by the circumstance that the power of transfer is vested in the President. It is significant in this connection that the President is also the appointing authority in the case of appointments made under Clause (1) of Article 217 and is also vested with the power of removal in cases falling under Article 218 read with Clause (4) of Article 124. Therefore, it was necessary that the authority who has been otherwise vested with the power to appoint a Judge and to terminate his appointment should also be the authority to transfer him. It may be added that inasmuch as the transfer constitutes an appointment of the Judge to the other High Court, Article 219 comes into play and, therefore, the transferred Judge must, before he enters upon his office in that High Court, make or subscribe an oath or affirmation according to the prescribed Form.

901. It is necessary to observe that the appointment to the other High Court involved in the order of transfer is an appointment attributable to the power under Clause (1) of Article 222, and cannot be regarded as an appointment under Clause (1) of Article 217. Whereas in the after the Constitution requires consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, in the case of an appointment by transfer the Chief Justice of India alone is involved in the consultation. The framers of the Constitution evidently considered it unnecessary to include other functionaries. If they had to be included, they would have consisted of the Governor of the State and the Chief Justice of the High Court to which the Judge was originally appointed as well as the Governor of the State and the Chief Justice of the High Court to which the Judge was being transferred. It was apparently considered that the consultation with the Chief Justice of India would suffice to take into account the relative interests of the two High Courts and the President would take into account the interests of the two States concerned. In this regard, while there is no constitutional requirement expressly mentioned in Clause (1) of Article 222, it is always open to the President and the Chief Justice of India to make necessary enquiries of the two States and the two High Courts affected by the transfer. The merit of involving the Chief Justice of India alone in the consultative process under Clause (1) of Article 222 lies in this hat the process of consultation can be more expeditiously completed and is to be preferred to the inevitably protracted process called for by a constitutional requirement involving two States and two High Courts. Whereas the Chief Justice of India can informally ascertain the views of the Chief Justices of the High Courts and satisfy himself whether he should advise in favour of the transfer, the President can similarly ascertain the views of the two States. The need for a formal presentation before the President of advice from the Chief Justices of the two High Courts, from the Governors of the two States and from the Chief Justice of India is thus eliminated.

902. I shall now examine whether the power to transfer under Clause (1) of Article 222 can be exercised only after securing the consent of the Judge concerned or even without his consent. As I have observed, the power to transfer was not expressly conferred by any provision under the Government of India Act, 1935. What was done was to clarify that when a Judge appointed to one High Court was thereafter appointed to another High Court, he must be deemed to have vacated his office in the original High Court In other words, it was made clear that on his subsequent appointment he could not be regarded as a Judge of two High Courts. That, it seems to me, was the intent of the speeches made by the Earl of Munster in the House of Lords and the Secretary of State for India, Mr. L.S. Amery, and Mr. Pethick Lawrence in the House of Commons when the India (Miscellaneous Provisions) Bill was introduced in the two Houses. Although they spoke of "the transfer" of High Court Judges, it is apparent that the word was used in the popular sense. It was not used in the particular sense of an obligatory transfer. There was no provision then in the Government of India Act for the appointment to another High Court of a sitting Judge without his consent. Indeed, the word used in Clause (c) of the proviso to Sub-section (2) of Section 220 of the Act was "appointed". That was also the word used in the original Clause (c) of the proviso to Clause (1) of Article 217 of our Draft Constitution. It was only when Article 222 was added that the word "appointed" was substituted by the word 'transferred'. The difference between the two words 'appointment' & 'transferred' in our Constitution is borne out by the different terms used in Clause (c) of the proviso to Clause (1) of Article 217, where it is declared that the office of a Judge shall be vacated by his being "appointed" by the President to be a Judge of the Supreme Court or on his being "transferred" by the President to any other High Court. It is true that Sub-clause (iii) of Clause (b) of paragraph 11 of the Second Schedule to the Constitution, which defines "actual service", speaks of "joining time on transfer from a High Court to the Supreme Court or one High Court to another". To my mind that plainly is an error in the drafting of the provision. It would seem that some of the provisions in the Schedules have not been framed with the care they deserved, because in another part, Form IV in the Third

Schedule, the Form of Oath or Affirmation to be taken by the Chief Justice of India before entering upon his office refers to him as the Chief Justice of the Supreme Court of India. In Clause (1) of Article 124, and throughout the other provisions in the body of the Constitution, he is described as the Chief Justice of India.

903. It seems to me that Clause (1) of Article 222 was specifically enacted in our Constitution for the purpose of empowering the President to transfer a Judge without necessarily securing his consent. The power was intended to be in the widest terms and subject only to the obligation to consult the Chief Justice of India. If transfer was conditioned further by the imperative of securing the consent of the Judge concerned, then having regard to past practice there was in fact no need to enact Article 222. A Judge can always be removed from one High Court to another with his consent. That had not in frequently been done during the ninety years of the High Courts in British India, and there was no reason why it could not have continued in the High Courts under our Constitution. But the framers of the Constitution intended a departure from that position. By Clause (1) of Article 222 in the terms enacted, they did not include the condition that the Judge concerned must consent to his transfer.

904. It was contended before us that Clause (1) of Article 222 was incorporated in the Constitution so that the Chief Justice of India could be brought in for the purpose of ensuring that the transfer was effected in the public interest only and not for the personal benefit of a Judge. The argument is without substance. Public power of this nature can be employed only in the public interest. It may be that incidentally the transfer may advantage the Judge, but in every case the primary ground for transfer must be public interest. It seems to me clear that unless Clause (1) of Article 222 had been enacted, it was not possible for the President to transfer a Judge from one High Court to another without his consent. If a transfer only with the consent was contemplated, it would have been sufficient to rely on the power of the President under Clause (1) of Article 217 to appoint the Judge to another High Court, and Clause (c) of the proviso to Clause (1) of Article 217 would remove any doubt that by such appointment the Judge vacated his office in the original High Court. There is no need to confer power in express terms to do a specific act which can be done with the consent of the parties under the umbrella of a general power.

905. It is worthy of note that where the element of consent was considered necessary, it was expressly mentioned in the Constitution. The proviso to Article 224A imposes that condition when a former Judge of a High Court is requested by the Chief Justice of a High Court to sit and act as a Judge of the High Court. So also is the provision in Article 128 in respect of former Judges of the Supreme Court, the Federal Court or of a High Court requested to sit and act as a Judge of the Supreme Court. In contrast, when under Clause (1) of Article 127 a Judge of a High Court is requested to sit as an ad hoc Judge of the Supreme Court when a quorum of the Judges of the Supreme Court is not available, the Judge of the High Court is bound to accept the request and his consent is not necessary. Reference may also be made to the position in England where under Section 4 of the Supreme Court of Judicature (Consolidation) Act, 1925 the High Court is divided into three divisions, the Chancery Division, the King's Bench Division and the Probate. Divorce and Admiralty Division. The puisne Judges of the High Court are attached to the several divisions by a direction of the Lord Chancellor. Sub-section (2) of Section 4 of the Act provides that any such Judge may with his consent be transferred by a like direction from one of the Divisions to another. It will be noticed that although the three Divisions are part of the same High Court, nonetheless the statute expressly insists that on a Judge being attached to one of the Divisions he can be transferred to another Division only with his consent. The provision was reiterated in Sub-section (4) of Section 1 of the Supreme Court of Judicature (Amendment) Act, 1944.

906. It is contended that the element of consent must be imported in Clause (1) of Article 222 because a fresh oath or affirmation is necessary when a Judge enters upon his office in the other High Court, and whether he will make and subscribe such oath or affirmation rests necessarily within his volition. To my mind that consideration does not necessarily lead to the conclusion sought to be inferred. If a transferred Judge refuses to make and subscribe such oath or affirmation he could be regarded, it seems as guilty of misbehaviour warranting his removal.

907. But the principal ground in support of the submission that a transfer of a Judge of a High Court can only be with his consent lies in the argument that such a transfer amounts to a punishment of the Judge without trial and therefore the principle of judicial independence is gravely prejudiced. That submission, to my mind, must be tested by an examination of the grounds on which a transfer is permissible. Clause (1) of Article 222 does not mention the grounds on which the Judge may be transferred. Plainly, inasmuch as it is in the nature of a public power vested in a functionary of the State, it can be exercised only in the public interest. Public interest is the touchstone on which every transfer must be tested. That is the necessary limitation implicitly circumscribing the exercise of power under Clause (1) of Article 222. All grounds which can be said to fall within that rubric may be entertained. But no ground which falls within the scope of Article 218 read with Clauses (4) and (5) of Article 124 can be brought within that scope. The grounds envisaged by those provisions are "proved misbehaviour or incapacity". In relation to them express provision has been made by the Constitution, the grounds being so grave that if established they can result in one penalty only, that of removal of the Judge.

908. The removal of a Judge is a matter of the greatest seriousness. It affects not only the Judge personally but also, in a larger sense, affects the general reputation of the judiciary. Consequently, the Constitution, by Clauses (4) and (5) of Article 124 and by the Judges (Inquiry) Act, 1968 has made the removal subject to a constitutional and statutory process consisting of several stages at each of which the action for removal is screened. The Judges (Inquiry) Act, 1968 requires a notice of motion for presenting an address to the President praying for the removal of a judge. The notice must be signed by a hundred members of the House of the People, where notice is given in that House and by fifty members of the Council of State where the notice is given in the Council. The Speaker or the Chairman, as the case may be, may consult such person as he thinks fit and after considering such material, if any as may be available to him, he may either admit the motion or refuse to admit the same. If the motion is admitted, the Speaker or the Chairman, will then constitute a Committee for the purpose of making an investigation into the grounds on which the removal is sought. The Committee consist of three members, one chosen from among the Chief Justice and other Judges of the Supreme Court, the other being a Chief Justice of a High Court and the third being a distinguished jurist. The Committee is required to frame definite charges against the Judge, and such charges together with the statement of the grounds must be communicated to the Judge, who will be given a reasonable opportunity of presenting a written statement of defence. Where it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Committee may arrange for the medical examination of the Judge by a Medical Board appointed by the Speaker or, as the case may be, the Chairman. The Medical Board undertakes the medical examination of the Judge and submits a report to the Committee. During the investigation, the Committee is obliged to give reasonable opportunity to the Judge of cross-examining witnesses, adducing evidence and of being heard in his defence. At the conclusion of the investigation, the Committee is required to submit its report to the Speaker or the Chairman, as the case may be. If the report of the Committee finds that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity no further steps can be taken in either House of Parliament and the motion pending in the House cannot be proceeded with. If the report finds that the Judge is guilty, then the motion together with the report of the Committee, is taken up for consideration by the House or the Houses in which it is pending. If the motion is adopted by each House of Parliament in accordance with Clause (4) of Article 124 read with Article 218, then the misbehaviour or incapacity of the Judge is deemed to have been proved and an address praying for the removal of the Judge must be presented to the President by each House of Parliament in the same session in which the motion has been adopted. It is clear that where an allegation of misbehaviour or incapacity is levelled against a Judge, he has the opportunity to defend himself including the right to lead evidence as well as to cross-examine witnesses produced against him. At every stage of the process the statute provides for careful consideration whether the motion for removal should be continued. Allegations which are so grave as to attract such detailed procedure and which afford full opportunity to the Judge to defend himself cannot possibly be made a ground for transfer of the Judge. In my view, the grounds of misbehaviour or incapacity are clearly ruled out from the scope of Clause (1) of Article 222. I am convinced that the transfer of a Judge under that provision cannot be made for the purpose of punishing him. It was never intended that the power should be exercised to impose a penalty by way of punishment. To permit that would be to permit a violation of the principle of judicial independence, for the only grounds envisaged by the Constitution for punishment are grounds constituting misbehaviour and the penalty for which is removal from office.

909. In the transfer of a Judge from one High Court to another the principle of judicial independence and the rights of the Judge are protected by two safeguards. The first is that incorporated in Clause (1) of Article 222, that is to say, the obligations of the President to consult the Chief Justice of India. The Constitution expects the Chief Justice of India to ensure in the process of consultation that the power to transfer is not used arbitrarily against a Judge of a High Court, that it is not employed as a disguise for punishing him, and that, even if the ground for the proposed transfer is made out, it will be in the public interest to affect the transfer. In this regard, the consultation with the Chief Justice of India must, in my opinion, extend to the entire gamut of the grounds on which the transfer is proposed, even where the grounds are incorporated in a policy. The protection afforded to the Judge by the obligation of consultation with the Chief Justice of India is intended to be a complete protection. It must be borne in mind that the Judge concerned is entitled to continue in the High Court to which he has been appointed for the full period of his tenure. It has already been observed that the transfer can be affected without the consent of the Judge. It is, therefore, necessary to construe the scope of the safeguard of consultation in its fullest comprehension. To properly discharge his responsibility in the matter, the Chief Justice of India must consider himself obliged to entertain not only the material furnished by the President to him but he must also make as full an enquiry as he conveniently can for the purpose of determining whether a transfer should be advised. In that process, he must determine not only whether the grounds on which the transfer proposed are made out but he must also consider as relevant the personal circumstances of the Judge concerned. It is ultimately in the public interest that the personal circumstances of the Judge should be taken into consideration, for there may be a case where they may hinder the proper discharge of his duties in the High Court to which he is transferred. In that connection it is only right that the Chief Justice of India should satisfy himself by enquiring from the Judge himself about what he has to say in the matter of his transfer, both in regard to the grounds for the transfer as well as in regard to any hardship or inconvenience which may be suffered by him by such transfer. As a sitting Judge he is entitled to be informed of the proposed transfer and of the grounds therefor because his right to continue as a Judge of the High Court is placed in jeopardy. It is a very different case from the transfer of an officer who is a member of a service and is ordinarily transferable. As has been observed earlier, a Judge of a High Court is

not a member of any All India Service of Judges. It may be made clear at this stage that the Judge does not have a right of hearing in the sense in which that right is generally understood in law. The scope and degree of inquiry by the Chief Justice of India must rest in his discretion. All that is necessary is that the Judge should know why his transfer is proposed and he should be able to acquaint the Chief Justice of India of any reason why he should not be transferred. It may also be added that the process of consultation envisaged under Clause (1) of Article 222 requires that all the material in the possession of the President must be placed before the Chief Justice of India, as well as such other information which he may need and may call for in order to render his advice.

910. The advice tendered by the Chief Justice of India should ordinarily be accepted by the President and in this regard the observations made in Union of India v. Sankalchand Himatlal MANU/SC/0065/1977(supra) will be fully attracted. Chandrachud, J. as he then was, speaking for the majority of the Court, relying on what Bhagwati & Krishna Iyer, JJ. said in Shamsher Singh v. State of Punjab MANU/SC/0073/1974 observed "that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India and that the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Executive if it departs from the counsel given by the Chief Justice of India." In practice, the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order'."

Krishna Iyer, J. observed (at pp. 2384 and 2385 of AIR):

Although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Article 222 cannot be exercised whimsically or arbitrarily.

and further;

It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India.

He added:

The danger of arbitrary action or unsavoury exercise has been minimised by straight-jacketing of the power of transfer. Likewise, the high legal risk of invalidation of any Presidential order made in the teeth of the Chief Justice's objection, runs in an added institutional protection. For it is reasonable for the court before which a Judge's transfer is challenged, to take a skeptic view and treat it as suspect if the Chief Justice's advice has been ignored.

I am fully in agreement with those observations. It is open to a Judge who is ordered to be transferred to invoke the jurisdiction of the court and seek judicial relief against the transfer on the ground of violation of Clause (1) of Article 222 as construed by this Court. This constitutes the second of the two safeguards mentioned earlier.

911. While on this point, I think it necessary to emphasise that the power to transfer a Judge from one High Court to another under Clause (1) of Article 222 is an extraordinary power. Inasmuch as it can be exercised without the consent of the Judge, it can constitute a threat to the sense of independence and impartiality of the Judge. It must, in my opinion, be used most sparingly and only for very strong reason. It must be clearly understood that the onus of justifying the transfer lies heavily on the State.

911-A. In the debate before us pointed reference was made to a policy contemplated by the Government in regard to the transfer of Judges of the High Court. It seems to me that any policy governing the application of Clause (1) of Article 222 must conform in all respects to the scope and content of Clause (1) of Article 222. The power to transfer is to be found in that clause, and every act of the Government, be it the framing and adoption of a policy or the actual order of transfer, must fall completely within the scope of that provision. The entire content of power vested in the President respecting the transfer of Judges of the High Courts must be traced to the confines of the clause. Accordingly, any policy framed and adopted in this behalf must be tested on the criterion of public interest, and it must be clearly understood that "public interest" means here the interest of the administration of justice. That is the sole purpose of the grant of the power under Clause (1) of Article 222. Now, if the framing and adoption of a policy is an act of the President under the power conferred by Clause (1) of Article 222, it must be subjected to consultation with the Chief Justice of India. That is an imperative condition grafted on the exercise of all power relating to the transfer of Judges of

the High Courts. That the framing and adoption of a policy should be governed by that condition is easily explicable if it is appreciated that the policy constitutes the basic consideration entering the order of transfer. All considerations controlling the transfer of a Judge of a High Court must fall within the scope of the consultative process. The Constitution intends that the Chief Justice of India should be consulted before a transfer is ordered by the President. The consultation must travel over the entire area of consideration which prompts the transfer. The scope of consultation is not limited to any particular. It must be remembered that the Constitution has insisted on consultation with the Chief Justice of India in order to protect the administration of justice and its central principle, the independence of the judiciary, from arbitrary encroachment by executive power.

912. It is contended that policy making is the exclusive and absolute preserve of Governmental power. While that may be so ordinarily, it cannot be accepted here having regard to the plain terms of Clause (1) of Article 222. It is also urged that the policy can always be tested in a court of law for its constitutional validity, and therefore the intervention of the Chief Justice of India in his consultative capacity need not be contemplated. It is not possible to agree. The framing of a policy is an administrative exercise, and calls for making a choice of one or more considerations for executive action within the field of several considerations. When the Chief Justice of India is consulted on the formation of a policy by the President, the consultation involves an administrative choice operating on an administrative plane. When the President consults the Chief Justice of India under Clause (1) of Article 222, it is consultation in relation to an executive act.

The transfer of Shri K.B.N. Singh, Chief Justice, High Court of Patna:

913. Shri K.B.N. Singh was a Judge of the High Court of Patna from September 15, 1966. He was appointed Chief Justice of that Court and assumed charge on July 19, 1976. On January 19, 1981 the President issued a notification, after consultation with the Chief Justice of India, transferring Shri K.B.N. Singh as Chief Justice of the High Court of Madras with effect from the day he assumed charge of that office. The transfer has been challenged in Writ Petition No. 274 of 1981 and Transferred Cases Nos. 2, 6 and 24 of 1981. The principal contentions of the petitioners are firstly, that there has been no effective consultation as envisaged by Clause (1) of Article 222 inasmuch as all the material considered by the Chief Justice of India was not placed before the President, and the process of consultation was not marked by fair procedure, and, secondly, that the transfer cannot be said to have been made in the public interest, and if different considerations have prevailed with the President and the Chief Justice of India, neither can be described as related to public interest.

914. An examination of the several affidavits and of the correspondence between the Government and the Chief Justice of India discloses the following facts;

915. The Chief Justice of India decided on visiting the High Court of Patna in February, 1980 in order to meet the Judges of the High Court and members of the Bar. After informing Shri K.B.N. Singh, Chief Justice of the High Court of his proposed visit, he proceeded to Patna and during his stay there on February 24, 25 and 26, 1980 he met the Judges of the High Court individually and interviewed individual members of the Bar, and also met Judges of the District Court and members of the District Court Bar. Of twenty advocates of the High Court whom he met, there were fifteen senior advocates suggested by Shri K.B.N. Singh. He also met the members of the Advocates' Association collectively at a function arranged by them. Among other things he had also come to know that Shri K.B.N. Singh's mother was old and infirm and not in a good state of health. At that time he did not indicate to Shri K.B.N. Singh that there was any proposal to transfer him to another High Court because at that time there was no proposal to transfer him. It is clear that he returned from Patna greatly perturbed about the conditions prevailing there, and the matter continued to engage his mind thereafter. It was then that he conceived of the transfer of Shri K.B.N. Singh. There was at that time a proposal by the Government that the Chief Justices of all the High Courts should be transferred as a matter of policy to other High Courts, so that each High Court would be headed by a Chief Justice from outside. No final formulation of the scheme had been reached and no modality or mechanism had been decided on for implementing such a policy. From the correspondence and other material on the record it is apparent that the Chief Justice of India and the Law Minister were engaged in continuous discussion over a long period with regard to the appointment of the Chief Justices of High Courts. The discussion was embodied in their letters and also took place in personal meetings and over the telephone. On December 7, 1980, the Chief Justice of India wrote to the Law Minister "in furtherance to the discussion which we had yesterday", stating that he was "firmly opposed to a wholesale transfer of the Chief Justices of High Courts", and that "such transfers may be made in appropriate cases for strictly objective reasons" and "personal considerations must, in the matter of such transfers, be wholly kept out". He mentioned that the transfer of some of the Chief Justices had been engaging his attention for the past few months and in this connection he had made personal enquiries and had met several lawyers and many Judges of the High Courts concerned. He recommended that Shri K.D. Sharma, then acting as Chief Justice of the High Court of Rajasthan, should be transferred as Chief Justice of the High Court of Kerala, and Shri K.B.N. Singh should be transferred from the High Court of Patna as the Chief Justice of the

Rajasthan High Court. It appears that it was then realized that certain difficulties would arise if Shri K.D. Sharma was transferred to the High Court of Kerala. In a letter to the Prime Minister written on December 18, 1980 the Chief Justice of India proposed that the transfer of Shri K.B.N. Singh from Patna to Rajasthan should await further consideration. After a telephone talk with the Law Minister, the Chief Justice of India wrote on December 20, 1980 proposing the transfer of Shri M.M. Ismail, Chief Justice of the High Court of Madras as Chief Justice of the High Court of Kerala and the transfer of Shri K.B.N. Singh as Chief Justice of the High Court of Madras. On January 5, 1981, the Chief Justice of India telephoned Shri K.B.N. Singh and informed him of the likelihood of his transfer to Madras. He asked him if he had anything to say in the matter. Shri K.B.N. Singh wished to know why he was being transferred and the Chief Justice of India informed him that it was "Government policy" and that it was proposed to transfer Shri M.M. Ismail from Madras and it was necessary to appoint an experienced and senior Chief Justice in his place. Shri K.B.N. Singh informed the Chief Justice of India on the telephone that his mother was bedridden and he was not in a position to go with his mother to Madras. No other personal difficulty was disclosed. Shri K.B.N. Singh also observed that if his transfer was insisted on he would prefer to resign. The Chief Justice of India requested him not to act in haste but to give the matter close thought, and he added that he was also making a note of the difficulty mentioned by him and "it will have to be taken into consideration before a final decision was taken." The Chief Justice of India requested him to come to Delhi to discuss the question of his transfer. On January 8, 1981 at 7-30 p. m. Shri K.B.N. Singh met the Chief Justice at India at his residence in Delhi and was with him for some time. He discussed the question of his mother's advanced age and illness; that was the only personal difficulty which he mentioned in the matter of his proposed transfer to Madras. The Chief Justice of India told him that he was unable to agree that the mother's circumstances presented any serious difficulty because there were other dependable persons in his family who could look after the mother and that, in any case, his brother Shri S.B.N. Singh, who was practising in the High Court, was quite capable of looking after the mother. Shri K.B.N. Singh replied that his mother was particularly devoted to him and he could not leave her to the care of his brother and other members of the family. He mentioned that some baseless complaints may have been made to the Chief Justice of India and that he desired to remove any wrong impression created by those complaints. The Chief Justice of India assured him that he was not proceeding on the basis of baseless complaints and that he did not believe that his conduct was blameworthy, but that if he wanted to explain any matter which according to him had created dissatisfaction about the working of the High Court he was welcome to do so. Upon that, Shri K.B.N. Singh told the Chief Justice how certain persons connected with the High Court were influenced by communal considerations and how he, on his own part, did not permit communal or other extraneous considerations to influence him administratively or judicially. The Chief Justice of India assured him that he did not hold him to blame, but that certain persons were exploiting their proximity to him and that had created unnecessary misunderstanding and dissatisfaction. The Chief Justice of India conveyed to Shri K.B.N. Singh that his transfer was pro-posed in the public interest and that it was not made by way of punishment, and that it was thought of also by the transfer of Shri Ismail from Madras to Kerala.

916. It seems clear that Shri K.B.N. Singh was informed by the Chief Justice of India in full detail of the proposal to transfer him from the High Court of Patna to the High Court of Madras, and keeping in mind the telephone conversation between them on January 5, 1981 and the personal discussion on January 8, 1981 it is apparent that Shri K.B.N. Singh was being transferred not because of any wrong or fault on his part or for any conduct for which blame could be attached to him, but because people were exploiting their proximity to him in matters which had created dissatisfaction and unnecessary misunderstanding in the High Court at Patna. It is also apparent that Shri K.B.N. Singh was aware that such a situation prevailed because he attempted to clear himself of any blame in connection with what was happening. He was invited by the Chief Justice of India to say whatever he wanted to in the matter which "according to him had created dissatisfaction about the working of the High Court". It is clear that the matter was discussed fully between the Chief Justice of India and Shri K.B.N. Singh and the latter had ample opportunity to say what he wanted to. And it is also clear that the proposal to transfer him from Patna was not by way of punishment. It is unfortunate that a situation had been allowed to develop in legal and judicial circles at Patna which could only be remedied by his transfer. That the transfer was intended to Madras was occasioned by the circumstance that Shri M.M. Ismail was being transferred from Madras to Kerala and it was necessary to send a senior and experienced Chief Justice to the High Court of Madras. The difficulty expressed by Shri K.B.N. Singh in regard to the condition of his mother's health was also considered by the Chief Justice of India, who felt that Shri S.B.N. Singh, his brother practicing law in the High Court, and other dependable persons in the family at Patna could be relied on to look after the mother. Every relevant circumstance, including the personal difficulty mentioned by Shri K.B.N. Singh was considered carefully and objectively by the Chief Justice of India and on an assessment of the relevant facts and circumstances he came to the conclusion that notwithstanding any difficulty posed by a different language in Madras, as Shri K.B.N. Singh was an experienced and senior High Court Chief Justice, he should be transferred from Patna to Madras. I am satisfied that a fair procedure was adopted and all that could reasonably be done in the circumstances was done in the matter.

917. It is urged there was no full and effective consultation between the chief Justice of India and the Government as the second discussion between the Chief Justice of India and Shri K.B.N Singh took place in the evening of January 8, 1981 and the order was signed by the Prime Minister the next day. The Chief Justice of India, in his affidavit on oath

has emphatically averted that "there was full and effective consultation between me and the President of India on the question of Shri K.B.N. Singh's transfer from Patna to Madras as the Chief Justice of Madras High Court. Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer". There is no material on the record for doubting the statement. It must be remembered that the matter of Shri K.B.N. Singh's transfer had been under discussion all along for a considerable time between the Chief Justice of India on the one side and the Law Minister and the Prime Minister on the other, arid the discussion had taken place through written correspondence as well as oral conversation by way of discussion in personal meetings and on the telephone. It is perfectly within the realm of credibility that what had passed between the Chief Justice of India and Shri K.B.N. Singh on January 8, 1981 had also been communicated to the Law Minister and the Prime Minister before the order of transfer was signed by the Prime Minister.

918. A point was raised that the Chief Justice of India had averred in his affidavit that the consultation was effected between him and the President of India and not that the consultation took place between him and the Law Minister and the Prime Minister. To my mind, it is clear that Chief Justice of India is referring to the President in the sense of the "Executive Government". This is amply borne out by the large volume of documentary material which shows that the Chief Justice of India was in communication with the Law Minister and the Prime Minister only. There is nothing to suggest that he met the President personally in this matter.

919. It is also contended that the proposal to transfer Shri K.B.N. Singh had already been made by the Chief Justice of India to the Government as early as December 1980 and this was before any discussion on the point between him and Shri K.B.N. Singh. Now it is clear from the record that the proposal so made was in the nature of a suggestion calling for an examination of the matter. The Chief Justice of India had visited Patna and from the material in his possession he had formed an opinion that there was a case for considering the transfer of Shri K.B.N. Singh. The matter was only at the stage of consideration and clearly could not be finalised before Shri K.B.N. Singh had been taken into confidence. We must remember that it was the Chief Justice of India (Chandrachud J. as he then was) who had pronounced judgment in Union of India v. Sankalchand Himatlal Sheth MANU/SC/0065/1977, where in considerable detail he has dwelt on the imperative need of a full and effective consultation which, as he observed there, could require the Chief Justice of India to elicit the facts directly from the Judge concerned. It was apparently pursuant to this that he considered it necessary to discuss the matter with Shri K.B.N. Singh otherwise, he would not have found it desirable to telephone from Delhi to Patna on January 5, 1881 and after discussing the matter with him then, to invite him for further discussion at Delhi on January 8, 1981. The proposal was pending, the consultation with the Government was going on and no final decision had been taken. As the Chief Justice of India has stated in his affidavit, the discussion with the Government continued even after the proposal. The process of consultation could continue right up to the moment the final decision was taken. The process of consultation continued actively throughout and there is no reason to doubt the objectivity which marked it. As the learned Solicitor General has pointed out, it must not be forgotten that the Chief Justice was not a personally interested party but was only discharging the duties and responsibilities cast on him by the Constitution. A few facts may be set forth again. On December 18, 1980, the Chief Justice of India requested the Prime Minister that the proposal to transfer Shri K.B.N. Singh to Rajasthan should await further consideration. On January 5, 1981, Shri K.B.N. Singh was informed by the Chief Justice of India that the difficulty mentioned by him concerning the infirmity and age of his mother was being noted by him and would be taken into consideration before a final decision was taken. It seems to me beyond dispute that the matter did not stand closed merely because of the proposal made in December 1980 to transfer him.

920. Then it is urged that Clause (1) of Article 222 contemplates that the process of consultation should be initiated by the President by a reference of the matter to the Chief Justice of India for his advice and that instead "it is the latter who has initiated the process I do not see any substance in this point having regard to the continuous consultation which was going on between the Chief Justice of India and the Government.

920-A. I shall now deal with the task of identifying the considerations which prevailed with the Chief Justice of India and the Government in transferring Shri K.B.N. Singh, and whether it can be said that those considerations fall within the expression "public interest."

921. When a Judge permits his judgment in a case to be influenced by the irrelevant considerations of caste and creed, of relationship or friendship, of hostility or enmity, he commits a breach of his oath. It is a case where justice is not done and is denied. It is a case of misbehaviour, to which the provisions of Article 218 read with Clauses (4) and (5) of Article 124 are attracted. There is another kind of case where a Judge acts in accordance with his conscience on the basis of the facts and the law as he bona fide understands them, and yet because of surrounding circumstances it may appear that justice, has not been done even though in fact it may have been done. Where there is a danger that justice will not appear to be done, and the prevailing environment is linked with the person of the Judge, notwithstanding that he may have done nothing to promote it, the injury to the administration of justice can be as serious as a case where the

Judge has consciously deviated from the standards of impartial judgment. Where there is a genuine apprehension that justice may not appear to be done, the ordinary rule is that the case pending before the Judge should be transferred to another Judge. But where the apprehension is rooted in local association, on links with members of the Bar or influences present in close proximity to the Judge and the circumstances are such that, notwithstanding that the conduct of the Judge has done nothing to promote it, there is grave and bona fide fear in the minds of honest citizens that the fount of justice may be polluted, its effect is not confined to a single case but spreads widely, endangering the purity of the entire administration of justice. Inasmuch as the administration of justice relies for its vitality on the strength of public confidence, it must range supreme and, therefore, if the Judge is transferred in these circumstances it must be regarded as a transfer in the public interest. The desirability of inducting Chief Justices and a proportion of the Judges from outside the State has been emphasised ever since the drafting of the Constitution. During the finalisation of the Draft Constitution a suggestion was received by the Drafting Committee that one-third of the Judges appointed to a High Court should be from outside the State. Successively, the idea has been promoted by the Law Commission of India in its Fourteenth Report and thereafter in its Eightieth Report, and also by the States Reorganisation Commission. The need has been affirmed from time to time and programmes to implement it have been constantly mooted. The Union Government, according to the evidence before us, has been actively engaged during the last two years in securing an acceptance of the policy from the judiciary and discussions have taken place from time to time between, the Chief Justice of India and the Law Minister. The Government has proposed that the policy should be implemented not only by appointing the Chief Justice and one-third of the number of Judges to a High Court from outside the State at the time of their initial appointment to the office, but should also be taken in hand presently by the transfer of sitting Chief Justices and Judges. It has been further proposed by Government that the transfers should be effected simultaneously in all the High Courts.

922. It seems from the material on the record that although the Chief Justice of India is in agreement with the need for appointment of Chief Justices and a number of Judges to the High Court from outside the State, he has not accepted yet the further suggestion of the Government that the transfer should be effected as a policy implemented en masse over all the High Courts. It seems that the Chief Justice of India is prepared to go so far only that the matter should be considered from case to case, on the objective merits of each case. This is evidently what he had in mind when he considered it desirable to propose the transfer of Shri K.B.N. Singh as Chief Justice from the High Court of Patna to the High Court of Madras. He did so plainly on the ground that although Shri K.B.N. Singh himself was not to blame for this, people in the proximity of Shri K.B.N. Singh had created an atmosphere injurious to the administration of justice resulting in great disaffection. It is apparent that the reasons which weighed with the Chief Justice of India form the very basis of the policy promoted by the Government. The basic component of that policy is identifiable in the reasons which prevailed with the Chief Justice of India. When this view is taken, it is immediately clear what the Chief Justice of India meant when during the telephone conversation with Shri K.B.N. Singh on January 5, 1981, he explained that the transfer was prompted by Government policy. This also readily explains why the Government accepted the proposal to transfer Shri K.B.N. Singh. As the learned Solicitor General explained before us, the Government considered this as the first stage in the implementation of its policy, and although there was no finalisation in regard to the time and manner of inducting the Chief Justice and a proportion of the Judges in a High Court from outside the State, the proposal to transfer Shri K.B.N. Singh was rooted in the very considerations which found favour with the Government in promoting the policy conceived by it.

923. I am of opinion that the considerations which prevailed with the Chief Justice of India and the Government in the transfer of Shri K.B.N. Singh were substantially identical, that for the purposes of this transfer the Government had agreed that having regard to the reasons for the transfer it was prepared to consider the case on its individual merits and not to insist on the making of transfers generally for the time being. I am also of opinion that the considerations on which the transfer was made must, in view of what I have observed, be regarded as falling within the expression "public interest". In my judgment, there is no violation of Clause (1) of Article 222.

923-A. It is next urged that the provisions of the Memorandum issued by the Ministry of Home Affairs in the Government of India had not been complied with inasmuch as no enquiry had been made of the Chief Ministers of the States concerned before the transfer of Shri K.B.N. Singh. The learned Solicitor General has stated from the Government records in his possession that the Law Minister consulted the Chief Minister of Tamil Nadu on January 3, 1881, the Chief Minister of Kerala on January 4, 1981 and the Chief Minister of Patna on January 6, 1981 in regard to the proposed transfers of Shri M.M. Ismail and Shri K.B.N. Singh. Learned Counsel for Shri K.B.N. Singh points out that there was opposition by the Tamil Nadu Government to the induction of Shri K.B.N. Singh as Chief Justice of the High Court of Madras on the ground that he was not acquainted with the Tamil language and would find difficulty in coping with his duties in the High Court at Madras. It is said that if the Chief Justice of India had been informed of this objection, Shri K.B.N. Singh would not have been transferred. I have observed earlier that the Chief Justice of India had considered this matter long before, and did not consider it as a substantial difficulty.

Validity of the Circular Letter dated March 18, 1981 issued by the Minister for Law, Justice and Company Affairs, Government of India:

924. The Circular letter was addressed by the Minister to the Chief Ministers of different States and to the Governor of Punjab pointing out that several bodies and forums, including the States Reorganisation Commission, the Law Commission and various Bar Associations had suggested that one-third of the Judges of a High Court should, as far as possible, be from outside the State in which the High Court was situated. It was said that the suggestion was made "to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations". He requested that the additional Judges working in the High Court of the State should be required to give their consent to be appointed as permanent Judges in another High Court in the country, and they could name three High Courts, in order of preference, where they would prefer such appointment. It was also requested that consent may similarly be taken from persons who have already been, or may in the future be, proposed for initial appointment. He requested further that it may also be made clear to the additional Judges that giving their consent and indicating their preference would not commit the Government in the matter of their appointment or in the matter of accommodating them according to their preference. Thereafter, it appears, some of the additional Judges, whose terms were expiring, were granted further appointment as Additional Judges for short periods of three months, six months or a year.

924-A. The validity of the Circular Letter has been challenged before us on several grounds including the ground that the contents of the letter constitute a threat to the judicial independence of the additional Judges inasmuch as, feeling pressured by the apprehension that unless they conveyed their consent to appointment to another High Court they would not be given further terms as additional Judges, some of them have conveyed their consent. It has been urged that the additional Judges have a right to be considered for appointment as permanent Judges in the High Courts where they are serving, and the Circular letter should be construed as an attempt to transfer them to some other High Court without operating through the consultative process which the President is obliged under the Constitution to enter into with the Chief Justice of India.

925. It seems to me unnecessary to enter into all these points of controversy, because to my mind if the Circular letter is regarded as intending to bind the additional Judges it can have no such effect in law, an appointment of a person as a Judge of a High Court must, as observed earlier, be an appointment to a particular High Court. For the purpose of making such appointment, the constitutional process must be initiated with respect to a particular High Court. The Constitution does not contemplate a single process in relation to several High Courts, collecting as many persons as there are vacancies all over India, and then in the discretion of the Government appointing each of them where the Government pleases. To adopt this procedure will be to equate the appointment of Judges with the appointment of members of an All India Service, a position which cannot constitutionally be countenanced. There must be a separate and distinct process in regard to appointment to each High Court. The Governor of the particular State and the Chief Justice of the particular High Court have to be involved in that process, besides the Chief Justice of India. It is in the course of such a process that a proposal for appointment is made to the person intended for appointment. In other words, a valid proposal, as part of the constitutional process, is one which offers an appointment to a particular High Court. It is only when consent is given to such a proposal, that is to say, consent to appointment in a particular High Court, that it can be said in law to be binding and effective. The Circular letter has invited the consent of the additional Judges in the most general terms, to appointment to any High Court other than the High Court in which they are serving as additional judges. If it is intended to bind the additional Judges, it has failed in its purpose. Neither the proposal nor any consent given thereto has any legal status. It may be that the Circular letter was intended only for the purpose of obtaining information informally whether the additional Judges would be agreeable to being appointed as permanent Judges of other High Courts. But inasmuch as the consent given by the additional Judges cannot bind them, it will be open to them to consider any concrete proposal now made offering appointment to a particular High Court with a perfectly open and free mind, unhindered by any consent given earlier in pursuance of the Circular letter. It may be added that a concrete proposal can contemplate appointment only in accordance with the procedure prescribed in Clause (1) of Article 217.

926. In this view of the matter, it would be sufficient to declare that the Circular letter cannot be acted on and any consent given pursuant to the Circular letter is not binding in law on those who have given it.

The claim of privilege against the disclosure of certain documents:

927. The law relating to the plea of privilege raised by the State against the disclosure of documents has advanced considerably in recent times and its evolution has been traced by brother Bhagwati who has discussed the present content of the law abroad, and has given substantial reason for taking the law forward in this country from the position enunciated by this Court in State of Punjab v. Sodhi Sukhdev Singh MANU/SC/0006/1960. I am in broad agreement with what he has said in regard to what the present state of the law in India should be.

928. But I think it desirable to add a note of warning. There is good reason to be circumspect. Traditions and beliefs which governed life until yesterday and held an important place in the polity cannot be rooted out overnight. Change to be valid must find general acceptance, and its pace will be determined by the education of experience. The past is ever with us, and when the present takes hold it must do so conscious of its responsibility to the future. The rules now developed by this Court relating to the disclosure of documents need to be carefully applied. The balance between the conflicting claims of public interest represented by officialdom and the public interest flowing from the administration of justice often calls for a delicate assessment, into which perforce must enter considerations vital to the operations of Government on the one hand and the demands of adjudication on the other. The responsibility fixed on the Court is a serious one, and there is need to warn that this power which now vests in the Court can have grave consequences if the content of its potential is not truly appreciated and realised by those who wield it. Whenever a court breaks new ground, the development and recognition of new rights is often accompanied by the birth of problems surfacing also for the first time. New doctrines must be cautiously applied, and yet no court can shirk its duty if it finds that its power has been rightly invoked.

929. In regard to the plea raised by the State on the basis of Clause (2) of Article 74 of the Constitution, there is no denying, in my view, the accuracy of what has been observed by brother Bhagwati, that it is the advice and its reasons tendered by the Council of Ministers to the President which are protected from enquiry by a court, and no such protection extends to the material from which the advice proceeds.

930. On the facts of the case, it was material, to my mind, to ascertain whether indeed a full and effective consultation had taken place with the Chief Justice of India on the question whether Shri S.N. Kumar should be appointed for a further term as additional Judge, and for that purpose it became necessary to consider the contents of the letter dated May 7, 1981 addressed by the Chief Justice of the High Court to the Law Minister. Great emphasis was laid by the parties in their submissions on the question of full and effective consultation in point of fact, and it seemed in the context in which the question was debated that the disclosure of the letter of May 7, 1981 and the connected correspondence was imperative in order that justice be administered. It was not an easy decision for the Court to order disclosure, but after carefully balancing the rival interests we came to the conclusion that the balance inclined in favour of a positive order.

Locus Standi:

931. What remains now is to consider the objection raised by the respondents to the maintainability of the petitions before us. My brother Bhagwati has dealt with this objection at some length, and has held that it has no substance. I find myself in general agreement with him, and need say nothing more.

932. Before concluding, I think it only right to record my appreciation and gratitude for the great and valuable assistance offered to the Court by the very able and erudite submissions made during the hearing of these cases. Eminent counsel appeared on both sides, who in the discharge of their responsibilities to the Court and to the parties represented by them, did not spare themselves and brought to bear to the hearing their vast learning and enormous industry, notwithstanding that the hearing had to proceed for several weeks.

933. In the result, Transferred Cases Nos. 19, 20, 21 and 22 of 1981 are allowed in so far that a declaration is granted that the Circular letter dated March 18, 1981 cannot be acted on and that the additional Judges concerned shall not be held bound by their consent, given in pursuance of the Circular letter, to their appointment as permanent Judges of High Courts other than those where they presently serve. In the Transferred Case No. 20 of 1981, the respondents are directed to reconsider the case of Shri S.N. Kumar for appointment as an additional Judge of the High Court of Delhi for a further term. Writ Petition No. 274 of 1981 and Transferred Cases Nos. 2, 6 and 24 of 1981 are dismissed.

934. In all these cases, having regard to the circumstances, there is no order as to costs.

E.S. Venkataramiah, J.

935. The judgment can be conveniently divided into fourteen parts thus:

I. Introduction

II. Locus standi of the petitioners

III. The doctrine of political question

IV. The status of High Courts.

V. Article 217(1) -- Appointment of a Judge of a High Court -- History --Process of consultation under Article 217(1) -- Is the opinion of the Chief Justice of India binding on the President? -- Whether the Council of Ministers can tender advice to the president on the question of appointment of a Judge? -- Whether such advice interferes with the basic structure of the Constitution? -- What is the practice prevailing in some other countries?

VI. Article 224(1) -- Appointment of Additional Judges -- History -- The manner in which Article 224(1) is applied from its commencement and its effect on the principle of independence of judiciary -- Has an additional Judge whose term prescribed under Article 224(1) has expired one right? -- Does the manner in which Article 224(1) is being used give rise to any enforceable constitutional convention? -- Are the principles of natural justice to be followed at the time of consideration of the question of re-appointment of an Additional Judge?

VII. Article 222 -- Transfer of High Court Judges -- History -- Does a transfer of a Judge of a High Court amount to a fresh appointment in another High Court? Does the majority judgment of this Court in Sankalchand Sheth's case holding that the consent of a Judge is not an essential condition of a valid transfer require reconsideration? -- Does an order of transfer amount to a punishment? -- Can a Judge be transferred on the basis of allegations of misbehaviour or of incapacity? -- Does the expression 'Judge' in Article 222 include a Chief Justice also? Is the policy of having the Chief Justice of every High Court from outside the State valid? -- Whether ignorance on the part of a Judge of the regional language of the State in which a High Court is situated is an impediment to transfer the Judge to that High Court?

VIII. Question of executive privilege in respect of documents relating to appointment of High Court Judges.

IX. Whether there has been any error in the consultation preceding the decision not to appoint Shri S.N. Kumar?

X. The validity of the circular letter dated March 18. 1981 written by the Law Minister to the Chief Ministers.

XI. Validity of the transfer of Shri K.B.N. Singh.

XII. Cannot the Union Government be called upon to review the strength of Judges in every High Court and to appoint sufficient number of Judges?

XIII. Relief.

XIV. Concluding remarks.

PART I

936. At the commencement, of the judgment it is my duty to thank the learned Counsel who have argued in these cases with exceptional ability and skill, without whose assistance it would have been very difficult to prepare this Judgment. I sincerely thank all of them.

937. These Petitions are disposed of by this common judgment because common questions of law arise for consideration in them. A brief statement of facts involved in these cases is given below.

938. Transferred Case No. 22 of 1981 had originally been filed in the High Court of Bombay under Article 226 of the Constitution. Later on it was transferred to the file of this Court by an order made under Article 139A of the Constitution to be disposed of along with other connected cases. The petitioners in this case are Shriyuts Iqbal M. Chagla, C.R. Dalvi, M.A. Rane and Sorab K.J. Mody. They are advocates practising in the High Court of Bombay. Respondents Nos. 1 and 2 in this case are the Union Law Minister and the Union of India. Respondents Nos. 3 to 12 are the additional Judges of the High Court of Bombay appointed under Article 224(1) of the Constitution. The above petition is filed questioning the validity of a circular letter dated March 18. 1981 addressed by the Union Law Minister to the Governor of Punjab and Chief Ministers (by name) (except the North-Eastern States) by which they were requested to obtain the consent of additional Judges working in the High Courts to their appointment as Judges of the

High Courts other than those in which they were additional Judges on the lines indicated in the said circular letter. A request was also made in that letter to obtain consent to appointment as judges from persons who had been or may in future 'be proposed by you' (that is by the Chief Ministers). It is alleged that aggrieved by the said letter, which according to them, amounted to a direct attack on the independence of the judiciary, which was a basic feature of the Constitution, the members of the Advocates' Association of Western India met at a Special General Meeting on April 3, 1981 and passed resolutions inter alia condemning the said letter as subversive of judicial independence and asking the Union Government to withdraw the said letter. The Bombay Bar Association also passed similar resolutions at its Extraordinary General Meeting on April 7, 1981. On April 14. 1981 it is alleged that the Managing Committee of the Bombay Incorporated Law Society (representing the Solicitors practising in Bombay who were also advocates) passed similar resolutions and also authorised the petitioner No. 4 to join as a petitioner in this petition. The petitioners have inter alia alleged that the impugned letter which affected about one hundred additional Judges currently working in the various High Courts and which threatened them with 'transfer' to High Courts other than the one in which they were working was outside the scope of Article 222 of the Constitution which provided for such transfers and amounted to an unwarranted executive interference with the judiciary. They have also alleged that the manner of appointment of additional Judges under Article 224(1) of the Constitution was a clear abuse of that provision which empowered the President to appoint additional Judges to clear off arrears in High Courts but not where the arrears were continuously rising. The petitioners have prayed for, among other reliefs, a declaration that the impugned letter of the Union Law Minister was ultra vires and void and that the Union Government should be directed not to act on the consent given by any of the Additional judges. By a counter-affidavit filed by Shri K.C. Kankan, Deputy Secretary, Department of Justice. Ministry of Law, Justice and Company Affairs, New Delhi, the Union Government has opposed the petition. The Union Government inter alia has questioned the locus standi of the petitioners to file the petition and has further pleaded that by the impugned letter, the Union Government merely sought the consent of the additional Judges and others who had been or who were to be proposed for appointment as Judges to the effect that they were willing to be initially appointed as Judges in other High Courts. It is stated that the consent of the additional Judges had not been sought for their transfer under Article 222 of the Constitution. It is denied that there was any attempt to interfere with the independence of the judiciary. The policy of appointment of Judges in High Courts from outside is justified on various grounds set out in the affidavit. Accordingly the Union Government has prayed that the petition may be dismissed.

939. Transferred Case No. 20 of 1981 was originally filed in the High Court of Delhi under Article 226 of the Constitution by Shri V.M. Tarkunde, Senior Advocate of the Supreme Court Bar after the Law Minister's letter of March 18, 1981 was written and three additional Judges of the Delhi High Court Sarv. Shri O.N. Vohra, S.N. Kumar and S.B. Wad who had originally been appointed as additional Judges for a period of two years with effect from March 7, 1979 were appointed as Additional Judges for a period of three months only from March 7, 1981. In addition to the declaration that the impugned letter of the Law Minister was unconstitutional and void. Shri V.M. Tarkunde has requested the Court, among other prayers, to issue a writ in the nature of mandamus to the Union Government (i) to convert the posts of additional Judges into permanent posts in various High Courts commensurate with the regular business of the High Courts and arrears in consultation with the Chief Justice of the concerned High Court and the Chief Justice of India and (ii) to convert 12 posts of additional Judges in the Delhi High Court into permanent posts having regard to the regular business and the arrears of that Court. In the course of the petition the propriety and constitutionality of appointing the three additional Judges referred to above for a period of three months only from March 7, 1981 have been questioned. The other allegations in the petition more or less are similar to the allegations made in the petition of Bombay lawyers. It is not necessary to go into certain events and proceedings that took place till the counter-affidavit was filed in this case on July 22, 1981 except the fact that Shri O.N. Vohra and Shri S.N. Kumar had ceased to be Judges with effect from June 7, 1981 as they had not been appointed as additional Judges for any further period and that Shri S.B. Wad had been appointed as an additional Judge from June 7, 1981 for one year more. In the counter-affidavit filed by shri K.C. Kankan, Deputy Secretary to the Government of India, the petition is opposed. This counter affidavit contains more or less similar pleas contained in the counter-affidavit filed in the petition filed by the Bombay lawyers and in addition to them certain further pleas are raised here in justification of the action taken by the Union Government in not appointing Shri O.N. Vohra and Shri S.N. Kumar as additional Judges for a further period and in appointing only Shri S.B. Wad at stated above. The specific plea with regard to the non-appointment of Shri O.N. Vohra and Shri S.N. Kumar and the appointment of Shri S.B. Wad runs thus:

(w) & (x) Shri Justice Vohra, Shri Justice Kumar and Shri Justice Wad were appointed for a further period of 3 months from 7-3-1981. The short-term appointment was made to enable the Government to take a final view having regard to the complaints that had been received against some of them after consultation with the constitutional authorities. The petitioner's statement that both the Chief Justice of the Delhi High Court and the Chief Justice of India had recommended the appointment of these 3 Judges for a further period of 2 years is untrue and incorrect. It is strange as to how the petitioner could claim know-ledge of the recommendations of the Chief Justice of India and Chief Justice of Delhi High Court. After careful consideration of the material available with it and after taking into account the views expressed by the Chief Justice of India and Chief Justice of Delhi High Court and after giving full consideration to the

views of both Government decided not to give appointments for a further term to Shri Justice O.N. Vohra and Shri Justice S.N. Kumar on the expiry of their term on 6-6-1981. Shri Justice Wad was however, appointed for a further period of 1 year from 7-6-1981.

It is neither necessary nor advisable to disclose to the additional Judges the reasons for their short-term appointments or for their non-appointment since this would bring them within the pale of public controversy and would involve disclosure of material which necessarily has to be kept confidential. There is no breach of the principles of natural justice in this.

940. It may be mentioned here that Shri O.N. Vohra has remained absent in these proceedings but Shri S.N. Kumar has filed a separate affidavit and has presented his case through a counsel. In the course of his affidavit in addition to the pleas supporting the pleas urged by Shri V.M. Tarkunde, he has questioned the validity of the proceedings culminating in not appointing him as an additional Judge after June 7, 1981. The allegations made by Shri S.N. Kumar are controverted by an additional affidavit filed on behalf of the Union Government in this case.

941. Transferred Case No. 21 of 1981 was filed in the High Court of Delhi by Shri J.L. Kalra and others, all advocates, under Article 226 of the Constitution. The petitioners have prayed for the issue of a writ in the nature of mandamus to the Union Government to make an assessment of the number of permanent and additional Judges required for the High Court of Delhi having regard to its current business and the accumulated arrears to create such number of posts of permanent and additional Judges as may be necessary and to make appointments to those posts. The other reliefs asked in this petition are substantially the same as the reliefs prayed in Transferred Case No. 20 of 1981 filed by Shri V.M. Tarkunde. The allegations in the petition and in the counter affidavit in these two cases are also substantially the same. This petition, however, emphasises the fact that Article 224(1) of the Constitution is being used for a purpose other than the one for which it is intended. The issues arising out of this petition are the same as those arising in Transferred Case No. 20 of 1981.

942. Transferred Case No. 19 of 1981 was filed under Article 226 of the Constitution before the High Court of Allahabad by Shri S.P. Gupta. Advocate, practising at Allahabad. Aggrieved by the circular letter dated March 18, 1911 which is impugned in Transferred Case No. 22 of 1981 filed by the Bombay lawyers, the non-determination of the necessary strength of permanent and additional Judges of the High Court of Allahabad as required by Articles 216 and 224(1) of the Constitution, the appointment of some additional Judges of the High Court of Allahabad for short terms of six months on the expiry of the period specified in their warrants of appointment under Article 224(1), the alleged misuse of Article 224(1) of the Constitution by the Union Government in making appointments of additional Judges where permanent Judge had to be appointed and several other matters urged in the petition, the petitioner filed the above petition requesting the Court to issue appropriate directions having regard to the submissions made in the petition and principally he has prayed for a declaration that the three additional Judges -- Mr. Justice Murlidhar, Mr. Justice A.N. Verma and Mr. Justice N.N. Mithal must be deemed to have been appointed as permanent Judges under the warrants already issued to them and that the circular letter of the Law Minister is void. The reliefs prayed for by the petitioner more or less are identical with the reliefs in Transferred Case No. 22 of 1981. The allegations made in the petition and in the counter-affidavit will be dealt with in the course of the judgment as many of them are common to all these cases.

943. Writ Petition No. 274 of 1981 is filed by Miss Lily Thomas, an advocate practising in the Supreme Court of India under Article 32 of the Constitution. She has sought for a declaration that the transfer of Mr. Justice M.M. Ismail, Chief Justice of the High Court of Madras as the Chief Justice of the Kerala High Court is unconstitutional. She has also stated that the Union Government had acted illegally in not appointing Mr. Justice Subramanian Poti, the senior-most Judge of the Kerala High Court as the Chief Justice of that Court in the vacancy created by the appointment of Mr. Justice Balakrishna Eradi, Chief Justice of the Kerala High Court, as a Judge of this Court. She has contended inter alia that Article 222 of the Constitution which provides for transfer of Judges does not apply to Chief Justices and that in any event Article 222 of the Constitution cannot be used to defeat the claim of the senior most Judge of a High Court to become the Chief Justice of that Court whenever a vacancy occurs in the office of the Chief Justice. She has pleaded that the transfer of Mr. Justice M.M. Ismail had not been made in the public interest and when such transfer is made without consent of the Judge concerned would be unconstitutional. On behalf of the Union of India it is pleaded that the transfer had been made in consultation with the Chief Justice of India in the public interest after taking into consideration all relevant matters. It is pleaded that Article 222 applies to Chief Justices also.

944. Mr. Justice M.M. Ismail who has been impleaded as the respondent No. 2 in this petition has filed an affidavit, the third paragraph of which reads thus:

3. As soon as I was informed of the Notification of the president of India under Article 222(1) of the Constitution of India, transferring me as the Chief Justice of the High Court of Kerala, I decided (1) not to proceed to Kerala to take charge as the Chief Justice of the High Court of Kerala, (2) not to challenge the legality or the validity of the order of the President so transferring me in any Court of Law and (3) to proceed on leave preparatory to premature retirement by resigning my office. In view of this I have nothing to submit to this Hon'ble Court in this Writ Petition and I do not want anyone to litigate far or against me. In these circumstances, I have nothing to represent with reference to the questions of law raised in the Petition and I do not want anything about me to be argued or debated.

945. Mr. Justice M.M. Ismail has since resigned from his office.

946. Transferred Case No. 2 of 1981 was originally filed under Article 226 of the Constitution in the High Court of Madras by Shri A. Rajappa, an advocate practising in Madras. He has prayed for a declaration that the orders of transfer passed by the President on January 19, 1981 transferring Mr. Justice M.M. Ismail, Chief Justice of the Madras High Court as the Chief Justice of the Kerala High Court and the transfer of Mr. Justice K.B.N. Singh, Chief Justice of the Patna High Court as the Chief Justice of Madras High Court are void. The principal grounds urged in the petition are that the transfers in question interfere with the independence of the judiciary, a transfer without consent of a Judge is ultra vires under Article 222 of the Constitution and non-consultation with the Governor concerned amounts to violation of Article 217(1) of the Constitution which should precede the appointment of a Chief Justice. The transfer of a Judge who does not know Tamil language to the High Court of Madras would not be in the public interest There is also a plea that the transfers suffer from mala fides. Some of the pleas urged by Miss Lily Thomas m her petition are urged in this petition also. The Union of India has opposed the petition. It has relied on Article 222 of the Constitution in support of the impugned orders of transfer. It is stated that the transfers had been ordered in the public interest in consultation with the Chief Justice of India who is the only authority to be consulted under Article 222 and that the procedure prescribed under Article 217(1) of the Constitution need not be followed when a transfer is ordered under Article 222. The plea that the transfers have interfered with the independence of the judiciary is also denied. The allegation that the impugned orders had been made mala fide is also denied in the counter affidavit filed on behalf of the Union of India.

947. Transferred Case No. 6 of 1981 was originally filed under Article 226 of the Constitution before the High Court of Madras by Shri P. Subramanian. The allegations and prayers made in this petition and the counter-affidavit filed by the Union of India are substantially the same as those in Transferred Case No. 2 of 1981 filed by Shri A. Rajappa.

948. Transferred Case No. 24 of 1981 was originally filed in the High Court of Patna under Article 226 of the Constitution by two advocates -- Shri D.N. Pandey and Shri Thakur Ramapati Sinha questioning the validity of the order of transfer of Mr. Justice M.M. Ismail. Chief Justice of the Madras High Court, as the Chief Justice of the Kerala High Court and the order of transfer of Mr. Justice K.B.N. Singh, Chief Justice of the Patna High Court as the Chief Justice of the Madras High Court. The allegations in this petition are substantially the same as those in Writ Petition No. 274 of 1981, in Transferred Case No. 2 of 1981 and in Transferred Case No. 6 of 1981. But during the pendency of this petition in this Court, Mr. Justice K.B.N. Singh who had been impleaded as a respondent was transposed as a petitioner by an order of this Court. Thereafter Mr. Justice K.B.N. Singh has filed an affidavit inter alia stating that his transfer was not in the public interest and that the transfer had been ordered on irrelevant and insufficient grounds. These allegations have been denied by the Union of India. It has stated in the counter-affidavit filed in support of its case that the transfer of Mr. Justice K.B.N. Singh had been made after full and effective consultation with the Chief Justice of India in the public interest keeping in view all relevant considerations. The Chief Justice of India has also filed a counter-affidavit to which detailed reference will be made in due course stating inter alia that Mr. Justice K.B.N. Singh had been transferred keeping in view all relevant matters in the public interest and not on any ground touching his character and conduct as a Judge.

949. India, that is Bharat, is a Union of States. It is not a federation of States like the United States of America. The word 'federation' is not used in the Constitution of India. There is no dual citizenship in India as we find it in the United States of America. The Constitution of India contemplates only one citizenship, only one loyalty and only one sovereignty. The geographical area covered by the States and the Union Territories mentioned in the First Schedule to the Constitution and such other areas that may be acquired constitute the territory of India which is an indivisible and indestructible whole though for administrative convenience is divided into States and Union Territories. Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; increase the area of any State; diminish the area of any State; alter the boundaries of any State and alter the name of any State in accordance with Article 3 and Article 4 of the Constitution. The principle of unity contemplated under the Constitution of India is much stronger than the principle underlying the Constitution of the United States of America. It is, therefore, necessary to remember and adopt it as our

own rule of conduct what Washington wrote on June 8, 1783 in his message to the Governors of States in the United States of America. He wrote:

There are four things which. I humbry conceive, are essential to the well-being, I may even venture to say, to the existence of the United States, as an independent power. Firstly, an indissoluble union of the States under one Federal head; secondly, a sacred regard to public justice; thirdly, the adoption of a proper peace establishment; and, fourthly, the prevalence of the pacific and friendly disposition among the people of the United State, which will induce them to forget their local prejudices and policies: to make those mutual concessions, which are requisite to the general prosperity; and in some instances, to sacrifice their individual advantages to the interest of the community. These are the pillars on which the glorious fabric of our independency and national character must be supported.

(By courtesy: "The Constitution of India" by N.R. Raghavachariar (1951) P. 17).

950. A Constitution of a country is a living document and cannot, therefore, be interpreted in a narrow pedantic sense. A broad and liberal spirit should inspire those who are called upon to interpret the Constitution. This does not mean that they are free to stretch or pervert the language of the Constitution. The broad purposes and the general scheme of every provision in the Constitution, its history, its objects and the result which it seeks to achieve should always be kept in view. Current usage and a priori reasoning should also be used as the tools of interpretation of the constitutional provisions. The Constitution of India in order to ensure sound administration has entrusted separate powers to different organs of the State, charging all of them with the joint responsibility of securing to all citizens of India, justice, social, economic and political, liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The said joint endeavour involves co-operation, mutual sympathy and understanding amongst all the organs. The Constitution demands that there should be mutual trust amongst them and there should be no room for suspicion. Distrust and a feeling of suspicion on the part of any of the organs of the State towards any other organ is bound to result in a great national calamity. We have worked the Indian Constitution for more than thirty years. The Constitution has undergone many changes. At the end of three decades of experience one is bound to feel in the same way in which Thomas Jefferson felt about the Constitution of the United States of America in 1816. He wrote to Samuel Karcheval on July 12, 1816:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human and suppose what they did to be beyond amendment, I knew that age well; I belonged to it, and laboured with it. It deserved well of its country, it was very like the present, and forty years of experience in government is worth a century of book reading and this they would say themselves, were they to rise from the dead.

951. We must while interpreting the Constitution realise that many of the difficulties that we may encounter now had not been foreseen by its makers. Application of constitutional provisions to actual facts of life therefore requires judicial statesmanship. The following words of Professor Frankfurter at Harvard University (who later became Justice Frankfurter) with reference to the American Constitution are equally apposite to our own:

Every legal system for a living society, even when embodied in a written Constitution must itself be alive. It is not merely the imprisonment of the past; it is also the unfolding of the future. Of all the means for ordering the political life of a nation, a federal sys-tem is the most complicated and subtle; if demands the most flexible and imaginative adjustments for harmonising national and local interests. The Constitution is not a printed finality but a dynamic process; its application to the actualities of Government is not a mechanical exercise, but a function of state-craft.

Let us now turn to the actual issues involved in these cases.

PART II

952. At the outset the question whether the petitioners who are advocates can file these petitions for the reliefs mentioned therein under Article 226 or Article 32 of the Constitution has got to be considered. The contention is that members of the Bar who are not personally affected by the circular letter of the Law Minister, by the appointment of certain additional Judges for short-terms of three months or six months, by the non-appointment of any of the additional Judges after the expiry of the tenure fixed under Article 224(1) or by the non-appointment of sufficient number of Judges of the High Courts or by the transfer of some Judges have no locus standi to file these petitions. It is contended that neither qualitatively nor quantitatively these petitioners have sufficient interest to prosecute these petitions the result of which would not affect them either directly or even indirectly.

953. The attitudes of the courts on the question of locus standi do not appear to be uniform. They vary from country to country, court to court and case to case. Sometimes the tests applied by courts also vary depending upon the nature of the relief sought. In some cases courts have taken a very narrow view on this question holding that unless an applicant has either personal or fiduciary interest in the result of the application, no relief can be granted on his application even though it may appear that the impugned action or omission of the administrative authority concerned is not in accordance with law. The other extreme view is that the courts may in their discretion Issue mandamus to an administrative authority at the instance of any member of the public. A close scrutiny of the authorities and texts cited before us shows that neither of the two extreme views is accepted as correct in majority of the cases. It is also seen that in many of them the courts have found some sort of special interest in the applicant which distinguishes him from the general public before granting the relief prayed for by him. A person who has a genuine grievance on account of an action which affects him prejudicially is ordinarily considered to be eligible to move the Court.

954. In England a member of the public who has no personal interest in the performance of a public duty by an administrative authority may as it may be done in India under Sections 91 and 92 of the Code of Civil P. C., 1908 in a limited and qualified way instead of himself approaching the Court, move the Attorney-General to initiate action in courts for the benefit of the public. If the Attorney-General is satisfied that action is called for in any given case, (he) as the nominal plaintiff in a relator action "can obtain an injunction to prohibit either some breach of the criminal law or else some ultra vires act by a public authority, such as illegal local government expenditure" -- H.W.R. Wade, Administrative Law. Fourth Edition, page 493. The learned author proceeds to observe:

A similar practice seems to be developing in actions brought by private plaintiffs -- despite the 'fundamental rule that the court will only grant an injunction at the suit of a private individual to support a legal right'. This, if it continues, may turn the injunction into a more general remedy of public law. Another consequence will be that there will be problems of standing, since a plaintiff without a personal legal right may be required to show that he has a sufficient interest to maintain the action.

955. If the Attorney-General declines to give his consent to a relator action the Court cannot question his exercise of discretion. This was firmly settled by the House of Lords in Gouriet v. Union of Post Office Workers (1973) AC 435 (CA) reversing a bold decision rendered by Lord Denning in the Court of Appeal in Gouriet v. Union of Post Office Workers (1977) 1 All ER 696 (CA) in which he had observed at page 719 thus:

...When the Attorney-General comes, as he does here and tells us that he has a prerogative -- a prerogative by which he alone is the one who can say whether the criminal law should be enforced in these courts or not -- then I say he has no such prerogative. He has no prerogative to suspend or dispense with the laws of England. If he does not give his consent, then any citizen of the land -- any one of the public at large who is adversely affected -- can come to this Court and ask that the law be enforced. Let no one say that in this we are prejudiced. We have but one prejudice. That is to uphold the law. And that we will do, whatever, befall. Nothing shall deter us from doing our duty'.

956. After his decision was reversed by the House of Lords, Lord Denning in his book entitled 'The Discipline of Law' page 144 wrote thus:

In administrative law the question of locus standi is the most vexed question of all. I must confess that whenever an ordinary citizen comes to the Court of Appeal and complains that this or that government department -- or this or that local authority -- or this or that trade union -- is abusing or misusing its power -- I always like to hear what he has to say. For I remember what Mr. T.P. Curran of the Middle Temple said in the year 1790:

It is ever the fate of the indolent to find their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance'. The ordinary citizen who comes to the Court in this wav is usually the vigilant one. Sometimes he is a mere busybody interfering with things which do not concern him. Then let him be turned down. But when he has a point which affects the rights and liberties of all the citizens, then I would hope that he would be heard: for there is no other person or body to whom he can appeal. But I am afraid that not everyone agrees with me.

957. The House of Lords having ruled in the Gouriet's case (1978) AC 435 (supra) the Court's jurisdiction in England appears to have been confined to declaring contested legal rights subsisting or future, of the parties and of them only when the Attorney-General does not intervene. This is a step which the House of Lords appears to have taken with a view to stalling a new trend in public interest litigation which had been set by Blackburn v. Attorney-General (1971) 1 WLR 1037 (CA) and Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority (1973) QB 629.

958. After the decision of the House of Lords in Gouriet's case (1978) AC 435 (supra) it is noteworthy that Order 53 was introduced into the Rules of the Supreme Court in England in the year 1977. The relevant part of Order 53 which took effect on January 11, 1978, some six months after the decision in Gouriet's case reads:

1. -- (1) An application for -- (a) an order of mandamus, prohibition or certiorari...shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1) (b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -- (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari, (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

2. On an application for judicial review any relief mentioned in Rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

3. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave must be made ex carte to a Divisional Court of the Queen's Bench Division.

(3)-(4) ...

(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates....

959. It appears that Order 53 was designed to stop technical procedural arguments of many types which had marred the true administration of justice, and to provide a machinery to determine at the preliminary stage of the granting of leave to prosecute an application for judicial review, whether the applicant has a sufficient interest in the matter to which the application relates. The phrase 'sufficient interest' which, it is stated, owed its origin to an interlocutory observation made by the Court in R v. Gotham (1898) 1 QB 802 at p. 804 and to its use by Avory, J. in his judgment in Ex parte Stott (1916) 1 KB 7 at p. 9 embraced all kinds of phrases 'a party', 'a person aggrieved', 'a person with a particular grievance' etc. used in various cases where the locus standi of the applicant concerned was questioned. After the aforesaid Order 53 came into force the application out of which the case Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd. (1981) 2 All ER 93 decided on April 9. 1981 by the House of Lords arose was instituted before the Queen's Bench. The facts of the case were these: There was a long standing practice in Fleet Street for casual employees on national newspapers to receive their wages without deduction of tax and to supply fictitious names and addresses when drawing their pay in order to avoid tax Their true identities were known only to their unions which operated a closed shop and controlled all casual employment on the newspapers. In order to prevent the evasion of tax by the casual employees, the Revenue made a special arrangement with the employers, the employees and the unions whereby the employees were required to register with the Revenue and submit tax returns for the previous two years (1977-78 and 1978-79) in return for an undertaking by the Revenue that they would not investigate tax evaded prior to 1977. The applicant, a federation of self-employed persons and small businessmen which claimed to represent a body of taxpayers, applied for judicial review under RSC Order 53 seeking (i) a declaration that the Revenue had acted unlawfully in making the arrangement and (ii) an order of mandamus directing the Revenue to assess and collect tax on the newspaper employees as required by law. The Revenue opposed the application on the ground that the applicant did not have 'a sufficient interest in the matter' relating to the application, as required by Order 53, Rule 3(5) for the Court to grant it the necessary leave to apply for judicial review. The Divisional Court upheld that contention and refused the applicant leave. The applicant appealed to the Court of Appeal which held that, as a preliminary issue and on the assumption that the Revenue had acted unlawfully, the applicant was not a mere busybody but had a genuine grievance and therefore had a sufficient interest for the purpose of Rule 3(5). The Revenue appealed contending that the duties imposed on them by the tax legislation, including in particular the duty of confidentiality as between the Revenue and each individual taxpayer, precluded the possibility of any other taxpayer or group of taxpayers from having any 'sufficient interest' in the performance by the Revenue of their statutory duties. The House of Lords held inter alia that whether an applicant for mandamus had a sufficient interest in the matter to which the application related, for the purposes of Order 53, Rule 3(5) depended on whether the definition (statutory or otherwise) of the duty alleged to have been breached or not performed expressly or impliedly gave the applicant the right to complain of the breach or non-performance. Since the tax legislation, far from expressly

or impliedly conferring on a taxpayer the right to make proposals about another's tax or to inquire about such tax, in fact indicated the reverse by reason of the total confidentiality of assessments and negotiations between individuals and the Revenue, and since on the evidence the Revenue in making the impugned arrangement were genuinely acting in the care and management of taxes under the powers entrusted to them, the application made by the applicant should be dismissed because the applicant did not have a sufficient interest for the purposes of Rule 3(5), or (per Lord Diplock) because it had not been shown that the Revenue had acted ultra vires or unlawfully in making the arrangement. Lord Wilberforce added that as a matter of general principle a taxpayer had no sufficient interest in asking the Court to investigate the tax arrears of another taxpayer or to complain that the latter had been underassessed or overassessed; indeed there was a strong public interest that he should not. Accordingly the appeal was allowed and the original application was dismissed.

960. In Canada, however, the rule has been that the principle requiring personal standing 'applies to legislation of a regulatory character which affects particular persons or classes but where no particular persons or classes are affected more than others, where the issue is justiciable and where the nature of the case is suitable the Court may grant declaratory relief to any citizen at its discretion as can be seen from the decision of the Supreme Court of Canada in Thorson v. Attorney-General of Canada (No. 2) (1974) 43 DLR (3d) 1, Dealing with the right of a taxpayer to dispute the constitutional validity of the Official Languages Act in Canada, Laskin, J. observed in that case thus:

It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament, where the issue in such behaviour is Justiciable legal question.

961. In Australia the prevailing view appears to be that in matters affecting public generally in order to maintain a petition for the issue of a direction to an administrative authority to act according to law 'while something less than an enforceable right would be sufficient, there nevertheless must be some special right in the prosecutor, over and above those held by the public at large or by all members of a particular class to which he belongs' (vide W. Friedmann:

Principles of Australian Administrative Law' (Second Edition) pace 180).

962. The question of locus standi of a petitioner under Article 226 of the Constitution was considered by this Court in Godde Venkateswara Rao v. Govt of Andhra Pradesh MANU/SC/0020/1965. The facts necessary for appreciating the point decided in that case and the decision of this Court on the locus standi of the petitioner therein can be seen from the following passage occurring at p. 181 (of SCR) : (at p. 833 of AIR).

Has the appellant a right to file the petition out of which the present appeal has arisen? The appellant is the President of the Panchayat Samithi of Dharamajigudem. The villagers of Dharamajigudem formed a committee with the appellant as President for the purpose of collecting contributions from the villagers for setting up the Primary Health Centre. The said committee collected Rs. 10,000/- and deposited the same with the Block Development Officer. The appellant represented the village in all its dealings with the Block Development Committee and the Panchayat Samithi in the matter of the location of the Primary Health Centre at Dharamajigudem. His conduct, the acquiescence on the Dart of the other members of the Committee, and the treatment meted out to him by the authorities concerned support the inference that he was authorised to act on behalf of the committee. The appellant was, therefore, a representative of the committee which was in law the trustee of the amounts collected by it from the villagers for a public purpose. We have, there-fore, no hesitation to hold that the appellant had the right to maintain the application under Article 226 of the Constitution. This Court held in the decision cited supra that "ordinarily" the petitioner who seeks to file an application under Article 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interests. It can alto relate to an interest of a trustee. That apart, to exceptional cases, as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Article 226 of the Constitution at his instance, therefore, is maintainable.

(emphasis added).

963. In Adi Pherozshah Gandhi v. H.M. Seervai. Advocate General of Maharashtra, Bombay MANU/SC/0044/1970, the expression 'person aggrieved' found in Section 37 of the Advocates Act, 1961 was considered by this Court. The appellant in that case was an advocate of Maharashtra. He was convicted by a Summary Court in London on a charge of pilfering from a Departmental Store and was sentenced to pay a fine. The State Bar Council called upon him suo motu to show cause why he should not be held guilty of misconduct. He submitted his explanation and the Disciplinary Committee of the Bar Council was satisfied that there was no reason for holding him guilty of professional misconduct.

The Advocate-General of the State who had sent a notice of the proceedings as required by Section 35(2) of the Advocates Act, 1961, and had appeared before the Disciplinary Committee, filed an appeal to the Bar Council of India under Section 37 of that Act, under which, any person aggrieved by an order of the Disciplinary Committee of the State Bar Council made under Section 35 of that Act, could prefer an appeal to the Bar Council of India. The appellant objected that the Advocate-General had no locus standi to file the appeal. The objection was overruled by the Disciplinary Committee of the Bar Council of India and the appellant was found guilty of professional misconduct. After examining the decision of the Privy Council in Attorney-General of the Gambias v. Pierre Sarr N'Jie (1961) AC 617 and other decisions cited before it, this Court held that the Advocate-General of Maharashtra could not be treated as a 'person aggrieved' who was entitled to file an appeal under Section 37 of the Advocates Act. The entire decision was based on the construction of the provisions (as they stood then) of the statute concerned, as it appeared to the Bench which decided the case. It may be noted that Section 37 of the Advocates Act has since been amended authorising the Advocate-General of a State expressly to file an appeal. In Bar Council of Maharashtra v. M.V. Dabholkar MANU/SC/0003/1975 the interpretation of the words 'person aggrieved' in the Advocates Act, 1961, again came up for consideration by this Court. In that case the right of the State Bar Council to file an appeal against the decision of the Bar Council of India before this Court was challenged on the ground that it was not an aggrieved party. That contention was negatived by Ray. C. J. by Riving a liberal interpretation to the words 'person aggrieved' with the following observation at page 315 (of SCR) ; (at p. 2098 of AIR):

The words "person aggrieved" are found in several statutes. The meaning of the words "person aggrieved" will have to be ascertained with reference to the purpose and the provisions of the statute. Sometimes, it is said that the words "person aggrieved" correspond to the requirement of locus standi which arises in relation to judicial remedies.

Where a right of appeal to Courts against an administrative or judicial decision is created by statute, the right is invariably confined to a person aggrieved or a person who claims to be aggrieved. The meaning of the words "a person aggrieved" may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved". Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality. The role of the Bar Council under the Advocates Act is comparable to the role of a guardian in professional ethics. The words "person aggrieved" in Sections 37 and 38 of the Act are of wide import and should not be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests. The test is whether the words "p erson aggrieved" include "a person who has a genuine grievance because an order has been made which prejudicially affects his interests". It has, therefore, to be found out whether the Bar Council has a grievance in respect of an order or decision affecting the professional conduct and etiquette.

The pre-eminent question is: what are the interests of the Bar Council? The interests of the Bar Council are the maintenance of standards of professional conduct and etiquette. The Bar Council has no personal or pecuniary interest. The Bar Council has the statutory duty and interest to see that the rules laid down by the Bar Council of India in relation to professional conduct and etiquette are upheld and not violated. The Bar Council acts as the sentinel of professional code of conduct and is vitally interested in the rights and privileges of the advocates as well as the purity and dignity of the profession.

The interest of the Bar Council is to uphold standards of professional conduct and etiquette in the profession, which is founded upon integrity and mutual trust. The Bar Council acts as the custodian of the high traditions of the noble profession. The grievance of the Bar Council is to be looked at purely from the point of view of standards of professional conduct and etiquette. If any decision of the disciplinary committee of the Bar Council of India is according to the State Bar Council such as will lower the standards and imperil the high traditions and values in the profession the State Bar Council is an aggrieved person to safeguard the interests of the public, the interests of the profession and the interests of the Bar.

964. The above two decisions are in cases in which writs in the nature of certiorari were sought. This Court has however in cases in which writs in the nature of habeas corpus or of quo warranto are prayed for relaxed the rule that ordinarily an applicant under Article 226 should show that some personal right or fiduciary interest is prejudiced by the action or inaction of the authority concerned.

965. In Jasbhai Motibhai Desai v. Roshan Kumar Haji Bashir Ahmed MANU/SC/0011/1975, this Court observed that "while a procrustean approach should be avoided, as a rule the Court should not interfere at the instance of a 'stranger'

unless there are exceptional circumstances involving a grave miscarriage of justice having an adverse impact on public interests".

966. In Fertilizer Corporation Kamgar Union (Regd.) Sindri v. Union of India MANU/SC/0010/1980 the right of workers in a factory owned by Government to question the validity of a disposal of plant and equipment of the factory by the management was disputed. On that question Chandrachud. C. J. observed:

That disposes of the question as regards the maintainability of the writ petition. But, we feel concerned to point out that the maintainability of a writ petition which is correlated to the existence and violation of a fundamental right is not always to be confused with the locus to bring a proceeding under Article 32. These two matters often mingle and coalesce with the result that it becomes difficult to consider them in watertight compartments. The quest on whether a person has the locus to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding, be it under Article 226 or under Article 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the Court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations. Public enterprises are owned by the people and those who run them are accountable to the people. The accountability of the public sector to the Parliament is ineffetive because the parliamentary control of public enterprises is "diffuse and haphazard". We are not too sure if we would have refused relief to the workers if we had found that the sale was unjust, unfair or mala fide.

967. In the same case Krishana Iyer, J. after an elaborate discussion of the principle of 'locus standi' observed at pp. 76-77 (of SCR) : (at pp. 356, 357 of AIR) thus:

In the present case a worker, who, clearly, has an interest in the industry, brings this action regarding an alleged wrong-doing by the Board of Management. Article 43A of the Constitution confers, in principle, partnership status to workers in industry and we cannot, therefore, be deterred by technical considerations of corporate personality to keep out those who seek to remedy wrongs committed in the management of public sector. Locus standi and justiciability are different issues, as I have earlier pointed out....

If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the court will not be ajar for him. But if he belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered. I, therefore, take the view that the present petition would clearly have been permissible under Article 226.

968. In Municipal Council, Ratlam v. Vardhichand MANU/SC/0171/1980, Krishna Iyer, J. upheld the right of the people who were residents of Rat-lam town to institute a case against its Municipal Council ventilating a public grievance thus:

It is procedural rules' as this appeal proves, 'which infuse life into substantive rights, which activate them to make them effective'. Here, before us, is what looks like a pedestrian quasi-criminal litigation under Section 133 Cr. P. C., where the Ratlam Municipality -- the appellant -- challenges the sense and soundness of the High Court's affirmation of the trial court's order directing the construction of drainage facilities and the like, which has spiralled up to this Court. The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us between the Ratlam Municipality and the citizens of a ward, is a path-finder in the field of people's involvement in the Justicing process, sans which as Prof. Sikes points out, the system may 'crumble under the burden of its own insensitivity'. The key question we have to answer is whether by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the comma of age of that branch of public law bearing on community actions and the court's power to force public bodies under public duties to implement specific plans in response to public grievances.

969. All these Transferred petitions were filed initially by advocates under Article 226 of the Constitution before one or the other High Court. The Writ Petition however is filed by an advocate under Article 32 of the Constitution before this Court. The petitioners belong to different High Court Bars -- Allahabad, Bombay. Madras. Patna and Delhi -- and to

the Supreme Court Bar. One important prayer made by them is that the Government should be directed to appoint sufficient number of permanent Judges in every High Court. The other points urged by them are that additional Judges should not be appointed for short terms like three months or six months, that Judges should not be transferred from one High Court to another without their consent and that the circular letter of the Law Ministry should be quashed. Their principal submission is that appointment of additional Judges for short terms and their transfer without their consent would interfere with the independence of the judiciary and would violate the directive principle of State policy contained in Article 50 of the Constitution which requires the State to take steps to separate the judiciary from the executive in the public services of the State. Whatever may be the position with regard to the other prayers made in these petitions, it is difficult to hold that on the first two questions the petitioners can be held to be having no 'standing' to file the petitions. It is no doubt true that the power to fix the number of permanent Judges to be appointed in each High Court is within the discretion of the President. But that power is coupled with a duty which the President owes to the public in genera1 and to the lawyers and litigants in particular. If at any given point of time is found that the number of Judges in a High Court is absolutely inadequate to meet its requirements, the members of the Bar who are vitally interested in the administration of justice can file a petition before the High Court to compel the Government to review the strength of the permanent Judges of that Court and to appoint adequate number of Judges. The members of the Bar are not called officers of courts only to impose obligations on them. They have certain rights too. It is significant that Article 124(3)(b), Article 217(2)(b) and Article 233(2) of the Constitution specifically state that the legal profession is a source of recruitment of Judges of the Supreme Court, High Courts and District Courts. Entries 77 and 78 of List I of the Seventh Schedule to the Constitution specifically refer to persons entitled to practice before the Supreme Court and the High Court. Section 29 of the Advocates Act, 1961, provides that only one class of persons can practise the profession of law, namely, advocates. Members of the Bar have a vital stake in the functioning of the judiciary, Members of the Bar and even litigants whose cases have remained undisposed for a long number of years on account of the Government not appointing sufficient number of Judges can therefore file a petition demanding appointment of sufficient number of permanent Judges in High Courts. The power under Article 216 of the Constitution is an administrative power which can be regulated in an appropriate way by the courts like any other administrative power. It is not a matter of policy simpliciter. The question of appointment of sufficient number of additional Judges under Article 224(1) of the Constitution for the required period having regard to the arrears or the quantum of business in a High Court can also be agitated by lawyers and litigants. It is true that the Court should not ordinarily issue a mandamus in such cases unless it is satisfied that there has been a gross dereliction of duty on the part of the Government. That however is a point to be considered before granting or refusing to grant the relief. But it cannot in any event be said that a petition filed by lawyers for the abovesaid reliefs is liable to be dismissed at the threshold merely on the ground of locus standi. The petitioners satisfy all the tests which are laid down in the decisions referred to above to maintain the petitions on the two questions referred to above. During the pendency of these petitions) two further circumstances have come into existence. Mr. S.N. Kumar who was an additional Judge of the Delhi High Court when the petition of Shri V.M. Tarkunde was filed in the High Court has ceased to be an additional Judge as his term was not extended beyond June 6, 1981, He has, though as a respondent, by filing necessary pleadings questioned the action of the Government in not extending his term and also the validity of the circular letter of the Law Minister. In the case relating to the transfer of Shri K.B.N. Singh, Chief Justice of Patna High Court as Chief Justice of Madras High Court, he has been permitted to be transposed as the petitioner. He has filed an additional affidavit challenging the order of transfer. In view of these new circumstances much of the sting in the objection to the locus standi of the original petitioners to file the petitions is lost. It must also be stated that the learned Attorney-General also stated at the commencement of the hearing of these cases that he would not press his objection relating to the locus standi of the petitioners having regard to the magnitude and the importance of the constitutional questions involved in the cases.

970. But Shri P.R. Mridul, learned Counsel appearing for the Law Minister, however, contends that the lawyers either as a class or individually cannot be permitted to file petitions for the issue of any direction to the Government concerning the appointment or transfer of Judges. He has depended upon the writings of L.A. Stein. S.M. Thio, Joel Grossman and Richard S. Wells and Louis L. Jaffe and a number of decisions in support of his submission. He has quoted copiously from 'judicial Protection Against The Executive' published by the Max Planck Institute. Shri Mridul argues that an applicant must show that he has a legal OR some special interest which is sufficient In law to move the Court and that the duty which is sought to be enforced i§ owed to him. I haw carefully considered his submission, The conclusion reached by S.M. Thio in his essay entitled 'Locus Standi in Relation to Mandamus' at page 133 in public Law, edited by J.A.G. Griffith on which Shri Mridul has relied is of significance. It runs thus:

It may be seen from the above analysis of the cases that the uncertainty surrounding the locus standi of an applicant for. mandamus is largely attributable to the variety of formulae employ-ed by the courts to describe the nature of the interest required to support as application for mandamus, some of which are conflicting and others ambiguous. The employment of the traditional syntax or a "legal right" to describe the requisite interest coupled with the assertion that a mandamus applicant must! show that the duty is owed to him personally has established two particular points. On the one hand, a strict rule limiting standing to a person who has a litigable right within the categories of private law. On the other hand, the courts have, in the absence of such a litigable right, accorded standing to a person who made out a

"special interest" in the performance of the duty sought to be enforced The courts, in some of these cases, paid lip service to the "legal right" test, but obviously using the term to connote any interest judicially recognised as worthy of protection rather than a right the invasion of .which gives rise to civil actionability. They have in the other cases, directly held it sufficient for a mandamus applicant to establish a "special interest" in order to have locus standi. As has been seen, the various judicial pronouncements requiring an applicant to show that the duty the performance of which is sought to be secured is one owed to him personally may be discounted since they were designed to bring out the point that where the repository of the duty was a Crown servant, it was imperative for the applicant to show that the duty was not onsowed to the Crown, but that it was imposed on the Crown servant as persona designate and hence amenable to mandamus. On balance, the weight of authorities favour the more liberal "special interest" test under which the courts have accorded standing to persons who, have a direct and substantial interest at stake. This is necessarily a matter of Judicial discretion, However, the preponderance of cases reveal that

(1) Where the duty sought to his (SIC)-forced is imposed on a public official or a public body for the benefit of a specific class of persons, persons within the class are competent to apply for mandrel (SIC)mug without further ado, Pereons out the class may have locus stoned they have a special interest in its performance i.e. an interest over and above that of the general public.

(2) Where the duty sought to be secured is a general one and is not specifically imposed for the benefit of a particular class of persons, the mandamus applicant must satisfy the "special interest" test. Where the failure to perform the duty has a de facto adverse effect on a class of persons over and beyond that sustained by the general public, any member of that class is competent to apply for mandamus without showing that he is more prejudiced than other members of the class. However, where the non-performance of the duty theoretically affects a class of persons more than the general public, but in actuality has only de facto effect on some members of the class, the mandamus applicant will probably have to show that his interest is more substantial than that of the interest-group to which he belongs.

971. Shri Mridul however fairly concedes that litigations of class character or public interest litigations (which may be called public injury cases) are an essential feature of modern civilised jurisprudence and there is no gainsaying the fact that in these cases of public wrongs and public injury a liberal approach is adopted by the courts to reach all forms of injustice particularly where prisoners, lunatics, minors and other weaker sections of people who cannot have access to court owing to their helplessness are involved. In support of this statement, he has brought to our notice the decision of this Court in Mumbai Kamgar Sabha, Bombay v. Abdulbhai Faizullabhai MANU/SC/0313/1976. in which Krishna Iyer. J. has observed thus:

Fairness to respondent's counsel constrains us to consider in liming a flawsome plea forcibly urged that the Union figured as the appellant before us but being no party to the dispute (which was between the workers on the one hand and the establishments on the other) had no locus standi. No right of the Union qua Union was involved and the real disputants were the workers. Surely there is terminological lapse in the cause-title because, in fact, the aggrieved appellants are the workers collectively, not the Union. But a bare reading of the petition the description of parties, the grounds urged and grievances aired, leave us in no doubt that the battle is between the workers and employers and the Union represents, as a collective noun. as it were, the numerous humans whose presence is indubitable in the contest, though formally invisible on the party array. The substance of the matter is obvious and formal defects, in such circumstances, fade away. We are not dealing with a civil litigation governed by the Civil Procedure Code but with an industrial dispute where the process of conflict resolution is informal, rough-and-ready and invites a liberal approach. Procedural prescriptions are handmaids, not mistresses of justice and failure of fair play is the spirit in which Courts must view processual deviances. Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical mis-descriptions and deficiencies in drafting pleading and setting out the cause-title create a secret weapon to non-suit a party. Where foul play is absent and fairness is not faulted, latitude is a grace of processual justice. Test litigations, representative actions, pro bono public and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural short-comings. Even Article 226, viewed in wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents, has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus 'stand! in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to Invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law. Therefore, the decisions cited before us founded on the jurisdiction under Article 226 are inept and themselves somewhat out of tune with the modern requirements of juries prudence calculated to benefit the community.

972. Yet the contention of Shri Mridul is that even though the lawyers constitute a special group who can be said to be concerned with the administration of Justice in the sense of having a professional interest in connection therewith, that by itself is not sufficient for holding that they can file the petitions in respect of the relief's prayed for by them which concern only the Judges and not the lawyers. He strongly pressed before us the view expressed by this Court in the State of Gujarat v. Ambica Mills Ltd., Ahmedabad MANU/SC/0092/1974. I find that the said decision has not much relevance on the question before us and it is not necessary to deal with it at length.

973. It is also difficult to hold that the recognition of the 'standing' of the lawyers to file these petitions would in any way interfere with the doctrine of separation of powers since it is not the case of Shri Mridul that a person who has indisputably the right to file these petitions cannot in law raise the Questions urged before us in these cases. If the issues are no unjustifiable, the petitions may have to be dismissed on the ground that the impugned administrative action is beyond judicial review but this has no bearing on the question of 'locus standi' of the petitioners, who are lawyers. Lawyers are entitled to* approach the Court to direct the Government to appoint sufficient number of permanent Judges and to appoint sufficient number. of additional Judges for the maximum period of two years having regard to the arrears and the business of the Court. They may also legitimately agitate that additional Judges should not be appointed when permanent vacancies have remained unfilled for no good reason.

974. It has, however, to be made clear that it cannot be said that lawyers only because they have a right to practice in a court have 'locus standi' to file petitions in respect of every matter concerning judges, courts and administration of justice. There are many such matters in which they have no 'locus standi' to ask for relief. By way of illustration, lawyers cannot question the establishment of a new court on the ground that their professional prospects would be affected thereby. (See V.R. Mudvedkar v. State of Mysore AIR 1971 Mys 202. Even in these cases on the question of non-appointment of Mr. S.N. Kumar and on the question of transfer of Mr. K.B.N. Singh, the lawyer-petitioners may have no voice. But for the active participation of these two persons, the petitions regarding relief's concerning them individually would have probably become liable to be dismissed on the ground that the lawyers have no 'locus standi' to make these prayers.

974A. But, since as already stated, Mr. S.N. Kumar and Mr. K.B.N. Singh-have requested the Court to consider and if thought fit to grant relief in their favour and the learned Attorney-General has fairly stated that he would not raise the objection that the petitioners have no locus standi in view of the importance of the questions debated in these cases, we hold that the petitions cannot be rejected merely on the ground that the petitioners who are lawyers have no locus standi to file these petitions. Before leaving this topic, it has to be observed that the question of locus standi in the field of administrative law is still in a fluid state and it is not possible to lay down in any one case the principles which can govern all situations:

PART III

975. The Court cannot also decline to go into the question agitated in these petitions on the ground that they are political questions or questions within the exclusive domain of executive discretion. The doctrine of political question which was holding the field long time back in the United States of America has now been exploded. It had been assumed for sometime that the courts would not adjudicate claims to power by the legislative and executive branches because they presented 'political' and therefore non-justifiable questions. This claim was based on the principle of separation of powers recognised by the Constitution of the United States of America. Alexis de Tocqueville was one of the earliest writers who challenged in the year 1835 itself the correctness of the doctrine of political question. He said in his book entitled 'Democracy in America' (published by Oxford University press in 1961. p. 82) thus:

But the American Judge is brought into the political arena independently of his own will. He only judges the laecause he is obliged to judge a case, The political question which he is called upon to resolve is connected with the Interest of the suitors, and he cannot refuse to decide it without abdicating the duties of his post.

976. It should, however, be borne in mind that separation of powers does not mean a rigid analytical division. It is a general guiding principle. As Wood-row Wilson put it in 1908.

... government is not a machine but a living thing.... No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick co-operation, their ready response to the commands of instinct or intelligence, their amicable community of purpose.... Their cooperation is indispensable, their warfare fatal.

(Wilson; 'Constitutional Government in the United States' 56 (1908))

977. Each one of the organs of the State -- the legislature, the executive and the judiciary -- has to discharge its legitimate duties having sound administration as the common goal.

978. The doctrine of political question was examined in the year 1962 by the Supreme Court of the United States of America in Baker v. Carr (1962) 369 UC 186 : 7 Led 2d 663, That was a civil action in which the complaint was that the plaintiffs and others similarly situated had been denied equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States of America by virtue of debasement of their votes by reason of unconstitutional division of their electoral area situated in the State of Tennessee, The District Court dismissed their claim on two grounds namely, lack of jurisdiction over the subject matter and that the action was a non-justifiable one. The Supreme Court of the United States of America reversed the judgment of the court below and remanded the casa to the District Court to 'dispose " of In the light of its decision, The Supreme Court held that the complaint of the appellants involved a Justifiable cause upon which they were entitled to a trial and a decision, Brennan, J. who delivered the judgment on behalf of six of the Judges, in the course of his decision, observed at page 691 thus:

We come, finally, to the ultimate inquiry whether our precedents as to whaonstitutes a non-justifiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the -common characteristics which we have been able to identify and label descriptively are present We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court, Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take Issue with Tennessee as to the constitutionality of her action here-challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy but simply arbitrary and capricious action.

979. In Powell v. MeCormack (1969) 395 US 486 : 23 L Ed 2d 491 the label of political question was considered a misnomer and all cases in which such a plea was raised were cases in which really the question of jurisdiction of the court to decide the issue arising in them had been canvassed. The plaintiff in that case Adam Clayton Powell Jr. was duly elected from a congressional district of New York as a member of the . United; States House of Representatives in 1968, However, pursuant to a House resolution he was not permitted to take his seat on the ground that he had earlier wrongfully diverted House funds, had made false reports regarding foreign currency etc. Powell along with some others who were voters in the constituency then filed a suit claiming that the House could exclude him only if it found that he failed to meet the standing requirements of age, citizenship and residence contained in Clause (2) of Article I of the Constitution of the United States of America and thus had excluded him un-constitutionally. The District Court dismissed the suit for want of jurisdhetiem over the subject matter. The Court of Appeal affirmed the dismissal al-though on somewhat different grounds. One of the points raised before the Supreme Court of the United States of America was that the question involved was a political question and hence was not justifiable. The Supreme Court held that it was an error to dismiss the suit and remanded it for disposal in accordance with law. Chief Justice Warren who spoke for the Court disposed of the defense based on political question at page 532 thus:

(25) Respondents' alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a "potentially embarrassing confrontation between coordinate branches" of the Federal Government. But, as our interpretation of Article 1 § 5, discloses a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of the respect due to (a) coordinate branch of government", nor does it involve an "initial policy determination of a kind clearly for non-judicial discretion". Baker v. Carr 369 US 186 at 217 : 7 L Ed 2d 663 at 686. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility....

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Thus, we conclude that petitioners claim is not barred by the political question doctrine, and, having determined that the claim is otherwise generally justifiable, we hold that the case is justifiable.

980. In sum, the political question doctrine, according to R. Berger, interposes no obstacle to judicial determination of the rival legislative-executive claims to receive or without information. The power to decide these claims plainly has not been lodged in either the legislative or the executive branch; equally plainly, the jurisdiction to demarcate constitutional boundaries between the rival claimants has been given to courts. The situation is the same when private parties are involved. This rule, of course, is subject to considerations such as national security and diplomatic relations. This appears to be the position in the United States of America.

981. In our country which is governed by a written Constitution also many questions which appear to have a purely political colour are bound to assume the character of Judicial Questions, In the State of Rajasthan v. Union of India MANU/SC/0370/1977 the Government's claim that the validity of the decision of the President under Article 356(1) of the Constitution being political in character was not justifiable on that sole ground was rejected by this Court. Bhagwati, J. in the course of his Judgment observed in that case at pages 80-81 (of SCR) : (at pp, 1413. 1414 of AIR) thus:

It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare "judicial hands off". So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it. it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is Suprema lex, he paramount law of the land, and there is no department or branch of government above or beyond it, Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if no, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law.

982. The objection that the questions involved in these petitions are non-Justifiable merely on the 'ground that they are political in character has to begatived. But it is made clear that the courts are not entitled to enquire into every sort of question without any limitation. There is still a certain class of questions such as international relations, national security which cannot be entertained by the Court It is for the Court to determine in each case whether a particular question should be debated before it or not.

983. The questions raised in these petitions will be considered hereafter.

PART IV

984. We are concerned in these cases with High Courts and Judges of High Courts in our country.

985. Speaking on the nature of the Draft Constitution. Dr. Ambedkar in his speech delivered On November 4, 1948, in the Constituent Assembly said:

All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances....

There is another special feature of the proposed Indian Federation which distinguishes it from other federations. A Federation being a dual polity based on divided authority with separate legislative, executive and judicial powers for each of the two polities is bound to produce diversity in laws, in administration and in judicial protection. Up to a certain point this diversity does not matter. It may be welcomed as being an attempt to accommodate the powers of Government to local needs and local circumstances, But this very diversity when it goes beyond a certain point is capable of producing chaos and has produced chaos in many federal States. One has only to imagine twenty different laws -- if we have twenty States in the Union -- of marriage, of divorce, of inheritance of property, family relations, contracts, torts, crimes, weights and measures, of bills and cheques, banking and commerce, of procedures for obtaining justice and in the standards and methods of administration. Such a state of affairs not only weakens the State but becomes intolerant to the citizen who moves from State to State only to find that what is lawful in one State is not lawful in another. The Draft Constitution has sough forge means and methods whereby India will have Federation and

at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country. The means adopted by the Draft Constitution are three.

(1) a single judiciary,

(2) uniformity in fundamental laws, civil and criminal, and

(3) a common All India Civil Service to man important posts.

A dual judiciary, a duality of legal codes and a duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in a federation. In the U.S.A. the Federal Judiciary and the State Judiciary are separate and independent of each other. The Indian Federation though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional Jaw, the civil law or the criminal law. (Constituent Assembly Debates, vol. 7 (1948-49) at pp. 34, 36-37).

986. The High Courts in India are established by the Constitution. Article 376 of the Constitution, however, provided for the continuance of the Judges of a High Court in any Province holding office immediately before the commencement of the Constitution as Judges of the new High Court in the corresponding State. Article 376 of the Constitution reads:

376. (1) Notwithstanding anything in Clause (2) of Article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 221 in respect of the Judges of such High Court.

Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court.

(2) The Judges of a High Court in any Indian State corresponding to any State specified in part B of the First Schedule holding office immediately before thommencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in Clauses (1) and (2) of Article 217 but subject to the proviso to Clause (1) of that article, continue to hold office until the expiration of such period as the president may by order determine.

(3) In this article, the expression "Judge" does not include an acting Judge or an additional Judge.

987. After the commencement of the Constitution, the new High Courts were allowed to exercise the jurisdiction of the existing High Courts, until it was duly altered by appropriate Legislature, by virtue of Article 225 of the Constitution which reads:

225. Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts shall be the same as immediately before the commencement of this Constitution.

Provided that any restriction to which the. exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall is longer apply to the exercise of such jurisdiction.

988. Some of the High Courts came to be constituted or reconstituted after the commencement of the Constitution under different laws made by the Parliament. An analysis of the various provisions of the Constitution and other laws having a bearing on the question shows that every High Court in India is an integral part of a single Indian judiciary and Judges who hold the posts of Judges of High Courts belong to a single family even though there may be a slight variation in two of the authorities who are required to be consulted at the time of the appointment, The provisions

dealing with the High Courts are found in Chapter V in Part VI of the Constitution containing provisions governing the States and the salaries of the Judges of a High Court are paid out of the funds of the State or States over which it exercises jurisdiction. Yet it is difficult to say that each High Court is independent of the other High Courts. A perusal of the other provisions in that Chapter shows that the State Legislatures and the State Governments have very little to do so far as the organization of the High Courts is concerned. Article 366(14) of the Constitution states that a 'High Court means any Court which is deemed for the purposes of this Constitution to be a High Court for any State and includes (a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court and (b) any other Court in the territory of India which may be declared by Parliament by law to be a High Court for all or any of the purposes of this Constitution'.

989-990. Article 214 of the Constitution as it was originally enacted read:

214. (1) There shall be a High Court for each State,

(2) For the purposes of this Constitution the High Court exercising jurisdiction in relation to any Province immediately before the commencement of this Constitution shall be deemed to be the High Court for the corresponding State.

(3) The provisions of this Chapter shall apply to every High Court referred to in this article.

Clauses (2) and (3) of Article 214 were omitted by the Constitution (Seventh Amendment) Act, 1956 and Article 214(1) was renumbered as Article 214. Clause (2) of Article 214 contained the necessary 'deeming' provision under which the High Courts exercising jurisdiction in any Province immediately prior to the commencement of the Constitution became High Courts under the Constitution as per definition contained in Article 366(14) of the Constitution. Clause (3) of Article 214 stated that Chapter V in Part VI of the Constitution did not apply to any particular High Court but generally to all the High Courts thereby suggesting that this Chapter could have very well been included in a separate part of the Constitution. The legislative power to constitute a High Court is vested in the Parliament by Entry 78 of List I of the Seventh Schedule to the Constitution which reads:

78. Constitution and organisation (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts.

991. It is today quite possible for the Parliament to pass a common High Courts Act governing all the High Courts in India replacing the existing laws governing them.

992. The appointment of a Judge of a High Court is made by the President in consultation with the Chief Justice of India, the Governor of the State concerned and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. A Judge may by writing under his hand addressed to the President resign his office. He is removable from office by the order of the President passed after an address by Parliament presented in the manner provided in Article 124(4) of the Constitution for the removal of a Judge of the Supreme Court, Article 222 of the Constitution states that the President may after consultation with the Chief Justice of India transfer a Judge from one High Court to any other High Court without any kind of consultation with the Governors of the States concerned or the Chief Justices of those High Courts, Article 224-A of the Constitution' inter alia provides that notwithstanding anything contained in Chap. V in Part VI of the Constitution, the Chief Justice of a High Court for any State may at any time with the previous consent of the President request any person who hag held the office of a Judge of that Court or any other High Court to sit and act as a Judge of the High Court for that State. Under para. 11 (b) (i) of the Second Schedule to the Constitution, the time spent by a Judge of any High Court on duty as a Judge or in the performance of such other functions (including functions connected with a different State) as he may at the request of the President undertake to discharge is treated as factual service'. Under Article 231 of the Constitution, Parliament may by law establish a common High Court for two or more States or for one or more States and a Union Territory. Article 139A(2) of the Constitution empowers the Supreme Court to transfer any case, appeal or other proceeding pending before a High Court to any other High Court. By virtue of the proviso to Clause (1) of Article 356 of the Constitution the powers vested and exercisable by a High Court remain unaffected by any proclamation issued under Article 356(1) by the President in relation to a State over which the High Court is exercising jurisdiction. These provisions indicate that all the High Courts organically form integral parts of a single system although their territorial jurisdictions are denned. No High Court can claim any superiority over the other either on the basis of its situation or on the basis that it is a successor to a High Court which was functioning in any Province immediately before the commencement of the Constitution or on the basis of the extent of its territorial jurisdiction. All the High Courts have the same status under the Constitution:

PART V

993. The scope of the power of the President to appoint Judges of the High Courts under Article 217(1) of the Constitution may be considered now. It may be appropriate to refer here to the position prevailing under the Government of India Article 1935. Under Section 220(2) of that Act every Judge of a High Court was to be appointed by His Majesty and he could hold office until he attained the age of sixty years. He was liable to be removed from his office by His Majesty on the ground of misbehavior or of infirmity of mind or body if the Judicial Committee of the Privy Council On a reference being made to them by His Majesty reported that he ought on any such ground to be removed. The appointment of a Judge of a High Court under the Government of India Act, 1935 was thus a Crown appointment. The Governor-General was. however, given the power under Section 222 of that Act to appoint additional or acting Judges on behalf of the Crown for a temporary period. There was no requirement of any consultation with any specified judicial authority. When Section 220 of the Government of India Act, 1935 came up for discussion before the House of Commons in order to ascertain whether the appointments of High Court Judges was subjected to political pressure or not, a question was raised in the following way:

The Crown must, of course, have nominations made to it Will those nominations be made by the Ministers, or withy be put forward by the Governor acting in his discretion?

994. The above question was replied by the Solicitor-General of His Majesty's Government thus:

I do not think there is anything to feller the Secretary of State in making inquiries from the Governor-General, the Governor or anybody he thinks proper. I think it is a perfectly urfeitered duly.

(See Parliamentary Debates -- Indian Affairs. Commons. 1934-35, Vol. II Col. 2683).

In the ordinary course, it is estimate to assume that there must have been always consultation with the Chief Justice of the High Court concerned or with some others who were familiar with judicial matters whenever an appointment of a Judge to a High Court was made.

995. Article 193(1) of the Draft Constitution tatted that every Judge of a High Court was to be appointed by the President by a warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court of that State. In the Memorandum containing the views of the Judires of the Federal Court and of the Chief Justices representing all the Provincial High Courts prepared by the Conference of the Judges of the Federal Court and the Chief Justices of the several High Courts have in March. 1948 on the question of appointment of judges of the High Court, it was represented to the Drafting Committee as follows:

The Chief justice should send his recommendation in that behalf directly to the President. After consultation with the Governor the President should make the appointment, with the concurrence of the Chief Justice of India This procedure would obviate the need for the Chief Justice of the High Court discussing the matter with the Premier and his Home Minister and "justifying" his recommendations before them. It would also ensure the recommendation of the Chief Justice of the High 'Court being always placed before the appointing au throaty, namely, the. President, The necessity for obtaining the "concurren(SIC) of the Chief Justice of India would provide a safeguard against political and party pressure at the highest level being brought to bear in the matter. It needs hardly to be pointed out. in this connection that under the system of responsible Government envisaged by the proposed Constitution. the President who is to make the appointment will be the constitutional head of the executive guided by the advice of the Council of Ministers who will of necessity be drawn from the political party for the time being in power, and there may thus be some riak of political and party considerations influencing the appointment of the highest judicial officers in the country which, under the existing Constitution, has so far remained on the whole free from such influences, the Governor-General and the Governors not being elected nor owing their appointment to political parties in this country. It is therefore suggested that Article 193(1) may be worded in the following or other suitable manner.

Every judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India....

(empnasls added)

We do not think it necessary to make any provision in the Constitution for the possibility of the Chief Justice of India refusing to concur in an appointment proposed by the President Both are officers of. the. highest, responsibility and so far no case of such, refusal has arisen although a convention now exists that such appointment should be made after referring the matter to the Chief Justice of India and obtaining his concurrence. If per 'chance such a situation were ever to arise it could 'of course be' met by the President making a different propesal, and no express provision-need, it serns to us be made in that behalf".

996. Ultimately Article 217(1) which provided for the appointment of High Court Judges was enacted in the following form:

217. (1) Ever Judge of a High Court shall be applined. by the President by warrant under his hand. and seal after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and....

997. It may be noted that the three different words 'recommendation', consultation' and 'concurrence' used in the proposal of the Conference of the Federal Court judges and Chief Justices of High Courts were not adopted by the Constituent Assembly but only the word 'consultation' was used in respect of all the three functionaries referred to in Article 217(1).

998. In Biswanath Khemka v. King Emperor 1945 FCR 99 : AIR 1945 FC 67. the effect of Section 256 of the Government of India Article 1935 which provided that no recommendation should be made for the grant of magisterial powers to, or the withdrawal of any magisterial powers from any person save after consultation with the District Magistrate of the District in which he was working or with the Chief Presidency Magistrate, as the case might be was considered by the Federal Court, The Federal Court held that the procedure of consultation prescribed in that section was directory and not mandatory and non-compliance with that would not render an appointment otherwise regularly and yalidly made ineffective Or inoperative. The Court felt that any other view would lead to general inconvenience and injustice to persona who had no control over those entrusted with the duty of making recommendations for the grant of magisterial powers. It is noteworthy that the above view was taken by the Federal Court notwithstanding the fact that the words in the section were very emphatic and of a prohibitory character. In State of Uttar Pradesh v. Manbodhan Lal Srivastava MANU/SC/0123/1957 the provisions of Article 320(3)(c) of the Constitution were held by this Court to be directory and that they did not confer any right on a public servant. It was further held that the absence of consultation or any irregularity in consultstion with the Public Service Commission by the Government before imposing a penalty on him at the end of a disciplin any enquiry and non-compliance with Article 320(3)(c) did not vitiate any such punishment, particularly when due enquiry had been held in accordance with Article 311 of the Constitution and no de-feet in such enquiry had been pointed out. In reaching that conclusion, the Court depended upon the statement is Crawford on 'Statutory Construction' which was to the following effect:

The question as to whether a statute is mandatory or directory depends upon the Intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from that phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other....

999. The words prescribing the consultation machinery in Article 217(1) of the Constitution have to be construed in the context of the broad purposes and the general scheme of that provision; its history, its object, and the result which it seeks to achieve, it is equally necessary that the Court while construing a constitutional provision should bear in mind that it is a part of the organic law of the country and not just an ordinary piece of legislation. A High Court is the highest judicial authority in State and is the court of the last resort for the majority of cases. Along with the Supreme Court at the apex, the High Courts have to play the role of protectors of the rights and liberties of the people and should, therefore, be manned by independent and efficient Judges, Realising the importance of the High Court in a democratic country with a federal form of Government, the Constitution states that the Judges should be appointed after following the consultative machinery provided in Article 217(1). A citizen of India who has for at least ten years held a judicial office in the territory of India is eligible to be appointed as a Judge of a High Court. A citizen of India who has for at least ten years been an advocate of a High Court or of two or more High Courts in succession is also qualified for appointment as a Judge of a High Court Article 217 is designed to select the best, known for their high character and unquestionable integrity from among the large number of qualified persons. Consequently the appointment of Judges of High Courts is not made by calling for applications or holding examinations because the really deserving persons would not make applications. The range of selection is. therefore, practically limited by the personal or acquired knowledge of the Chief Justice of the High Court concerned about, the advocates or Judicial Officers. In that process it may be that many deserving advocates escape notice and consideration. An advocate who is thus left out of consderation cannot make a grievance of it before a court of law and claim that his case should be considered for such

appointment The paramount public importance attached to the post prevents institution of such action by a member of the Bar. From the nature of the provisions contained in Article 217(1) of the Constitution, it is also dear that any appointment made without following the procedure of consultation with the authorities mentioned therein, which appears to me to be mandatory, would not be a valid one.

1000. It is. however, contended on behalf of some of the petitioners and also on behalf of Shri S.N. Kumar that on a true construction of Article 217(1), the opinion expressed by the Chief Justice of India should be treated as final and binding on the President, having regard to the position of primacy assigned to the Chief Justice of India by the Constitution regarding matters connected with the Indian 1ud-ciary. It is also submitted that the Council of Ministers can have no voice in matters of appointment of Judges. Both these contentions are repudiated by the Central Government.

1001. The question is whether Article 217(1) treats the opinion of any of the functionaries who have to be consulted thereunder and in particular of the Chief Justice of India as fnal and binding on the President. The Constitution has used different words signifying varying degrees of compulsive or binding character of the opinion of one constitutional dignitary or authority on the other wherever there is need for two or more of them participating in any decision making process under the Constitution. They are, for example, 'shall act according to such opinion' (Article 103 and Article 192), 'consent' (Article 127(1), Article 128, Article 224A and Article 348(2)). 'advice' (Article 74 and Article 150), 'concurrence1 (Article 370(1)(b)(ii)), 'approval' (Article 130, Article 148(2) Article 229(2)). 'recommended by' (Article 233(2)) and 'after consultation with' or 'in consultation with' or be consulted' (Article 124(2) Article 127(1). Article 146(1). Article 217(1). Article 217(3) Article 222, Article 229, Article 233(1), Article 320(3), Article 341(1), Article 342(1) and Article 370(1)(b)(1) 1. It is significant that the words 'after consultation with' in Article 150 were substituted by the words on the advice of by the Constitution (Forty-fourth Amendment) Act, 1978 since the Parliament wanted, as can be seen from the Notes on Clauses in the relevant Bill which later on became the Constitution (Forty-fourth Amendment) Act, the President to prescribe the form of the accounts of the Union and of the States with the concurrence of and not merely in consultation with the Comptroller and Auditor General of India.

1002. Prom the scheme of the contitutional provisions, it appears that each of the three functionaries mentioned in Article 217(1) of the Constitution who have to be consulted before a Judge of a High Court is appointed has a distinct and separate role to play. The Chief Justice of the High Court is the most competent person to evaluate the merit and efficiency of a person recommended for the judgeship. The Governor is the proper authority who through the executive agency available to him may be able to report about the local POSItion of the person proposed, his character and integrity, his affiliations and the like, which have a considerable bearing on the working of the person proposed for appointment as a Judge. The Chief Justice of India is brought into the picture to prevent any vagaries on the part of the Chief Justice of the High Court who may be moved on occasions by petty considerations such as communalism and favouritisrn or who may even be capricious in proposing names of persons for judge-ship. The Chief Justice of India will naturally be able to assess the qualities of persons proposed having in view the standard of efficiency of Judges in all the High Courts in India and also to prevent unsatisfactory appointment being made on the basis of faulty recommendations made by the Chief Justices of High Courts. The position of the Chief Justice of India under Article 217(1) however is not that of an appellate authority or that of the highest administrative authority having the power to overrule the opinion of any other authority. From the specific roles attributed to each of them as explained above, which may to some extent overlapping also, it cannot be said that the Chief Justice of India has .been given any petition of primacy amongst the three persons who have to be consulted under Article 217(1) of the Constitution. There are no express words conveying that meaning. The president has to take into consideration the opinions of all of them and he should not accept the opinion of any of them only on the sole principle of primacy. He has to take a decision on the question of appointment of Judges of the High Courts on the basis of all relevant materials before him.

1003. Article 217(1) confers the power of appointment on the president, who ordinarily has to act on the advice of the Council of Ministers under Article 74(1) of the Constitution. Now we have to examine whether there is any compelling reason to hold that the Council of Ministers would have no voice in the matter of appointment of a High Court Judge and the opinion of the Chief Justice of India would be binding on the president. It is necessary to refer here to certain articles of the Constitution. Article 74(1) provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President, who shall in the exercise of his functions, act in accordance with such advice. The proviso to that clause provides that the President may require the Council of Ministers to reconsider such advice either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration, it is thus clear that the only means of counteracting any advice tendered to him by his Council of Minis-ten available to the President where he feels that the advice should not be straightway acted upon is to remit it to the Council of Ministers for reconsideration. If after such reconsideration the Council of Ministers tenders its advice the President has to act in accordance with such advice. The advice thus tendered is binding on the President. A comparison of Article 74(1) with Article 163(1) which also requires a Governor to act on the advice of his Council of

Ministers shows that the Governor may in certain matters which are within Ma discretionary power act independently of his Couned of Ministers, There is no such exception expressly made in Article 74(1) specifically excluding any matter from its scope. Article 103 of the Constitution is another provision which has to be noticed here. It confers power on the President to decide the question whether a Member of Parliament has Incurred any disqualification mentioned in Article 102(1) of the Constitution. It reads:

103. (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in Clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

1004. Clause (2) of Article 103 lays dawn the only method in accordance with which the President can decide a question arising under Clause (1) thereof. It requires him to refer the .said question to the Election Commission for its opinion and to decide the question according to its opinion. Article 74(1) therefore is excluded from operation by npcessary implication. A question of similar nature arising in respect of a member of the State Legislature has to be decided under Article 102 by the Governor concerned in accordance with the opinion of the Election Commission. Article 163(1) therefore becomes inapplicable by necessary intendment to such a case. It is thus seen that wherever the opinion of another authority alone is binding on the President or a Governor, as the case may be the Constitution uses appropriate words convey ing such meaning.

1005. Under Article 217(3) of the Constitution which provides for the determination of the age of a Judge of a High Court, the President has to decide the age of a High Court Judge after consultation with the Chief Justice of India and this Court has observed in Union of India v. Jyoti Prakash Mitter (1071) 3 SCR 483: AIR 1071 SC 1093 that the President cannot in deciding the case under Article 217(3) and on the advice of his Ministers. Here again Article 74(1) of the Constitution gets excluded by necessary implication. But that case stands on an entirely different footing. The function of the President under Article 217(3) is a judicial function and that makes all the difference. This Court observed in the said case at pages 504-505 (of SCR): (at pp. 1105, 1106) thus:

It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Article 217(3) invested with judicial power of great significance which has bearing on the independence of the Judges of the higher Courts. The President is by Article 74 of the Constitution the constitutional head who acts on the advice of the Council of Ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a Judge, our Constitution makers have thought it necessary to invest the power in the President. In the exercise of this power if democratic institutions are to take root in our country, even the slightest suspicion of appearance of misuse of that power should be avoided. Otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and asking for representation from Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India. Again we are of the view that normally an opportunity for an oral hearing should be given to the Judge whose age is in question, and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against him after the same is disclosed to him. The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. But this Court will not sit in appeal over the judgment of the President, nor will the Courts determine the weight which should be attached (SIC) the evidence. Appreciation of evidence is entirely left to the president and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion.

1006. The power of appointment of a Judge of a High Court is an executive power and the analogy of Article 217(3) is, therefore, inappropriate.

1007. The power of the Governor with regard to matters connected with appointment or dismissal of judicial officers was construed by this Court giving the final voice regarding such appointment or dismissal only to the Governor under

Article 233 of the Constitution notwithstanding the vesting o! control over the subordinate judiciary in the High Court under Article 235 in the case of the State of West Bengal v. Nripendra Nath Bagchi MANU/SC/0310/1965. In that case Hidayatullah. J. (as he then was) reconciled and interpreted Article 233, Article 234, Article 235 and Article 311 thus:

That the Governor appoints District Judges and the Governor alone can dismiss or remove them goes without saying. That does not impinge upon the control of the High Court. It only means that the High Court cannot appoint or dismiss or remove District Judges. In the same way the High Court cannot use the special jurisdiction conferred by the two provisos. The High Court cannot decide that it is not reasonably practicable to give a District Judge an opportunity of showing cause or that in the interest of the security of the State it is not expedient to give such an opportunity. This the Governor alone can decide. That certain powers are to be exercised by the Governor and not by the High Court does not necessarily take away throwers from the High Courts. The provisos can be given their full effect without giving rise to other implications. It is obvious that if a case arose for the exercise of the special powers under the two provisos, the High Court must leave the matter to the Governor. In this connection we may incidentally add that we have no doubt that in exercising these special powers in relation to inquiries against District Judges, the Governor will always have regard to the opinion of the High Court in the matter. This will be so whoever be the inquiring authority in the State. But this does not lead to the further conclusion that the High Court must not hold the enquiry any more than that the Governor should personally hold the enquiry.

There is, therefore, nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry if Article 235 vested such a power in it. In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal, subject however to the conditions of service, to a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by Clause (2) of Article 311 unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this direction.

1008. Again in Chandramouleshwar Prasad v. Patna High Court MANU/SC/0495/1969 the power of appointment of District Judges exercisable by the Governor in consultation with the High Court arose for consideration. This Court recognised in that case that the power to appoint District Judges was vested with Governor but that such power could be exercised only after a full and effectivonsultation with the High Court. It held that if the process of consultation was defective the appointment would become invalid. The Court did not, however go to the extent of saying that any opinion expressed by the High Court was binding on the Governor.

1009. In Samsher Singh v. State of Punjab MANU/SC/0073/1974 which is a judgment of a bench of seven learned Judges of this Court, Chief Justice Ray observed at page 843 (of SCR) : (at p. 2209 of AIR) thus:

For the foregoing reasons we hold that the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers. Where the Governor has any discretion the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers. The appointment as well as removal of the members of the Subordinate Judicial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. Appointments and removals of persons are made by the President and the Governor as the constitutional head of the executive on the aid and advice of the Council of Ministers. That is why any action by any servant of the Union or the State in regard to appointment dismissal is brought against the Union or the State and not against the President or the Governor.

1010. In the same case Krishna Iyer, J. with whom Bhagwati, J. agreed in his concurring judgment has summed up the true legal position under Article 74 and Article 163 of the Constitution at page 875 (of SCR) : (at p. 2230 of AIR) thus:

We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various Articles, shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well unexceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House: (b) the dismissal of a Government which has lost its majority in the House but refuses to quit office; (e) the dissolution of the House where an appeal to the country is necessitous, although in this area the Head of State should avoid Retting involved in

politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step.

1011. The above decision was delivered by this Court after a careful consideration of all aspects of constitutional law bearing on the point in the light of Article 234 of the Constitution which entrusts the power of appointment of persons other than District Judges to the Judicial Service of a State to the Governor. In principle an appointment under Article 217(1) cannot be different from an appointment under Article 234,

1012. The binding nature of an opinion expressed by an authority who has to be consulted before making an appointment of a Judge was disposed of by Chandrachud, C. J. in Re. The Special Courts Bill MANU/SC/0039/1978 with the following words "... the process of consultation has its own limitations and they are quite well-known. The obligation to consult may not necessarily act as a check on an executive...." Later on the learned Chief Justice again observed at pages 550-551 (of SCR): (at p. 518 of AIR):

Yet another infirmity from which the procedure prescribed by the Bill suffers is that the only obligation which Clause 7 imposes on the Central Government while nominating a person to preside over the Special Court is to consult the Chief Justice of India. This is not a proper place and it is to some extent embarrassing to dwell upon the pitfalls of the consultative process though, by hearsay, one may say that as a matter of convention, it is in the rarest of rare cases that the advice tendered by the Chief Justice of India is not accepted by the Government. Buhe right of an accused to life and liberty cannot be made to depend upon pious expressions of hope howsoever past experience may justify them. The assurance that conventions are seldom broken is a poor consolation to an accused whose life and honour are at stake. Indeed, one must look at the matter not so much from the point of view of the Chief justice of India, nor indeed from the point of view of the Government, as from the point of view of the accused and the expectations and sensitivities of the society.

1013. The substance of these observations is that the opinion expressed by the Chief Justice of India who has to be consulted before hand would not be binding as such on the executive. That was the reason for insisting upon in that case that the Government should appoint a Judge of the Special Court with the concurrence of the Chief Justice of India as otherwise there would have been no need for such insistence.

1014. The thesis that the Constitution prohibits the participation of the Executive in the appointment of Judges of superior courts and that the opinion of the Chief Justice of India alone should be binding on the President in such matters totally fails when we consider the question of appointment of the Chief Justice of India. Article 124(2) of the Constitution provides that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and sea] after consultation with such of the Judges of the Supreme Court and of the High Courts-in the States as the president may deem necessary for the purpose and that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. From the above clause of Article 124, it is obvious that when the appointment is to the post of the Chief Justice of India, it is not obligatory on the part of the President to consult any specified functionary. But he has to consult such of the Judges of the Supreme Court each one of whom may himself be an aspirant to the post and such other Judges of the High Courts he may consider necessary. In this situation, it is quite evident that the opinion of any one of the Judges who may be consulted cannot be treated as binding on the President. The power appointment rests with the President who has no doubt to take the decision on the advice given by the Council of Ministers after making the necessary consultation. When the 'primacy of Judicial opinion' doctrine thus falls in the case of the appointment of the Chief Justice of India, it would not be appropriate to hold that it prevails in the case of appointments of other Judges of the Supreme Court and the Judges of the High Courts.

1015. Under Article 217(1) of the Constitution the President should, therefore, while making an appointment of a High Court Judge act on the advice of his Council of Ministers having due regard to the opinions expressed by the functionaries mentioned therein after a full and effective consultation. There is no scope for holding that either the Council of Ministers cannot advice the President on this matter or that the opinion of the Chief Justice of India is binding on the President although such opinion should be given due respect and regard

1016. As a part of this very contention it is urged that the Executive should have no voice at all in the matter of appointment of Judges of the superior courts in India as the independence of the judiciary which is a basic feature of the Constitution would be in serious jeopardy if the executive can interfere with the process of their appointment, It is difficult to hold that merely because the power of appointment is with the executive, the independence of the judiciary would become impaired. The true principle is that after such appointment the executive should have no scope to interfere with the work of a Judge.

1017. In this connection out of curiosity I have looked into some of the books dealing with the modes of appointment of Judges in other countries. The methods by which, Judges are chosen in the different countries of the world may be broadly classified accordin a to Prof. J.W. Garner into three types -- (1) election by the legislature, (2) election by the people and (3) appointment by the executive either absolutely or from a list of nominees presented, by the courts or with the concurrence of an executive council or the upper chamber of the legislature/ Choice by the legislature was a favorite method of selection in the American States for sometime but this system has. been abandoned in all the States except Rhode Island, Vermont, South Carolina and Virginia. In Switzerland the Judges of the federal tribunal are chosen by the legislative assembly of the federation. Election of Judges by the people was first introduced in France in 1790. With the advent of Napolean this system was abolished as it had become discredited by them. In thirty eight of the States in the U.S.A. the method of popular election of Judges is the rule. In nearly all countries other than the United States of America, the Judges are appointed by the executive and even in the United states it is the method followed for the appointment of federal Judges and in six States for appointment of State Judges. In Belgium the Judges of the Court of Cassation are appointed from two lists of nominees each containing twice as many names as there the vacancies to be filled, one presented by the Court itself and another by the Senate, in Prance it is the custom when a vacancy occurs on the Bench it is for the President of the Court and the State's Attorney to propose the names of several persons to the Minister of Justice for his consideration. Generally he appoints one of the persons so recommended but sometimes for political reasons he prefers to follow the recommendations of a deputy, who may be an influential member of the Minister's party.

1018. In England the nominations to all vacancies 'among the superior Judges are made either by the prime Minister or by the Lord Chancellor. 'The Prime Minister nominates the Law Lords, the Lords Justices of Appeal, the Load Chief Justice, the Master of the Rolls and the President of the Probate Divorce and Admiralty Division. It is commonly assumed that the Prime Minister is guided by the Lord Chancellor. The ordinary Judges of the High Court often called puisne Judges are nominated by the Lord Chancellor. The Lord Chancellor is responsible for the lesser judicial appointments.' (See R.M. Jackson. The Machinery of Justice in England 1960 Edition p. 232).

1019. In his letter written by the end of 1951 of Morse Erskine, a member of the Califeraia Bar Lord Jewitt who the Lord Chancellor in the Labour Government till October 1951. however, stated:

I think that I can fairly say that we have established a tradition in which "politics" and "influence" (in the appointment of judges) are now completely disregarded. The Lord Chancellor selects the man whom he believes to be the best able to fill the position. In my own case I had an unusually large number of appointments, and I can only recall appointing two men who were members of my own party.

You must remember these facts which help in establishing the tradition. The Inns of Courts are completely independent of any governmental control. The Lord Chancellor has always been a barrister, and must therefore be a member of one of the Inns. He is in dose touch with all that goes on in, his Inn of Court. How should I have felt if I had made a lot of unworthy appointments, when I noticed the cold looks that I should have received when next I went to lunch at the Inn.

Secondly, in practice, the Lord Chancellor would always consult with the Head of the Division to which he was called upon to appoint a Judge. If I had to appoint a Judge to the Queen's Bench Division, I should, in practice, always consult with the Chief Justice; if to the diverse Division, with the President, if to the Chancery Division, with the senior fridge In all my many appointments I never in fact made one without the approbation of such a per-son. When it came to the Court of Appeal, I should consult the Master of the Rolls as to who was the most suitable person....

(See "The Life of the Law' Ed. by John Honnold (1964) p. 270).

1020. Sir Albert Napier, the permanent secretary of the office of Lord Chancellor in a paper prepared in about the year 1963 said much the same thing as Lord Jowitt as follows:

The Lord Chancellor is the most appropriate Minister to advice on appointments and promotions for the very reason. that he is a Judge and is qualified for that position by actual practice at the Bar. He knows by experience as an advocase, the nature and degree of the knowledge and Idad oharacter and temperament which go to make the best Judges. When he sits he hears eminent Barristers arguing before him. He is in almost daily touch as a Law Lord and a Bencher of his Inn. with the Lords, of Appeal and other Judges and members of the Bar. The Bench of an Inn is a society where all are equal, and talk is free, and so far as precedence is neoessary, it goes by date of election and not by rank. In such a society a bad appointment could not escape criticism, and if it were ever suggested to a Lord Chancellor that he should appoint or promote the wrong man for the wrong motive, he would know not only where his duty lay but

that if he were to accede he would lose the respect of the whole profession. (See 'The Life of the Law' Ed. by John Honnold (1964) p. 270).

1021. The foregoing gives a fairly reliable picture of the English system of appointments of Judges. It is thus seen that in England the . Judges are appointed by the Executive. 'Nevertheless, the judiciary is substantially insulated by virtue of rules of strict law, constitutional conventions, political practice and professional tradition from political influence.' (Vide Halsbury's Laws of England, Fourth Edition. Vol. 1 para 5).

1022. In Australia the Justices of the High Court and of the other courts created by the Parliament are appointed by the Governor-General in Council (See Section 72(1) of the Commonwealth of Australia Constitution Act. 1900). The appointment of federal Judges is a cabinet matter which is formally ratified by the Executive Council. It is stated that the practice is that the Attorney -General would recommend to Cabinet persons for appointment though it is the Cabinet which will make the final decision.

1023. In Canada Judges of superior courts are appointed by the. Governor-General (Vide Section 96 of the British North America Article 1867).

1024. In. Japan, the Emperor appoints the Chief Judge of the Supreme Court as designated by the Cabinet and Judges, other than the Chief Justice are appointed by the Cabinet,

1025. In India we have adopted the procedure contained in Article 217(1) of the Constitution for the appointment of Judges of the High Courts. We do need anything intrinsically wrong in this method The process of consultation prescribed by Article 217(1) acts as a sufficient safeguard against the appointment of undesirable persona as Judges of the High Courts. Our experience has been that the independence of the judiciary has not in any way been impaired by reason of the president appointing Judges on the advice of his Council of Ministers after following the process of consultation prescribed in Article 217(1). This method appears to have been adopted so that the appointments of Judges may have ultimately the sanction of the people whom the Council of Ministers represent in a parliamentary form of Government. In that way only the Judges may be called people's Judges. If the appointments of Judges are to be made on the basis of the recommendations of Judges only then they will be Judges' Judges and such appointments may not fit into the scheme of popular democracy.

1026. As a corollary to the above contention, it is urged that an advocate or a member of the subordinate judiciary who is recommended by the Chief Justice of a High Court acquires a right to be appointed if his name is approved by the Chief Justice of India also and one of the learned Counsel appearing in these cases said that such a person would be entitled to request the Court to issue a writ of mandamus compelling the President to appoint him as a Judge of the High Court. The soundness of this argument depends upon the process of appointment itself. Article 217 of the Constitution does not say in terms that the proposal for appointment of a person as a Judge should be initiated by the Chief Justice of the High Court. Let us assume for purposes of argument that he may initiate the proposal recommending the name of a person who according to him is qualified for the post. The Governor may or may not agree with the proposal. The Chief Justice of India may or may not agree with the proposal. Ultimately the appointing authority has to take a decision on the question. Under the scheme ft Article 217 the power to appoint a Judge of a High Court is vested in the President. While he is bound to consult the authorities mentioned therein and take into consideration their opinions, he is not bound heir opinions. Ordinarily one does not expect the President to make an appointment by ignoring all the adverse opinions expressed by the functionaries mentioned in Article 217. If there are conflicting opinions the President has to weigh them after giving due consideration to each of them and take a decision on the question. In any event it. is difficult to hold that an advocate or a member of the Subordinate Judiciary whose name is approved by the Chief Justice of a High Court and the Chief Justice of India gets a vested right to be appointed as a Judge of a High Court. In fact he has no Justifiable right at all. If for any reason he is not appointed he cannot move the Court to appoint him as a Judge of the High Court. The position of an additional Judge who is currently holding office and who is not reappointed stands on a slightly different footing and his case will be considered at the appropriate place.

PART VI

1027. The evolution of the system of appointing additional Judges in the High Courts for such period not exceeding two years as the President may specify needs to be examined now. Appointment of a Judge who is a member of the superior judiciary for such short period appears to be peculiar to our country. Such practice is not prevailing in the United Kingdom. Even in India we do not have Judges either in the Subordinate Judiciary or in the Supreme Court

whose tenure is so short. We may have additional courts in the Subordinate Judiciary but they are manned by Judges belonging to regular judicial cadre, whose tenure is the same as the tenure of others in the cadre.

1028. Under Section 4 of the High Courts Act or the Charter Act, 1861 (24 & 25 Vict. e. 104) it was provided that all the Judges of the High Courts established under that Act held their offices during Her Majesty's pleasure provided that it was lawful for any Judge of a High Court to resign such office of Judge. Section 7 of that Act, however, provided that upon the. happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice, the Governor-General in Council or Governor in Council as the case might be could appoint of the Judges of the High Court concerned to perform the duties of Chief Justice of that Court until some person was appointed to the office of the Chief Justice (this provision corresponds to Article 223 of the Constitution;. It also provided that upon the happening of a vacancy in the office of any other Judge of a High Court and during any absence of any such judge or on the appointment of any such Judge to act as Chief Justice it was lawful to the Governor-General in Council or Governor in Council as the case might be to appoint a person with such qualifications as were required in persons to be appointed to the High Court to act as Judge of that court and the person so appointed was authorised to sit and to perform the duties of a Judge of that Court until some person was appointed to the office of the Judge of that Court and had entered on the discharge of the duties of such office or until the absent Judge had returned from such absence or until the Governor-General in Council or Governor in Council as aforesaid saw cause to cancel the appointment of such acting Judge. (This provision corresponds to Article 224(2) of the Constitution. It may be noted that the president cannot cancel the appointment of an acting Judge under Article 224(2)).

1029. In the High Courts Act or the Charter Act, 1861, there was no provision for appointment of an additional Judge of a High Court with a restricted tenure as it is in Article 224(1) of the Constitution.

1030. Section 105 of the Government of India Article 1915 contained almost the same provisions which were found in Section 7 of the High Courts Act or the Charter Act. 1861 providing for the appointment of acting Chief Justice and acting Judges. But Section 101 of the 1915 Act however made provision for the appointment of additional Judges. Sub-section (2) of Section 101 stated that each High Court should consist of a Chief Justice and as many other Judges as His Majesty might think to appoint. Clause (i) of the proviso to that sub-section authorised the Governor-General -in-Council to appoint persons to a-t as Additional Judges for such period not exceeding two years. Such provision for the appointment of additional Judges of High Courts appear have been made by this Act for the first time.

1031. Section 220 of the Government of India Article 1935 as it was originally enacted provided that every High Court was to consist of a Chief Justice and such other Judges as His Majesty might from time to time consider it necessary to appoint. It further provided that the Judges so appointed together with any additional Judges appointed by the Governor-General in accordance with law could at no time exceed in number such maximum number as His Majesty in Council might fix in relation to the High Court concerned. Under the Government of India Act, 1935, every Judge of a High Court held his office until he attained the age of sixty years provided that he would cease to be a Judge of the High Court if any of the events mentioned in the proviso to Section 220(2) happened earlier. Section 220 of the Government of India Article 1935 underwent subsequently slight modifications which are of no materiality for the present purpose. Section 222 of the Government of India Act, 1935 which provided for the appointment of temporary and additional Judges of a High Court read immediately prior to the commencement of the Constitution as follows:

222. (1) If the office of Chief Justice of a High Court becomes vacant, or if any such Chief Justice is by reason of absence, or for any other reason, unable to perform the duties of Ms office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof or until the Chief Justice has resumed his duties, as the case may be. be performed by such one of the other Judges of the court as the Governor-General may in his discretion think fit to appoint for the purpose.

(2) If the office of any other judge of a High Court becomes vacant, or if any such judge is appointed to Act temporarily as a Chief Justice, or is by reason of absence, or for any other reason, unable to perform the dutes of his office, the Governor-General may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of that Court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, beamed to be a judge pf that Court until some person appointed by His Majesty to the vacant office has entered on the duties thereof or until the permanent judge has resumed his duties.

(3) If by reason of any temporary Increase in the business of any High Court or by reason of arrears of work in any such Court it appears to the Governor-General that the number of the judges of the Court should be for the time being increased, the Governor-General in his discretion may, subject to the foregoing provisions of this chapter with respect

to the maximum number of judges appoint persons duly qualified for appointment as judges to be additional judges of the Court for such period not exceeding two years as he may specify.

1032. Article 166 of the Draft prepared by the Constitutional Adviser more or less adopted the language of Section 222 of the Government of India Act, 1635 with some modifications. The Drafting Committee, however, redrafted Article 166 of the Draft Constitution prepared by the Constitutional Adviser by splitting it into two articles i.e. Articles 198 and 169. The redrafted Articles 198 and 190 of the Draft Constitution read as follows:

198. (1) When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the court as the President may appoint for the purpose.

(2) (a) When the office of any other judge of a High Court is vacant or when any such judge is appointed to act temporarily as a Chief Justice or is unable to perform the duties of his office by reason of absence or otherwise, the president may appoint a person duly qualified for appointment as a judge to act as a judge of that court.

(b) The person appointed shall, while so acting, be deemed to be a judge of the Court.

(c) Nothing contained in this clause shall prevent the President from revoking any appointment made under this clause.

199. If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such court, it appears to the President that the number of the judges of the court should be for the time being increased, the President may. subject to the foregoing provisions of this Chapter with respect to the maximum number of judges, appoint persons duly qualified for appointment as judges to be additional judges of the court for such period not exceeding two years as he may specify.

1033. The Drafting Committee also introduced one more Article i. e. Article 200 providing for the attendance of retired Judges at sittings of High Courts which conformed to the practice in the United Kingdom and the United States of America. That Article read:

200. Notwithstanding anything contained in this Chapter, the Chief Justice of a High Court may at any time, subject to the provisions Of this Article request any person who has held the office of a judge of that court to sit and act as a judge of the court, and every such person so requested shall, while so sitting and acting, have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a judge of that court:

Provided that nothing in this Article shall be deemed to require any such, person as aforesaid to sit and act as a judge; of that court unless he consents so to do.

1034. At the conference of the Federal Court Judges and Chief Justices of the High Courts which met in March, 1948, it was recommended that Article 198(2)(c) of the Draft Constitution which empowered the President to revoke the appointment of an acting' judge appointed under Article 198(2)(a) should be omitted.

1035. The Drafting Committee received at this juncture a number of representations to delete the Article pro-viding for the appointment of additional Judges and acting Judges. The comments of Tej Bahadur Sapru on the practice of additional Judges or acting Judges resuming practice after a short stay on the Bench were telling. He said:

Additional Judges, under the old Constitution, were appointed by the Governor-General for a period not exceeding two years. I do not know whether that condition has been reproduced in the proposed Constitution This prohibition, however, does not apply to acting judges or temporary judges. I think the rule in future should be that any barrister or advocate, who accepts a seat on the Bench, shall be prohibited from resuming practice anywhere on retirement. I would not, however, apply this to temp orary judges taken from the Services, who hold a seat on the Bench for a few months, but I would add that the practice of appointing additional and temporary judges should be definitely given up. When I said at the Round Table Conference that there were acting, additional and temporary judges in India, some of the English lawyers not accustomed to Indian law felt rather surprised. I am also of the opinion that temporary or acting judges do greater harm than permanent judges, when after their seat on the Bench for a short period they revert to the Bar. A seat on the Bench gives them a preeminence over their colleagues and. embarrasses the subordinate judges who were at one time under their control and thus instead of their helping justice they act as a hindrance to free justice. I

have a very strong feeling in this matter and have during my long experience seen the evil effects of unchecked resumption of practice by barristers and advocates.

(B. Shiva Rao : 'The Framing of India's Constitution' Vol. IV pp. 172-173).

1036. In October, 1948, the Drafting Committee decided to drop both Article 198(2) and Article 199 providing for the appointment of acting and additional Judges. It was of the view that it was 'possible to discontinue the system of appointment of temporary and additional Judges in High Courts altogether by increasing, if necessary, the total number of permanent Judges o! such courts'. On June 7, 1949 after hearing the plea of Dr. B.R. Ambedkar 'that all Judges of the High Court shall have to be permanent', the Constituent Assembly adopted the recommendation of the Drafting Committee to delete Articles 198(2) and 199 of the Draft Constitution providing for the appointment of acting and additional judges in High Courts. Accordingly the Drafting Committee deleted reference to appointment of acting and additional Judges altogether in the revised Draft Constitutioubmitted to the Constituent Assembly on November 3, 1949 but retained only those provisions relating to appointment of acting Chief Justice and attendance of retired Judges at sittings of High Courts. In the Constitution as it was enacted finally by the Constituent Assembly there were provisions for appointment of Chief Justice, Judges, acting Chief Justices and attendance of retired Judges at the sittings of the High Court. (Vide Article 217. Article 223 and Article 224). There was no provision for the appointment of acting or additional Judges. Since it was felt that the working of Article 224 as it was originally enacted which provided for the attendance of retired Judges at sittings of High Courts was not satisfactory and that there way need to introduce provisions for appointment of acting and additional Judges as it obtained in Sub-sections (2) and (3) of Section 222 of the Government of India Act, 1935, by the Constitution (Seventh Amendment Act, 1956, Article 224 was substituted by the new Article 224 which read thus:

224. (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified person, to be additional judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting judge of a High Court shall hold office after attaining the age of sixty years.

1037. Article 217(1) was simultaneously amended in order to make the procedure of the appointment of permanent Judges applicable to additional and acting Judges too. After amendment. Article 217(1) reads:

217. (1) Every Judge of a High Court shall be appointed by the President by warrant under this hand and seal after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office in the case of an additional or acting Judge as provided in Article 224 and in any other case until he attains the age of sixty years....

1038. The original Article 224 which was replaced by the new Article 224 was again reintroduced as Article 224A by the Constitution (Fifteenth Amendment) Act. 1963 again providing for the attendance of retired Judges at sittings of High Courts. Simultaneously Article 271(1) was amended substituting "sixty two years" in the place of "sixty years" in it. Clause (3) of Article 224 was also amended by substituting "sixty two years" in the place of "sixty years". This completes the history of Article 224 of the Constitution.

1039. What is the true meaning of Article 224(1)? It empowers the President to appoint duly qualified persons to be additional Judges, if it appears to him by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein that the number of Judges of that Court should for the time being be increased. The two occasions when an additional Judge can be appointed are those mentioned in Article 224(1) of the Constitution, namely, (i) a temporary increase in its business or (ii) accumulation of arrears of work in the High Court concerned. Article 224(1) is not, therefore, intended for meeting a situation where the work of the High Court is gradually on the increase requiring the appointment of more number of permanent Judges. The reasons for the increase in the work of the High Courts according to the Fourteenth Report of the Law Commission were:

The problem of arrears in the High Courts must in our opinion be viewed against the very large increase in the work of these courts in recent years, particularly during the period following the Constitution. Two main causes of this increase need mention. Firstly, the growing volume of ordinary litigation following the economic and industrial development of the country, has considerably added to the normal work of all the Courts. We append a Table (Table 1) showing the extent of the increase under various heads. Secondly, there has been an expansion of the High Courts' special jurisdiction under a variety of fiscal enactments like the Income-tax and Sales Tax Act and other special laws. The fact of such expansion was noticed by the High Courts Arrears Committee as far back as 1949. A very recent example of the conferment of the special jurisdiction on the High Courts will be found in the Representation of the People Act by which the High Court is empowered to hear appeals from the decisions of Election Tribunal.

The fundamental rights conferred by the Constitution and resort to the remedies provided for their enforcement have contributed largely to the increase in the volume of work in the High Courts. Applications for the enforcement of fundamental rights, applications seeking to restrain the usurpation of jurisdiction by administrative bodies and applications or suits challenging the constitutionality of laws have made large additions to the pending files of the High Courts. It has to be observed that many laws have come in for challenge in the Courts on the ground of their inconsistency with the Constitution. The complexity of recent legislation has resulted in a large number of novel and difficult questions having been brought before the High Courts. Their decisions have not only taken longer time but have led not infrequently to references to Full Benches which necessarily divert the available judge-power from what may be called normal judicial work. As a result of this large addition to their work, the disposal of ordinary civil and criminal work in the High Courts has suffered very considerably. This increase of work and its specially difficult and novel character can well be regarded as an important cause of the accumulation of old cases.

(Vide paragraphs 2 and 3 in Chapter 6 of Vol. I of the Fourteenth Report of the Law Commission).

1040. These observations were made in 1958. There are more reasons now for the increase in the work of the High Courts.

1041. The Law Commission in paragraphs 54 and 57 of Chap. 6 in Volume I of its Fourteenth Report recommended thus:

54. The large increase in the volume of annual institutions which has been referred to earlier must now, we think, be taken as a permanent feature. This position accordingly necessitates a thorough revision of existing ideas regarding the number of judges required for each High Court. The strength of some of the High Courts has been increased from time to time. In doing this, however, the post-Constitutional developments which have thrown a much heavier burden on the High Courts have, in our view, not been adequately taken into account. To expect the existing number of judges in the various High Courts to deal efficiently with the vastly increased volume of work is, in our opinion, to ask them to attempt the impossible. As pointed out to us by a senior counsel, if there is a congestion on the roads due to an increase is traffic, the remedy is not to blame the traffic but to widen the roads.

The first essential therefore, is to see that the strength of every High Court is maintained at a level so as to be adequate to dispose of what may be called its normal institutions. The normal strength of a High Court must be fixed on the basis of the average annual institutions of all types of proceedings in a particular High Court during the last three years. This is essential in order to prevent what may be termed the current file of the Court falling into arrears and adding to the pile of old cases. The problem of clearing the arrears can be satisfactorily dealt with only after the normal strength of each Court has been brought up to the level required to cope with its normal institutions. We suggest that the required strength of the High Court of each State should be fixed in consultation with the Chief Justice of that State and the Chief Justice of India and the strength so fixed should be reviewed at an interval of two or three years. Such a review will be necessary not only by reason of changing conditions but because the implementation of our recommendations made elsewhere will lead to a quicker disposal of work in the subordinate courts which, in its turn, will result in increase in the work of the High Courts.

57. We are of the view that the provisions of Article 224 of the Constitution should be availed of and additional judges be appointed for the specific purpose of dealing with these arrears. The number of such additional judges required for each High Court for the purpose of dealing with the arrears will have to be fixed in consultation with the Chief Justice of India and the Chief Justice of the State High Court after taking into consideration the arrears in the particular court, their nature and the average disposal of that court. The number of additional judges to be fixed for this purpose should be such as to enable the arrears to be cleared within a period of two years. The additional judges so appointed should, in our view, be utilised as far as possible exclusively for the purpose of disposing of arrears and not be diverted to the disposal of current work. Parjpassu with the disposal of the arrears, the permanent strength of the High Court will have

to be brought up to and maintained at the required level, care being taken to see that their normal disposal keeps pace with the new institutions and that they are not allowed to develop into arrears. The appointment of additional Judges for the exclusive purpose of dealing with the arrears is, in our view, called for in a large number of High Courts.

1042. The practice that grew in the High Courts was, however, different. Article 224(1) was treated as the gateway through which almost every Judge had to pass before being made permanent It is indeed disturbing to notice that some Judges before they were made permanent had functioned as additional Judges for nearly five years.

1043. Article 217(1) of the Constitution lays down the procedure to be followed in making the appointment of a Judge of a High Court. The President can appoint a High Court Judge after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Article 217(1) as it was originally enacted referred to the appointment of permanent Judges only as there was no provision in the Constitution then to the appointment of additional or acting Judges. When the new Article 224 of the Constitution was substituted in the place of the original Article 224 by the Constitution (Seventh Amendment) Act, 1956 providing for the appointment of additional and acting Judges. Article 217(1) also was amended requiring the appointment of additional and acting Judges also in the same manner, the only distinction maintained between the permanent Judges and the additional and acting Judges being the one relating to their tenure. A permanent Judge is entitled to be in office till he attains the age of sixty two years whereas the tenure of an additional or acting Judge is as specified by the President under Article 224(1) or Article 224(2) of the Constitution as the case may be. It is, however, to be noted that the Constitution does not prescribe any difference in the mode of appointment of a permanent Judge or of an additional or an acting Judge. All of them should satisfy the same tests as to their fitness to be appointed as Judges irrespective of the fact whether they are appointed as permanent Judges or as additional or acting Judges. We shall hereafter confine our attention to the appointment of permanent Judges and additional Judges only.

1044. Article 219 of the Constitution reads.

216. Every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint.

1045. It is well known that with the increase of the population and the number of laws and with the changes brought about in the economic, social and political life of the people, litigation in all courts has been continuously increasing. Naturally the number of cases filed in the High Courts which happen to be the highest courts in the case of a large number of matters have gone on growing. From the statements filed oh behalf of the Central Government along with the affidavit dated Aug. 29. 1981 of Shri T.N. Chaturvedi, Secretary (Justice), Government of India, the following facts emerge:

As on	As on	As on
31-12-1978	31-12-1970	31-12-1980
(a) The total number of main cases pending.	6.13,799	6,17,239	6,78,951
(b) Average disposal of main cases per Judge per year during the years 1978, 1979 and 1960.	860	Sanctioned Actual strength strength
(c) The sanctioned strength of permanent Judges in all the High Courts as on 18-3-1981.	360	
(d) The actual strength of perma- nent Judges in all the High Courts as on 18-3-1981.	277	
(e) The sanctioned strength of additional Judges in all the High Courts as on 18-3-1981.	97	
(f) The actual strength of addit- ional Judges in all the High Courts' as on 18-3-1981.	43	
	405	320

1046. Hence on March 18. 1981 in alt there were 320 Judges (perrnanent and additional) in all the High Courts. At the average rate of 860 main cases per year per Judge, 320 Judges can dispose of about 2,75,200 eases per year. To dispose of the aprears of cases as on 31-12-1980 they heed approximately four years since many of them are bound to be heavy Division Bench matters which consume a lot of time of them it mer be noted that 2,59,627 cases were mohan two years old as on 31-12-1980. The fresh institutions in all the High Courts are also on the increase. Fresn cases instituted in all the High Courts were 4,85,880, 530,614 and 5,55.719 respectively in the years 1978, 1979 and 1980. If the total average disposal of all the existing Judges per year is only 2,75,200 cases then twice the number of existing Judges would be needed even to dispose of the new cases instituted every year having regard to the institutions in the year 1980, let alone the backlog of nearly 7,00,000 of cases. It is thus clear that the number of Judges in the High Courts, both permanent and additional is wholly inadequate to cope up with the situation which Has arisen more on account of delay in filling up existing vacancies and on account of not increasingthe strength of Judges of the High Courts to the requisite number from time to time. There appear to be some discrepancies in the statistics furnished in these cases. But it is admitted by the Government that they need at least 150 more additional Judges in addition to the sanctioned strength of 308 permanent Judges and 67 additional Judges to clear off the arrears in two years.

1047. Article 216 of the Constitution requires the President to appoint necessary number of Judges in each High Court. The w6rd 'necessary' in Article 216 is a crucial one. It imposes a duty on the President to review the strength of Judges in each High Court from time to time and to increase the number of Judges as an when it is necessary. No steps appear to have been taken to do so properly and that is the reason why we have reached these staggering arrears. In the present situation, it appears, there should be at least 600 permanent Judges to fight the problem of arrears. If in any given High Court the arrears come down, then fresh appointments in that High Court may not be made. But steps "have to be taken to appoint immediately at least 200 more Judges after making all the existing additional Judges permanent. In this state of affairs, it is difficult to understand as to why Judges are being appointed even now as additional Judges only for a period of two years or for lesser periods. When it is not dispend that a Judge appointender Article 224(1) of the Constitution is not a Judge on probation, what is the advantage of appointing additional Judges when there is need to appoint more permanent Judges? Surely there is no financial gain to the Government as the expenditure involved is almost the same whether a Judge is an additional Judge or a permanent Judge. On the other hand, the appointment of additional Judges even where permanent Judges are needed leads to two important disadvantages. First, the periodic processing of the papers relating to the renewal of the term of an additional Judge consumes a lot of time of the high functionaries who have to be consulted under Article 217(1). Secondly, an additional Judge concerned will not be able to deal with the matters as independently as a permanent Judge can. Because the conduct of an additional Judge would become subject to scrutiny by the Chief Justice of the High Court, the Governor, the Chief Justice of India and the President in connection with his reappointment just when his tenure specified under Article 224(1) is about to come to a close, it is natural that he would not be able to deal with the matters placed before him without fear of incurring the displeasure of any one of them. We have to bear in mind that the State and the Central Governments are the biggest litigants in every High Court and orders passed by an additional Judge are sure to displease them in one way or the other. It is no doubt true that an additional Judge takes the oath of office to deal with the matters without fear or favour, and affection ill-will, but we should remember that he is after all a human being. If an advocate who is at the age of about 45 years, is appointed as an additional Judge for two years, what should he do if at the end of two years he is dropped on the ground that he is not fit for being continued as a Judge ? Having burnt his boats at the Bar, should he make fresh efforts to re-establish himself in the Bar ? Will not his position be made more difficult if he is sent back with a label that he was not found fit to be continued as a Judge ? Similarly in the case of a District Judge who is promoted as a High Court Judge. should he go back as a District Judge at the end of the tenure fixed under Article 224(1)? Probably having in view all these difficulties at the time when the Constitution was enacted, no provision was made for appointing additional Judges. It was no doubt introduced in 1956 to meet emergencies arising out of sudden increase in arrears of cases. Article 224(1) was never intended for appointing almost every Judge first as an additional Judge and then as a permanent Judge. A perusal of the list of Judges of the High Courts maintained by the Government shows that not less than 4/5ths of the Judges have been initially appointed as additional Judges and then as permanent Judges. Only 1/5th of them are appointed as permanent Judges initially. This may be due to the existence of vacancies in the permanent strength when they were appointed as Judges. The sanctiond strength of permanent Judges, however, at no time represented the true position as it is found that always the permanent strengh fell short of the requisite number. This is not a happy position at all but this is not all Judges whose tenure is not assured as in the case of permanent Judges but whose continuance in office after the specified period is subject to the will of any other authority generally do not inspire confidence in the litigant public also. The decision of this Court in Krishan Gopal v. Prakash Chandra MANU/SC/0249/1973 supports this statement. That was a case where the appellant had questioned the jurisdiction of a retired Judge of the Madhya pra-desh High Court who had been requested to function as Judge under Article 224A of the Constitution to try an election petition. This Court negatived that contention of the appellant holding that a retired Judge functioning under Article 223A had all the powers and jurisdiction of a sitting Judge. This Court also negatived another contention of the appellant which had been urged in support of the apppeal. The appeal should have, therefore, been dismissed. The operative part of the judgment, however, was entirely different. It reads at page 215(of SCR): (at p. 216 of AIR) thus:

The two legal contentions which have been advanced on behalf of the appellant in our opinion, arp not well founded, and we have no hesitation to repel them. All the same, looking to the special facts and circumstances of this case, we are of the opinion that it is fit and proper and in the interest of justice that the election petition filed by the appellant be tried by another learned judge of the High Court who may be assigned for the purpose by the Chief Justice of that Court. It seems indeed desirable that election petitions should ordinarily, if possible, be en-trusted for trial to a permanent judge of the High Court, even though we find that additional or acting judge or those requested under Article 224A of the Constitution to sit and act as judges of the High Court, if assigned for the purpose by the Chief Justice, are legally competent to hear those matters. We therefore, set aside the order dated Aug. 10, 1973. The election petition filed by the appellant shall now be heard by a permanent judge who may be assigned for the purpose by the learned Chief Justice. The case may, therefore, be placed before the learned Chief Justice for necessary order's. The appeal is accepted accordingly. The parties in the circumstances shall bear their own costs of this Court and in the High Court

(Emphasis added)

1048. What does this decision mean? Additional or acting Judges appointed under Article 224(1) and (2) or retired Judges requested under Article 224A of the Constitution are looked at with suspicion even by this Court. Why? The reason is obvious. This Court felt that cases like elction petitions which had political overtones should not be entrusted to additional Judges or acting Judges whose tenure was dependent upon the pleasure of the Government which had the power to withhold its consent to the fresh appointments of the Judges concerned to be made at the end of the period specified under Article 224. Is this not sufficient to hold that by constantly resorting to Article 224(1) where it could not be done, the Government has created a second class of Judges in the High Courts even though as we are aware their integrity, character and erudition are beyond question? The answer has to be in the affinative.

1049. The appointment of a retired Judge whose tenure was at the pleasure of the Government to try criminal cases was found to be violative of Article 21 of the Constitution by Chandrachud, C. J-in In re. The Special Courts Bill, 1978's case MANU/SC/0039/1978 (supra). In that connection, the learned Chief Justice observed at pages 549-550 (of SCR) (at p. 517 of AIR) thus:

The second infirmity from which the procedural part of the Bill suffers is that by Clause 7, Special Courts are to be presided over either by a sitting Judge of a High Court or by a person who has held office as Judge of a High Court to be nominated by the Central Government in consultation with the Chief Justice of India. The provision for the appointment of a sitting High Court Judge as a Judge of the Special Court is open to no exception. In so far as the alternate source is concerned, we entertain the highest respect for retired Judges of High Courts and we are anxious that nothing said by us in our judgment should be construed as casting any aspersion on them as a class. Some of them have distinguished themselves as lawyers once again, some as members of administrative tribunals, and many of them are in demand in important walks of life. Unquestionably they occupy a position of honour and respect in society. But one cannot shut one's eyes to the constitutional position that whereas by Article 217, a sitting Judge of a High Court enjoys security of tenure until he attains a particular age, the retired Judge will hold Ms office as a Judge of the Special Court during the pleasure of the Government. The pleasure doctrine is subversive of judicial independence.

A retired Judge presiding over a Special Court, who displays strength and independence may be frowned upon by the Government and there is nothing to prevent it from terminating his appointment as and when it likes. It is said on behalf of the Government that if the appointment has to be made in consultation with the Chief Justice of India, the termination of the appointment will also require similar consultation. We are not impressed by that submission. But. granting that the argument is valid, the process of consultation has its own limitations and they are quite well-known. The obligation to consult may not necessarily act as a check on an executive which is determined to remove an inconvenient incumbent. We are, therefore, of the opinion that Clause 7 of the Bill violates Article 21 of the Constitution to the extent that a person who has held office as a Judge of the High Court can be appointed to preside over a Special Court, merely in consultation with the Chief Justice of India.

1050. This again supports the view that the present pratice of appointing almost all the High Court Judges in itially under Article 224(1) and later on as permanent Judges is not conducive I to the independence of judiciary.

1051. It is important to bear in mind that the independence of the judiciary is one of the central values on which our Constitution is based. No other constitutional agency is shielded as are the superior courts in our country with so many built-in safeguards. The judges can, if they choose to, be guided by the doctrine of conscience only while discharging their duties. They are not expected to be under any kind of external pressure. They are circumscrib ed by 'expectations of neutrality and impartiality and by the traditions of the legal profession which is always keeping a watchful eye on every action of a Judge. In all countries where the rule of law prevails and the power to adjudicate upon disputes between a man and a man, a man and the State, a State and a State, and a State and the Centre, is entrusted to a judicial body, it is natural that such body should be assigned a status free from capricious or whimsical interference from outside and the judges who constitut e it should be granted a security of tenure that lifts them above the fear of acting against their conscience.

1052. Lord Chief Justice Sir Edward Coke is remembered with gratitude by all who cherish the independence of the judiciary as an inviolable part of a democratic Government. That when all the other judges basely succumbed to the mandate of a sovereign who wished to introduce despotism under the forms of judicial procedure. Chief Justice Coke did his duty at the sacrifice of his office'. The extract from 12 Coke, 63 which is found at pages 271 and 272 of the The Lives of The Chief Justices of England' by J.L. Campbell, Vol. I (1849) shows the courage with which Coke, C. J. resisted the attempts of King James I to interfere with the judicial proceedings. Archbishop Bancroft suggested that in order to curb the independence of Lord Coke the King himself should commence to decide whatever cause he pleased in his own person. Accordingly the King summoned all the Judges before him and his Council to know what they had to say against the said proposal. Coke, C.J. said:

By the law of England, the King in his own person cannot adjudge any case, either criminal, as treason, felony, Or betwixt party and party concerning his inheritance or goods; but these matters ought to be determined in some court of justice....

Hearing this, King James asked:

My Lords, I always thought, and by my soul I have often heard the boast, that your English law was founded upon reason. If that be so, why have not I and others reason as well as you the Judges?

Coke, C.J. replied:

True it is, please your Majesty, that God has endowed your Majesty with excellent science as well as great gifts of nature; but Your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this your realm of England, and I crave leave to remind Your Majesty that causes which concern the life or inheritance, or goods or fortunes, of your subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before a man can attain to the cognizance of it. The law is the golden met-wand and measure to try the causes of your Majesty's subjects, and it is by the law that Your Majesty is protected in safety and peace.

1053. The foregoing demonstrates the true role of a Judge in a country where rule of law prevails,

1054. Speaking on the Judge's Remuneration Bill in the House of Commons in March, 1954 Sir Winston Churchill, the then Prime Minister of England observed in the course of his speech thus:

The principle of the complete independence of the Judiciary from the Executive is the foundation of many things in our island life. It has been widely imitated in varying degrees throghout the free world. It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule. The only subordination which a judge knows in his judicial capacity is that which he owes to the existing body of legal doctrine enunciated in years past by his brethren on the bench, past and present, and upon the laws passed by Parliament which have received the Royal Assent, The judge has not only to do justice between man and man. He also--and this is one of his most important functions considered incomprehensible in some large parts of the world--has to do justice between the citizens and the State. He has to ensure that the administration conforms with the law, and to adjudicate upon the legality of the exercise by the Executive of its powers. The relations between the Judiciary and the Legislature are also exceptional and privileged. Parliament has deliberately maintained the judges in a special position, not only by charging their salaries to the Consolidated Fund so that they do not fall within the annual scrutiny of Parliament, but also by eschewing any claim to criticise a judge's conduct in his judicial capacity except on a specific Motion for an Address to the Crown for the judge's removal. That has worked, as far as one can see, without any adverse comment as long as any of us can remember.

Parliament has a vital interest in the efficiency and the integrity of the bench because Parliament and the Judiciary are interdependent and, from different angles, they exercise and enforce their control upon the Executive. Parliament decides what the law shall be and the judges decide what, in fact. Parliament has made it. The labours of Parliament in enacting the law depend for their effectiveness very largely on the fact that there is behind Parliament an independent judiciary applying and enforcing the law with high integrity and a great measure of commonsense and knowledge of daily life, and with high professional skill, and applying it in conformity with the intentions of Parliament. Perhaps only those who have led the life of a judge can know the lonely responsibility which rests upon him. In criminal cases, and in some civil cases, he may have the assistance of a jury, but it is on his shoulders that even in these cases the heaviest burden lies. In other cases in which the honour and fortune of citizens are at stake, he has the sole responsibility of decision, and a heavy one it must be.

The service rendered by judges demands the highest qualities of learnings, training and character. These qualities are not to be measured in terms of pounds, shillings and pence according to the quantity of work done. A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct. (Parliamentary Debates--Commons (1953-54) Vol. 525 at p, 1062).

1055. Moving the very same Bill in the House of Lords the Marquess of Salisbury described the high esteem in which Parliament regarded the judiciary thus:

But even Parliament has put Judges in a very special position. It has taken the precaution, as we all know, of charging their salaries on the Consolidated Fund, so that they are not subject to the annual scrutiny of Parliament; it has also eschewed the right to criticise Judges in their judicial capacity. Parliament, which represents the British people, the whole electorate of the country, has throughout history been at special pains to protect the independence of the Judiciary. This, I should have thought, was both natural and right. After all, the legislation that rules our lives is, in fact, the joint creation of Parliament and the Bench; Parliament decides what the law ought to be, and the Bench decides what an fact it is. As I see it the work of Parliament largely depends for its effectiveness on the fact that both Parliament itself and the individual citizens of the country know there is behind it the Judiciary, which not only applies and enforces the law, but interprets it, where necessary, with high integrity and vast professional skill. I imagine that there can be no profession where professional skill based on long experience is more necessary than in the case of the Judiciary.

(Parliamentary Debates--Lords (1953-54) Vol. 186 at p. 1019).

1056. The foregoing shows the importance of the independence of the Judiciary in our body-Politic.

1057. The next point which requires to be examined is whether an additional Judge who is appointed for a specified term and, who is not reap-pointed after the expiry of the said term can complain before a court of law about his non-appointment. In other words whether such an additional Judge has any judicial remedy at all if he is aggrieved by the Government not appointing him as additional Judge for a further term or as a permanent Judge is the question which has to be considered here. Ordinarily wherever there is a right there should be a remedy, otherwise the right would be without meaning. On a fair construction of Article 224(1) of the Constitution which enables the President to appoint an additional Judge for a period not exceeding two years and of Article 217(1) of the Constitution which limits the tenure of an Additional Judge appointed to the period specified under Article 224(1), it is not possible to make a declaration that an additional Judge should be deemed to have been appointed as a permanent Judge On the ground that when his appointment was made under Artcile 224(1) it was necessary for the President to appoint a permanent Judge in view of the quantum of work pending in the High Court concerned and not an additional Judge The warrant of appointment has to be construed in accordance with the unequivocal language in which it is couched and nothing more can be read into it. The Constitution does not confer any right upon an additional Judge to claim, as of right, that he should be appointed again either as a permanent Judge or as an additional Judge. There is no such enforceable right. a court of law has no power to give effect to any right not recognised by law. It is also not the function of a court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights. It seems to be a very formidable proposition indeed to say that any court has a right to enforce what may seem to it to be just, apart from the Constitution and the laws.

1058. As an aid to the construction of the relevant Articles of the Constitution and in particular Article 217, and Article 224 of the Constitution, it is urged, that the British constitutional convention regarding the tenure of Judges should be adopted. Elaborating this contention, it is urged that in England there are no Judges who may be equated with additional or acting Judges. "All the superior Judges other than the Lord Chancellor hold office during food behaviour subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament." This has been the accepted legal position since the Act of Settlement 1700 and it is so formulated with the object of securing the independence of the judiciary. By a constitutional convention the procedure lor removal of a Judge by the presentation of an address has been evolved. Since the independence of the judiciary is an integral part of the scheme of the Indian Constitution it is argued that whatever constitutional conventions are prevalent in England whose system we have adopted in creating an independent judiciary free from executive interference should be followed while interpreting the words of Artcile 217 and Article 224 of the Constitution. It is argued that when once a Judge is appointed to the High Court under Article 224(1) of the Constitution as an additional Judge by following the procedure of consultation prescribed in Article 217, he should either be appointed as a permanent Judge if a vacancy arises before the end of his tenure fixed pursuant to Article 224(1) which cannot exceed a period of two years or reappoint-ed as an additional Judge before the end of that period if the arrears of work in the Court to which he is appointed is such that there is a need to have an additional Judge for a further period. It is urged that when the occasion to appoint such additional Judge as a permanent Judge or as an additional Judge, as the case may be, arises even though consultation with the functionaries specified in Article 217 of the Constitution should again be followed, the consultation on that occasion shoutt be limited to the existence of a vacancy Of a permanent Judge or the existence of arrears, as the case may be, and not to any other question which may be relevant at the time of the initial appointment. In other words, the argument is that the consultation on the second occasion cannot" relate to the capacity, integrity, behaviour etc. of the additional Judge and any other view, according to the petitioners, would be opposed to the spirit of the constitutional convention which should be followed in such a case as otherwise the whole process would be vitiated on account of the scope it gives for executive interference. Alternatively, it;s urged that since almost all the additional Judges appointed after 1958 have been later on absorbed as permanent Judges, it should be held that a constitutional convention to

appoint every additional Judge as a permanent Judge has come into existence and that such convention should be enforced by courts.

1059. About the applicability of the principle of judicial independence embodied in the provisions relating to the tenure of judges in the Act of Settlement, 1700, reference may be made here to Terrell v. Secretary of State for the Colonies (1953) 2 QB 482 in which a similar contention was urged in support of the case of the claimant therein, In 1930. the claimant, then in his 49th year was offered an appointment as a puisne Judge of the Supreme Court in Malaya. By a letter written on behalf of the Secretary of State, the claimant was informed that the qualifying terms for a pension was seven years and that the compulsory retiring age in the case of a Judge was 62, and the claimant accepted the appointment on those terms. In 1942, while the claimant was on leave in Australia, Malaya was oc-cupied by the enemy and the Letters Patent appointing the claimant, of which there was no copy and those re-lating to other Judges, were lost or destroyed. On April 7, 1942, the claimant was informed that the Secretary of State could not justify retaining him now that his post was necessarily in abeyance and there was no alternative but to award him pension on abolition of his office and the claimant's appointment, accordingly, ended on July 7, 1942, 17 months before his 62nd birthday. On the question whether the claimant was liable in law to be required to retire before the age of 62, it was contended that the principle of judicial independence embodied in the Act of Settlement, 1700, was to be regarded as part of the law of the Straits Settlements, and that therefore the claimant held office during good behaviour and could not be removed; alternatively, that if he had been appointed during pleasure, the correspondence between the claimant and the Secretary of State constituted a contract enforceable against the Crown that the Crown would employ him until he attained the age of 62. It was held by Lord Goddard, C. J. that the provisions of the Act of Settlement relating to the tenure of office of Judges of the Supreme Court in England did not apply to the Straits Settlements or to any other colony; it was for the Crown by exercise of the prerogative or Parliament by statute to set up courts in an acquired territory, and the conditions under which Judges of those courts held office depended upon the terms on which the Crown or Parliament established them. Secondly that it was clear from a consideration of the Straits Settlements Act, 1866, Royal Letters Patent of 1911 which instructed the Governor that he might appoint Judges to hold office during His Majesty's pleasure, and the Royal Warrants relating to the courts in the Straits Settlements that Judges held office during the Royal pleasure; accordingly, the claimant having been appointed by Letters Patent issued pursuant to a Royal Warrant which following the terms of the Letters Patent of 1911, held office during the Royal pleasure. Thirdly, that it was a rule of law that once it was established that the Crown had the right to dismiss at pleasure, that right could not be taken away by any contractual arrangement made by an executive officer or department of State; a Judge appointed during pleasure was in no way (in a) different position from the point of view of dismissal from that of any other person In the Service of the Crown: having been appointed to hold office during pleasure no correspondence which took place before or after the claimant's ap-gointment could affect the terms of appointment; accordingly, the termination of the appointment by the Crown was justifiable in law. It is thus seen that the English court did not extend the benefit of the Act of Settlement, 1700, to a Judge appointed in a British colony. It is more difficult to extend the benefit of that Act to Judges functioning in an independent country like India governed by its own Constitution, even though the same pattern of administration of justice is continued even now as it was in the British India.

1060. The nature of constitutional conventions, understandings and practices, according to A. v. Dicey "make of a body, not of laws, but of constitutional or political ethics." They are not enforced or recognised by the courts. Freeman writes in his 'Growth of the English Constitution (1872)' that when an Englishman speaks of the conduct of a public man being constitutional or unconstitutional, he means something wholly different from what he means by conduct being legal or illegal'. Constitutional conventions in England are those which mainly govern the exercise of the royal prerogative. 'The right to dissolve or to convoke Parliament, to make peace or war, to make new peers, to dismiss a minister or to appoint his successor, even though vested in the Crown is always regulated in accordance with the wishes of the ministry. A ministry which is out-voted on any vital question in the House of Commons is bound to retire from office is an important constitutional understanding which is invariably obeyed. The aim of these precepts is to secure that Parliament or the Cabinet shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State--the majority of the electors or (to use popular though not quite accurate language) the nation.' A convention is a rule of constitutional practice which is neither enacted by Parliament as a formal legislation nor enforced by courts, yet its violation is considered to be a serious breach of constitutional morality leading to grave political consequences to those who have indulged in such violations. They are, according to O. Hood Phillips, 'rules of political practice which are regarded as binding by those to whom they apply, but which ...are not enforced by the courts or by the Houses of Parliament,' Constitutional conventions, understandings or practices therefore constitute a source of constitutional law or binding rule of conduct though not enforced by courts. The true position may be summarised thus:

The people as a whole and Parliament itself, recognise that under the unwritten Constitution there are certain established principles which limit the scope of Parliament. It is true that the courts cannot enforce these, principles as they can under the Federal system in the United States, but this does not mean that these principles are any the less binding and effective.--Prof. A. L. Goodhart,

1061. The conventions are evolved over a long period of political experience and are capable of regulating the operation of political power and are largely relied on particularly in those countries where there are no written Constitutions. They, however, vary from country to country in the Commonwealth. In India we have incorporated some of the conventions in the Constitution itself which has established a Parliamentary form of Government. Articles 74, 75, 77, 85 and 117 contain some of the British constitutional conventions in a modified form. Apart from those conventions which are incorporated in the Constitution, there may be some conventions which are followed by those in office out of poll-tical necessity. The latter however are not capable of enforcement in courts. The courts are not concerned with the 'constitutional practices' which are outside the Constitution. It is, therefore, difficult to make a declaration on the basis of any constitutional convention not found in the Constitution that an additional Judge who was appointed after following the same procedure prescribed for appointment of a permanent Judge should be deemed to have been appointed as a permanent Judge because the circumstances warranted the appointment of a permanent Judge at the time of his appointment, contrary to the express and unequivocal language of the warrant of his appointment.

1062. I must confess before proceeding further that the above argument appeared to be very attractive at one stage but on closer scrutiny it had to be rejected. In doing so I am influenced in no small measure by the following observations made in the dissenting opinion of Justice Holmes in Northern Securities Co. v. United States (1903) 193 U.S. 197, 400, 401 : 48 L Ed. 679, 726, Justice Holmes said:

Great cases like hard cases make bad law. For great cases are called great not by reason of their real importance in shaping the law of future; but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment, These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well settled principles of law bend.

1063. But the question is whether an additional Judge can apply to the Court to direct the Government to consider his case for such reappointment having regard to the situation in which he is placed and the circumstances surrounding his case. This has presented some unsual difficulty in answering it. A rule of practice should, according to some legal philosophers who are principally concrened with what the law ought to be, be treated as binding if it is fair and operates in a fair society and if it involves mutual benefits to the participants, so that the party who receives or expects to receive benefits, must in his turn be willing to render benefits according to the practice, because such practice gives rise to expectations, which when violated would result in harm to one or the other. These philosophical reasons may appeal to the sense of morality but while interpreting the Constitution, it has to be seen whether there is any room for concluding that an enforceable right has come into existence as a consequence of such practice.

1064. Prof. P.S. Atiyah, who has tried to analyse the nature of promissory obligations in the light of the theories of 'promising' associated with the natural lawyers, the utilitarians and a number of other legal philosophers in his book entitled 'Promises, Morals and Law (1981), Oxford, observes at pages 141-142 thus:

Some philosophers have recognised that the binding force of promises may vary in a similar sort of way, but the implications of this have not (I think) been properly grasped. At the lowest, recognition of these differing degrees of bindingness must involve acceptance that pure expectations are not generally thought deserving of a nigh degree of protection and in some cases are not thought worthy of protection at all.

1065. If this is the position in the case of laws relating to promises of private individuals, the position in the case of an appointment under the Constitution would be weaker still unless there is any provision in the Constitution which expressly or by necessary intendment binds the authority concerned to act in a particular way.

1066. When the Chief Justice of a High Court feels that a member of the Bar should be invited to accept the post of a Judge of the High Court, after obtaining the consent of such advocate, he recommends that his case may be considered for appointment as a permanent or as an additional Judge depending on the vacancy which has to be filled up by such appointment. It is stated that in some High Courts including the Delhi High Court an undertaking would be taken from the advocate concerned when his name is recommended for the post of an Additional Judge that he would accept the post of a permanent Judge if offered before the expiry of the term of appointment as additional Judge. Even though such practice of taking an undertaking is not shown to be prevailing in all the High Courts, it is seen that a suggestion had been mdae by K.N. Wanchoo, Chief Justice of India in 1967 that such an undertaking should be taken. K.N. Wanchoo, C.J. recorded a note on June 29, 1967 as follows:

When a member of the Bar is appointed Additional Judge, it must be with a view to making him permanent in the course. If that is not possible, additional judgeship should not be offered to a member of the Bar. I agree therefore that

an undertaking should be taken from the members of the Bar that they will accept a permanent judgeship when offered to them in the course....

1067. As stated elsewhere the. provision for appointment of additional Judges was included in the Constitution by the Constitution (Seventh Amendment) Act, 1956. From that time onwards nearly 500 persons have been appointed as Judges of High Courts. About one-fifth of them were initially appointed as permanent Judges and the rest were appointed initially as additional Judges for a certain term and thereafter appointed as permanent Judges. Some of them were appointed as additional Judges twice or thrice before they were made permanent, Only a few of them were not made permanent, either because they had attained the age of retirement or they had resigned or for some other reason. The number of .persons who were not made permanent on the ground that they were found unfit when their cases for reappointment were considered appears to be almost insignificant as it may not be more than five. But at no time the action of the Government in not reappointing an additional Judge as a permanent Judge was questioned before any Court as it is now done in these cases.

1068. What is to be noticed is that in almost every High Court a few posts have been kept as sanctioned posts of additional Judges as if they were part of the total strength. The result has been that unless all the sanctioned posts of additional Judges and at least one post of a permanent Judge have fallen vacant at a given point of time any new Judge appointed on that occasion being the junior most has to be appointed as an additional Judge and later on appointed as a permanent Judge when a vacancy arises in the permanent strength after all other additional Judges senior to him have been absorbed as permanent Judges. Such a thing could not have happened before the Constitution (Seventh Amendment) Act, 1956 came into force. At that time every Judge of a High Court had to be appointed only as a permanent Judge without any need for scrutinising his case again for purposes of reappointment as additional Judge or permanent Judge.

1069. From the information made available to the Court, it apptars that subject to just exceptions in almost all the High Courts if a realistic review of the present strength is made the total number of permanent Judges needed will be much more the existing number of permanent Judges and additional Judges. This must have been the position for some years past. But still instead of increasing the number of posts of permanent Judges and making appointments to them the practice of inducting a new member as an additional Judge first and making him permanent later on has been continued quite contrary to the letter and spirit of Article 216 and Article 224(1) of the Constitution. Since invariably an additional Judge has been appointed as a permanent Judge in due course except in some rare cases, (sic) member who is appointed as an additional Judge and who has not completed the age of retirement expects that he will be made permanent as and when a vacancy arises in the permanent strength and will be continued as an additional Judge by fresh appointments until such vacancy arises provided the arrears in the High Court requiring his continuance as an additional Judge persist. It cannot be said that such expectation on the part of an additional Judge is not well founded. In addition to such settled expectation on the part of the additional Judge, as the learned Attorney-General has submitted, even on the part of the Govrenment there has always been reluctance to send back an additional Judge to the Bar after the completion of his term specified under Article 224(1) and to lose the services of a Judge with experience. These twin factors namely the expectation on the part of the additional Judge and the reluctance on the part of the Government distinguish the case of an additional Judge from the case of a new member who may be a competitor for the same post at the termination of the tenure of the additional Judge. Ordinarily the additional Judge is continued in service as a Judge or as an additional Judge unless there are any relevant circumstances which would outweigh the above mentioned factOrs. In the absence of any such cogent reasons for not appointing him again, the appointment of somebody else in his place would be an unreasonable or perverse act which entitles an additional Judge to move the Court for appropriate relief in the peculiar circumstances in which Article 224(1) is being operated till now.

1070. At this stage an allied contention urged in this connection may be disposed of. That contention is that in additional Judge cannot be dropped without giving him a reasonable opportunity of being heard in accordance with the prniciples of natural justice. We do not find any merit in this contention since the wide discretionary power of appointment exercisable by the President in the public interest under Article 217(1) is indicative of the absence of an obligation to act judicially. (Vide Para 65 Vol. I of Halsbury's Laws of England (4th Edn,)). It is seen that from the language of that Article that the Constitution has evinced an intention to exclude the operation of the rule of audi alteram partem by conferring on the President unfettered discretionary power subject only to the prescribed procedure of a consultation mentioned therein. (Vide Para 74, Vol. I of 'Halsbury's Laws of England' (4th Edn.)). Having regard to the high office to whi'ch appointment has to be made under Article 217(1) of the Constitution and to the association of the high dignitaries who have to be consulted before any such appointment is made the application of principles of natural justice as of right is ruled out and non-compliance with such principles would not vitiate the decision. But it may still be shown on the available material that there was no cogent reason for the decision.

1071. It is argued on behalf of the Government that there is no precedent in administrative law to such a conclusion being reached. There cannot be a precedent in England, in the United States of America and in Australia as there are no Additional Judges in those countries of the tppe we are having in India and in India too we do not have a precedent because no such case has come up before the Court so far. This case is indeed an extraordinary one. This Court, however, is under a duty to do complete justice when a matter comes before it. What kind of relief should be granted in such a case is governed by the facts and circumstances of the case and the legal provisions governing it. If the problem is a new one a new solution has to be evolved. A Judge who has cultivated assiduously a sense of right and wrong sometimes may even depend upon his hunch while moulding the relief to be granted in a given case. It is a part of the judging process. The following words of judge Hutcheson are illuminating indeed. He tells us:

I must premise that I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision: the decree, as opposed to the logomachy, the effusion of the iudge by which that decree is explained or excused....The judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appearing only in the opinion. The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, ot only to justify that intuition to himself, but to make it pass muster with his critics. Accordingly, he passes in review all of the rules, principles, legal categories, and concepts "which he may find useful, directly or by an analogy, so as to select from them those which in his opinion will justify his desired result. (See Jerome Frank; "Law and the Modem Mind' (1963) p. 112).

1072. The following observations of Denning, L. J. (as he then was) in Can-dler v. Crane, Christmas & Co. (1951) 2 KB 164 at p. 178 though in the minority are also relevant here. He observed:

This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law. and it has always, or nearly always, been rejected. If you read the great cases of Ashby v. White (1703) 2 Ld. Raym, 938, pasley v. Freeman (1789) 3 Term Rep. 51 and Donoghue v. Stevenson (1932) AC 562, you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.

1073. If a progressive view was possible in the English Common Law it should not be difficult to evolve solution in India under the Constitution to do justice within the bonds of law provided the case calls for legal redress.

1074. On the facts and in the peculiar circumsttances of the case, the only thing which the Court can do here is to examine the material before it in order to ascertain whether the refusal to re-appoint the additional Judge concerned is based on any relevant grounds or not and to mould the relief on the basis of the finding on the above question by applying the relevant principles of administrative law. Any relief beyond this would be impermissible in view of the language of the relevant provisions of the Constitution. It is however made clear that even this limited enquiry is made possible only on account of the wrong application of Article 224(1) of the Constitution all these years. A similar enquiry may not be possible in the case of additional Judge to be appointed hereafter.

PART VII

1075. It is interesting to trace the history of the provision relating to the transfer of Judges from one High Court to another. The Draft Constitution of India did not contain any provision providing for such transfer. Clause (c) of the proviso to Article 193(1) of the Draft Constitution merely stated that the office of the judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or of any other High Court. When two members of the Constituent Assembly Shri R. R. Diwa-kar and Shri S.V. Krishnamurthy Rao moved an amendment to Clause (1) of Article 193 of the Draft Constitution for adding Clause (d) which read as "(d) every judge shall be liable to be transferred to other High Courts" it was recorded that there was no need for the amendment as Clause (c) of Article 193(1) of the Constitution provided that the office of a judge shall be vacated by his being appointed to be a judge of another High Court. Perhaps the present Article 222 of the Constitution was not in view at that stage. (See B Shiva Rao: 'The Framing of India's Constitution', Vol., IV p. 165). The note made by the Drafting Committee on the proposal of the Home Ministry that a convention should be established wereby a proportion of judges in every High Court could be recruited from outside the Province stated that there was no bar to the recruitment of Judges of High Court in any Province from outside the Province or to the transfer of a judge of a High Court to another High Court and a convention might be established whereby a proportion of judges of a High Court could be recruited from outside the Province. (B. Shiva Rao; 'The Framing of India's Constitution'. Volume JV, p. 166). In view of the suggestions made in the course of

the discussion on the Draft Constitution, the Drafting Committee incorporated in the Revised Draft, Article 222 which read as follows:

222. (1) The President may transfer a Judge from one High Court to any ether High Court within the territory of India.

(2) When a Judge is so transferred, he shall, during the period he serves as a Judge of the other Court, be entitled to receive in addition to his salary such compensatory allowances as may be determined, by parliament by law and until so determined such compensatory allowance as the President may by order fix.

1076. In the letter dated November 3, 1949. forwarding the Revised Draft to the President of the Constituent Assembly referring to the newly added Article 222, the Drafting Committee observed thus:

Article 222 (new): We have proposed the insertion of this new article to enable the President to transfer a judge of a High Court from one High Court to another. The present provision in the Constitution would not permit of any compensatory allowance being given to judges on such transfer. Power has accordingly been reserved to Parliament to determine by law the compensatory allowance to be paid in case they are so transferred, and, until Parliament so determine, to the president to fix by order the quantum of such allowance.

1077. It may be seen that Article 222(1) which was incorporated in the Revised Draft gave the power to the President to transfer a Judge from one High Court to another without any obligation to consult any other functionary before doing so. But on the 16th November, 1949 an amendment to that Article was adopted by the Constituent Assembly which required the President to consult the Chief Justice of India before exercising the power of transfer. Article 222(1) was fnally enacted as follows:

222. (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court within the territory of India.

1078. Clause (2) of Article 222 was adopted in the form in which it had been proposed in the Revised Draft as set out above. Consequently Article 217 was also suitably amended by introducing the word 'transferred' in proviso (c) to Clause (1) thereof. In defence of Article 222 and in particular of Clause (2) of that Article providing for payment of compensatory allowance to a Judge who is transferred from one High Court to another High Court, Dr. B.R. Ambedkar spoke in the Constituent Assembly before Article 222 was passed thus:

The only question that we are called upon to consider is when a person is appointed as a Judge of a High Court of a particular State, should it be permissible for the Government to transfer him from that Court to a High Court in any other State? If so, should this transfer be accompanied by some kind of pecuinary allowance which would compensate him for the monetary loss that he might has to sustain by reason of the transfer? The Drafting Committee felt that since all the High Courts so far as the appointment of Judges is concerned form now a central subject, it was desirable to treat all the Judges of the High Courts throughout India as forming one single cadre like the I. C. S. and that they should be liable to be transferred from one High Court to another. If such power was not reserved to the Centre the administration of justice might become a very difficult matter. It might be necessary that one Judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talent which may not be locally available. Secondly, it might be desirable tp import a new Chief Justice to a High Court because it might be desirable to have a man who is unaffected by local politics and local jealousies. We thought therefore that the power to transfer should be placed in the hands of the Central Government.

We also took into account the fact that this cower of transfer of Judges from one High Court to another may be abused. A Provincial Government might like to transfer a particular Judge from its High Court because that Judge had become very inconvenient to the Provincial Government by the particular attitude that he had taken with regard to certain judicial matters, or that he had made a nuisance of himself by giving decisions which the Provincial Government did not like. We have taken care that in effecting these transfers no such considerations ought to prevail Transfers ought to take place only on the ground of convenience of the gene-ral administration. Consequently, we have introduced a provision that such transfers shall take place in consultation with the Chief Justice of India who can be trusted to advise the Government in a matter which is not affected by local or personal prejudices.

The only question, therefore, that remained was whether such transfer should be made so obligatory as not to involve any provision for compensation for loss incurred. We felt that that would be a severe hardship. A judge is generally appointed to the High Court from the local bar. He may have a household there. He may have a house and other things

in which he will be personally interested and which form his belongings. If he is transferred from one High Court to another obviously he cannot transfer all his household. He will have to maintain a household in the original Province in which he worked and he will have to establish a new household in the new Province to which he is transferred. The Drafting Committee felt therefore justified in making provision that where such transfer is made it would be permissible for parliament to allow a personal allowance to be given to a judge so transferred. I contend that there is nothing wrong in the amendment proposed by the Drafting Committee.

(The Constituent Assembly Debates, Vol. 11 (1949) pages 580-581)

1079. But by the Constitution (Seventh Amendment) Act, 1956, the words "within the territory of India" in Clause (1) of Article 222 and the whole of Clause (2) which provided for payment of compensatory allowance to a transferred judge were omitted. By the Constitution (Fifteenth Amendment) Act, 1963, a new Clause (2) was introduced into Article 222. After this amendment. Article 222 of the Constitution reads thus:

222. (1) The President may, after consultation with the Chief justice of India, transfer a Judge from one High Court to any other High Court.

(2) When a Judge has been or is so transferred he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act. 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the president may by order fix.

1080. This leads to the question whether under Article 222 of the Constitution, the consent of a Judge of a High Court is necessary to transfer him from one High Court to another High Court. The majority judgment of this Court in Union of India v. Sankalchand Himatlal Sheth MANU/SC/0065/1977 holds that the eon-sent of a Judge for his transfer from one High Court to another High Court is not necessary. It is, however, eon-tended before us that the said interpretation of Article 222 is erroneous as it would affect adversely the independence of the judiciary. It is significant that Article 222 does not state in express terms that the consent of the Judge concerned is a pre-requisite for his transfer. In places where consent of a Judge is needed the Constitution has stated that such eon-sent should be obtained from the Judge concerned (vide proviso to Article 128 and proviso to Article 224A of the Constitution). Under Article 127(1) of the Constitution if at any time there is no quorum of the Judges of the Supreme Court available to hold or to continue any session of the Court, the Chief Justice of India may with the previous consent of the President and after con-sultation with the Chief Justice of the High Court concerned request in writing the attendance at the sittings of the Supreme Court as an ad hoe Judge for such period as may be necessary of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India. Clause (2) of Article 127 makes it obligatory on the part of the High Court Judge who is so de-signated to attend the sittings of the Supreme Court in priority to other duties of his office at the time and for the period for which his attendance required and while so attending he shall have all the jurisdiction, powers and privileges and shall discharge the duties of a Judge of the Supreme Court. It is significant that Article 127 does not require the consent of the Judge to be designated under Article 127(1) to be obtained before asking him to function as an hoc Judge of the Supreme Court even though it may involve the shifting of his residence during the period specified in the letter of request sent to him under Article 127(1). A Judge of a High Court may have to be shifted from one place to another when the reorganisation of the State in which the High Court is situated takes place even though such shifting may not strictly amount to a transfer under Article 222 (See U. B. Raju v. State of Gujarat MANU/SC/0090/1980 and such shifting may not depend upon the willingness of the Judge concerned. It cannot be said that any transfer or shifting of a Judge without his consent would amount to a punishment and would interfere with the independence of the Judge concerned or of the judiciary. If the requirement of the consent of the Judge in question is read into Article 222 then the power conferred on the President ceases to be a power in the jurisprudential sense. A power is defined by Salmond as ability conferred on a person by the law to alter, by his own will directed to that end the rights, duties, liabilities or other legal relations either of himself or of other persons. Powers are either public or private. The former are those which are vested in a person as an agent or instrument of the functions of the State. We are not here concerned with the latter class. If Article 222 is construed as requiring the consent of a Judge to be transferred then the power of the President can be neutralised bv the Judge withholding con-sent. Such a construction would virtually confer on an unwilling Judge an immunity against the exercise of the power by the President under Article 222 even though public interest demands the transfer of the Judge. Article 222 would in that case become almost ineffective. That being so, auch a construction has to be avoided.

1081. One other reason which prompts me to say so is as follows: By way of comparison we may refer here to some of the provisions of the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5. C-49) of England which appears to have been used as a model for some of the relevant provisions of the Government of India Act, 1935 and of the Constitution. Section 3 of that Act corresponds to Article 224A of the Constitution. Section 7 of that Act

corresponds to Article 127 and Section 8 of that Act corresponds to Article 128. Section 4(1) of that Act provides for the establishment of three Divisions of the High Court and they are now called the Chancery Division, the King's Bench Division (now called the Queen's Bench Division) and the Family Divison (formally known as the Probate Divorce and Admiralty Division). Section 4(2) of that Act which provides for the attachment of a puisne Judge to one of the abovesaid three Divisions and his transfer from one Division to another reads:

4. (2) The puisne Judges of the High Court shall be attached to the several Divisions thereof by direction of the Lord Chancellor and any such Judge may with his consent be transferred by a like direction from one of the said Divisions to another:

Provided that no direction shall be given for the transfer of a puisne judge from the King's Bench Division or from the Probate, Divorce and Admiralty Division without the concurrence of the President of that Division.

(Emphasis added)

1082. The pattern of the above section shows that if the Constitution makers intended that the transfer of a Judgs from one High Court to another under Article 222 should be with his consent, they would have included necessary words in Article 222. The words corresponding to the words "with his consent" in the above said Section 4(2) are significantly absent in Article 222 of the Constitution.

1083. It is argued by Shri H.M. Seervai, learned Counsel for the petitioners in Transfer Case No. 22 of 1981 that the majority decision of this Court in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) holding that the consent of the Judge concerned is not necessary for transferring him from one High Court to another High Court under Article 222 of the Constitution requires to be reconsidered for the reason that the assumption of Chandrachud, J. (as he then was) and Krishna Iyer. J. that there was no provision for transfer of Judges of High Courts in the Government of India Act, 1935 is erroneous and that every such transfer should be considered as a fresh appointment of the Judge concerned in the court to which he is transferred. It is contended that if the effect of a transfer under Article 222 is a fresh appointment, the consent of the Judge so transferred should be considered as an essential pre-requisite of every such transfer. I should say at the outset that the argument is really an ingenious one, but it does not appear to have been presented in Sankalchand Seth's case AIR 1977 SC 2328 (supra) in the form in which it is argued before us.

1084. We shall examine the above contention now urged before us in two parts--(1) Whether there was a provision for a transfer of a Judge under the Government of India Act, 1935? and (2) If, there was such a provision, whether the decision of the majority in Sankalchand Sheth's case (supra) requires to be reconsidered?

1085. It is true that Chandrachud, J. (as he then was) and Krishna Iyer, J. have both stated in the course of their opinions that there was no provision in the Government of India Act, 1935 providing for the transfer of a Judge from one High Court to another High Court and both the learned Judges proceeded on the assumption that under that Act the induction of a Judge of one High Court in another was possible only by a fresh appointment. Even Bhagwati and Untwalia, JJ. who constituted the minority in Sakalchand Sheth's case (supra) porceeded on the same basis. Bhagwati, J. observed in that case at page 473: "Neither in proviso (c) nor in any other provision of the Government of India Act. 1935 was the word 'transfer' used and there was also no specific provision in that Act conferring power to transfer a High Court Judge." Untwalia, J. observed in that case at page 510: "Neither in proviso (c) nor in any other section of the Government of India Act was the word "transfer" used Or such a power conferred in terms on the Governor-General." It is, however, assert • ed before us that there was a provision for transfer in the Government of India Act, 1935 for the following reason. Section 220(2) of the Government of India Act, 1935 as it was originally enacted read:

220. (2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years:

Provided that--

(a) a judge may by resignation ur.der his hand addressed to the Governor resign his office;

(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

1086. On October 26, 1944, the British Parliament enacted the India (Miscellaneous provisions) Act, 1944 by which Clause (c) was added at the end of the proviso, to Sub-section (2) of Section 220 of the Government of India Act, 1935. Sec, 2 of the said amending Act of 1944 read:

2. Judges to vacate office on transfer.--At the end of the proviso to Sub-section (2) of section two hundred and twenty of the principal Act (which relates to the term of office of judges of High Courts) there shall be added the following paragraph:

(c) the office of a judge shall be vacated by his being appointed by His Majesty to be a judge of the Federal Court or of another High Court.

1087. Section 6 of the said amending Act of 1944 provided that the above amendment made by Section 2 thereof in the Principal Act should be deemed to have seen made therein immediately before the passing thereof and thus the newly added Clause (c) of the proviso to Section 220(2) was given retrospective effect. Then reliance is placed on the speech of Earl of Munster made on July 4, 1944 in the House of Lords in support of the Bill which later became the said amending Act, the relevant part of which read thus:

Clause 2 of the Bill -makes it dear I that if a Judge of the High Court is transferred to another High Court or to the Federal Court, he shall not retain his office of a iudge of the High Court from which he was transferred. This is the only Clause which will be retrospective. I might mention that there is a similar provision in Section 10 of the Supreme Court of Judicature Act, 1925 applicable to High Court Judges in this country. (Underlining supplied). See Hansard. (Lords) Vol. 132, Col. 632 of July 4. 1944.

1088. Reliance is also placed on two other speeches made in the House of Commons on September 27, 1944 on the same Bill, the relevant parts of which are given below:

1089. The Secretary of State for India (Mr. Amery) stated:

The second clause clears up a doubt which had been expressed as to whether under the provisions of the Act a Judge transferred in India from one High Court to another or to the Supreme Court (sic) might not be considered as still holding his position in his original Court. In our Own Judicature Act, 1925, that point is made clear in Section 10. This Clause simply adopts the Indian condition to the wording of our own Judicature Act. (Underlining supplied). (See Hansard. (Commons) Vol. 493, Col. 345 of 27-9-1944).

1090. Mr, Pethick Lawrence also observed:

With respect to the Judges, I understand the proposal is merely intended to put beyond question what was certainly the intention in regard to them. That is, I understand the only part of the Bill which is retrospective. It is simply to clear up doubts...(Ibid Col, 347)

1091. The argument constructed on the basis of the above material is that Clause (c) of the proviso to Section 220(2) of the Government of India Act, 1935 provided for the transfer of Judges of one High Court to another High Court although it used the word 'appoint' and that is made clear by the use of the word 'transfer' in the marginal note of Section 2 of the amending Act of 1944 which introduced the amendment, I have carefully considered the above submission but I have to state that it requires lot of credulity to accept it in the circumstances of the case. The source of inspiration for this argument is easily traceable to the marginal note to Section 2 of the India (Miscellaneous Provisions) Act, 1944, which reads: Judge to vacate office on transfer'. The importance of a marginal note in statutory construction so far as English statutes are concerned appears to be very little as can be gathered from the following words in Craies on 'Statute Law' (sixth Edn.) page 197:

The sidenotes are not pan of the Act and I believe are not considered or amended by the legislature". Lord Mac Naughten in the Privy Council considered it well settled that the marginal notes cannot be referred to for purposes of construction, Thakurain Balrai Kunwar v. Rae Jagatpal Singh (1904) 31 IA 132, 142 and Lord Hanworth M.R. referring to the Superannuation Act of 1859 said: "It was contended that these catchwords could be used to explain the meaning of sections upon which they appear. As explained by Baggallay LJ in Att.-Gen, v. G.E. Ry. supra, marginal notes are not part of an Act of Parliament. The Houses of parliament have nothing to do with them, and I agree with the learned Lords Justices in that case that the courts cannot look at them Nixon v. Att.-Genl. (1930) 1 Ch 566, 593.

1092. in Maxwell on 'The Interpretation of Statutes' (12th Edition) it is stated at pages 9-10 thus;

The notes often found printed at the side of sections in an Act. which purport to summarise the effect of the sections, have sometimes been used as an aid to construction. But the weight of the authorities is to the effect that they are no parts of the statute and so should not be considered, for they are "inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons.

1093. In 'Statutory Interpretation' by Sir Rupert Cross (1976 Edition), we have a very instructive passage, explaining the relative importance of certain parts of a statute, including side notes (or marginal notes). The learned author is of the view that although the long title, preamble (if any) and short title of a statute may be described as aids to the ascertainment of the intention of Parliament, crossheadings, side-notes (or marginal notes) and punctuation merely indicate the intention of the draftsman. He proceeds to observe at pages 107-106, 113-114 thus:

There is a bewildering mass of conflicting dicta on the question whether some of the above items can be treated as aids to construction at all and, when it is conceded that they may be so treated, upon their weight. This is due to a failure to distinguish between two stages in the process of interpretation at which the aids may be relevant. The first stage is that at which the judge has to decide whether he has any real doubt about the meaning of the word, phrase or passage which he is called upon to interpret. At this point it is hard to believe that he can or should have any inhibitions concerning the parts of the statute which he will read. No doubt he will begin with the section containing the word, phrase or passage in dispute. He can hardly help taking account of the punctuation and side note. If he is to fulfill his duty of reading the whole Act, when it is necessary to do so in order to determine whether there is an ambiguity, he must look at the long title, preamble (if any), short title and cross-headings. If, after this performance, the Judge is satisfied that the word, phrase or passage the meaning of which is in dispute really only has one meaning in the context, he must apply that meaning; but if he has doubts on the subject he will think again. It is at this point that the distinction between the enacting parts of a statute and the other parts becomes crucial. If the sole cause of doubt is a disparity between the otherwise clear and unambiguous words and a title, preamble, heading Or side note, the judge must disregard his doubts and apply the otherwise clear and unambiguous words. This is because there is a rule of law according to which, although the parts of the statute which do not enact anything may be consulted as a guide to parliamentary intent and hence to the meaning of the enacted word, effect must not be given to any doubts which they may raise about the meaning of that word. If, however, the iudge has doubts about the meaning of the statutory provision he is considering for some such other reason as its lack of clarity or apparent pointlessness, he may take the title, preamble, heading or side note into consideration in determining how those doubts should be resolved, As we shall see, reservations have been expressed about the propriety of taking any of the above items into consideration, and it is necessary to be especially cautious when endeavouring to state the law with regard to the extent to which the short title and side notes, not to mention punctuation, may be taken into consideration, but it is submitted that the following remarks of Lord Upjohn in Director of Public Prosecutions v. Schildkamp (1971) AC 1 at p. 28 amply justify the above general account of the relevance of the items mentioned at the beginning of this section to the judicial process of interpretation. The remarks were made with special reference to cross-headings.

When the Court construing the Act is reading it through to understand it, it must read the cross-headings as well as the body of the Act and that will always be a useful pointer to the intention of Parliament in enacting the immediately following sections, whether the cross-heading is no more than a pointer or label, or is helpful in assisting to construe, or even in some cases to control, the meaning or ambit of those sections must necessarily depend on the circumstances of each case and I do not think it is possible to lay down any rules.

The matter must now be considered in slightly greater detail.

....

Side notes:

Chandler y. Director of Public Prose-Qutions. (1964 AC 763) may be cited as conclusive authority |or the proposition that side notes (frequently spoken of as "marginal notes") cannot be Used as aids to construction in any circumstances. The defendants, members of the Commitee of One Hundred, the aim of which was to further nuclear disarmament, participated in a demonstration at an airfield with the object of grounding all aircraft. They were charged with and convicted of an offence against Section 1(i) of the Official Secrets Act 1911 which punishes those who approach prohibited places for a purpose prejudicial to the safety of the State. The side note reads "penalties for spying" and it was conceded that the defendants were not spying, but their appeal to the House of Lords was dismissed on the ground

that they were acting for a purpose prejudicial to the safety of the State within the meaning of Section 1(1). Lord Reid said:

In my view side notes cannot be used as an aid to construction. They are mere catchwords and I have never heard of it being supposed in recent times that an amendment to alter a side note could be proposed in either House of Parliament, Side notes in the original Bill are inserted by the draftsman. During the passage of the Bill through its various stages amendments to it or other reasons may make it desirable to alter a side note, in that event I have reason to believe that alteration is made by the appropriate officer of the House--no doubt in consultation with the draftsman. So sidenote cannot be enacted in the same sense as the long title or any part of the body of the Act.

In spite of its great weight, three remarks may be made with regard to this passage. In the first place what Lord Reid said would seem to be equally applicable to cross-headings, yet we have just seen that this has not prevented them from being treated in much the same way as the long title and preamble. Secondly, even if it is the case that side notes cannot be called in aid in order to resolve doubts, it can hardly be the law that they are to be disregarded by the judge when he is perusing the Act with a view to ascertaining whether he has any doubts. No judge can be expected to treat something which is before his eyes as though it was not there. In the words of Upjohn, L. J.: "While the marginal note to a section cannot control the language used in the section, it. is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind. Finally, Lord Reid's remarks in Chandler v. Director of Public Prosecutions must be read in the light of his subsequent remarks in Director of Public Prosecutions v. Schildkamp (1971) AC 1 at p. 10:

But it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act. I say more realistic because in very many cases the provision before the court was never even mentioned in debate in either House, and it may be that its wording was never closely scrutinised by any member of either House. In such a case it is not very meaningful to say that the words of the Act represent the intention of Parliament but the punctuation, cross-headings and side notes do not.

1094. In Bhinka v. Charan Singh (1959) Supp 2 SCR 798 at p. 809 : ATR 1959 SC 960 at pp. 965, 986 Subba Rao, J. (as he then was) observed thus:

Maxwell on Interpretation of Statutes", 10th Edn., gives the scope of the user of such a heading in the interpretation of 3 section thus, at p. 50:

The headings prefixed to sections or sets of sections in some modern statutes are regarded, as preambles to those sections. They cannot control the plain words of the statute but they mav explain ambiguous words." If there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt.

1095. In Indian Aluminium Company etc. v. Kerala State Electricity Board MANU/SC/0310/1975 Bhagwati, J. said:

It is true the marginal note cannot afford any legitimate aid to a construction of a section, but it can certainly be relied upon as indicating the drift of the section, or, to use the word of Col-lins M. R. in Bushell v. Hammond (1904) 2 K.B. 56.3 "to show what the section was dealing with".

1096. A reading of the passages and decisions referred to above leads to the view thai the Court while construing a statute has to read both the marginal notes and the body of its provisions. Whether the marginal notes would be useful to interpret the provisions and if so to what extent depends upon the circumstances of each case. No settled principles applicable to all cases can be laid down in this fluctuating state of the law as to the degree of importance to be attached to a marginal note in a statute. If the relevant provisions in the body of the statute firmly point towards a construction which would conflict with the marginal note the marginal note has to yield. If there is any ambiguity in the meaning of the provisions in the body of the statute, the marginal note may be looked into as an aid to construction.

1097. The marginal note in question was not incorporated in the Government of India Act, 1935. Moreover, the marginal note differed in material respects from Clause (c) which was added to the proviso to Section 220(2) of the Government of India Act 1935 as Clause (c) referred to appointments to the Federal Court and to another High Court There could be no transfer of a High Court Judge to the Federal Court He could become a Judge of the Federal Court only on being appointed as such under Section 200(2) under a separate warrant of appointment. Even in the case of High Courts, a Judge of a High Court could become a Judge of another High Court under the Government of India Act, 1935 only by an appointment under Section 220(2) by a warrant of appointment. There was no independent provision

corresponding to Article 222 of the Constitution, providing for transfer in the Government of India Act, 1935. The Earl of Munster and Mr. Amery who spoke in the British Parliament on the subject were probably influenced by the marginal note in the amending Act and if I may say so got into an error of proximity when they relied on Section 10 of the Supreme Court of Judicature (Consolidation) Act, 1925, which established the Supreme Court of Judicature in England consisting of His Majesty's High Court of Justice and His Majesty's Court of Appeal both of which were in the same building at the Royal Courts of Justice. Even there Section 10(2) of that Act provided that the office of any Judge of the High Court would be vacated by his being appointed as a Judge of the Court of Appeal and the same Act used 'transferred' in Section 4(2) thereof where it was dealing with the transfer of a Judge of the High Court from one Division to another Division. The Marginal note and the speeches relied on are. therefore, of not much use. On this slender material we cannot hold that there was a provision for transfer of a High Court Judae under the Government of India Act, 1935, I am of the view that there is no error committed by the learned Judges in stating so in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) and the decision in that case is not liable to be reconsidered on the ground now urged before us.

1098. It is alternatively urged that as the Constitution has used the words 'transfer' and 'appointment' interchangeably in Article 222 and in paragraph 11(b)(iii) of the Schedule to the Constitution, the word 'transfer' in Article 222 should be read as equivalent to 'appointment' and a transfer of a Judge therefore results in a fresh appointment which requires his consent, para 11(b)(iii) of the Second Schedule to the Constitution reads thus:

11(b). "Actual service" includes --

(i) & (ii) ...

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

1099. The contention is that since a High Court Judge can become a Judge of the Supreme Court only by a fresh appointment and that in para 11(b)(iii) of the Second Schedule to the Constitution the word 'transfer' is used to denote such appointment, it should be held that even when a High Court Judge is transferred to another High Court he must' be deemed to have been appointed afresh in the Court to which he is transferred and because it is a fresh apooint-ment his consent is necessary as it is needed under Article 217(1). In support of this submission reliance is placed on another part of Maxwell on The Inter-pretation of Statutes' (12th Edition) at page 286 where it is stated thus:

Just as the presumption that the same meaning is intended for the same expression in every part of an Act is not of much weight, so the presumption of a change of intention from a change of language--which is of no great weight in the construction of documents--seems entitled to less weight in the construction of a statute than in any other case; for the variation is sometimes to be accounted for by the draftsmen's concern for "the graces of the style" and his wish to avoid the repeated use of the same words, sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament

1100. The decision in State of Bombay v. Heman Santlal Alreia AIR 1952 Bom 16) is also cited before us for our consideration in support of this contention. In that case, the High Court of Bombay has observed at pages 23-24 thus --

The argument is very attractive and receives considerable support from two different expressions used in the Constitution. It is perfectly true that the ordinary and normal canon of construction requires that when we find in a statute or in a Constitution two different expressions used, as far as possible two different meanings must be given to these expressions, because it must be assumed that the Legislature or the Constituent Assembly did not use two different expressions without intending to convey two different meanings. But instances are not unknown where two different expressions have been used to convey the same meaning.

1101. In the aforesaid Bombay case the learned Judges were concerned with the apparent difference between two expressions 'law in force' and 'the existing law' of which the latter expression was more compendious than the former and could include within its scope both the former expression 'law in force' which meant law actually in force and any law potentially in operation such as law which had been suspended or which had not been extended to certain territories. The two expressions found place in Article 13 and Article 372 respectively of the Constitution. On a consideration of the relevant circumstances, the Bombay High Court came to the conclusion that 'existing law' and 'law in force' had been used in the Constitution without any distinction or difference. We are not faced with any difficulty in this case of the sort with which the Bombay High Court had to deal in the above decision. The Constitution has used the word 'appointment' and 'transfer" to convey two different senses, the first meaning the initial induction of a person

into a post and the latter meaning the shifting of a person from one post to another equivalent post. The members of the Constituent Assembly were quite familiar with this disttaction which was well known to the bureaucracy at the time when the Constitution was enacted. The following history of the legislation supports the view that the two expressions are not used in the same sense as meaning 'appointment' only but they mean two different concepts as stated earlier, Clause (c) of proviso to Section 220(2) of the Government of India Act, 1935 which is the earliest of the relevant clauses read as:

(c) the office of a Judge shall be vacated by his being appointed bv His Majesty to be a Judge of the Federal Court cr of another High Court.

1102. Clause (c) of the proviso to Article 193(1) of the Draft Constitution which did not contain a provision for the transfer of High Court Judges read as follows:

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

1103. In the Revised Draft Constitution which was submitted to the Constituent Assembly on Nov. 3. 1949, in which a provision for transfer had been included in Article 222. Clause (c) of the proviso to Article 217(1) which almost remained unaffected read as:

(c) The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or of any other High Court in any State specified in the First Schedule.

1104. But on November 16, 1949 the above clause was amended at the stage of the third reading of the Constitution emphasizing the difference between 'appointed' and 'transferred' and in order to bring it in accord with Article 222 which provided for transfer of High Court Judges. After the amendment it read as under:

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

(emphasis added)

(See Constituent Assembly Debates, Vol. 11 P. 596).

1105. If the Constituent Assembly had thought that 'appointed' and 'transferred' were interchangeable, there would have been no need for the amendment as the provision in the Revised Draft Constitution was sufficient. But it deliberately amended the provision as stated above by distinguishing a 'transfer' from an 'appointment'. If in spite of this amendment, the Constituent Assembly has allowed para. 11(b)(iii) in the Second Schedule to the Constitution to remain as it is, it only means that it thought that the word 'transfer' had been used therein in a broad sense meaning a physical 'transfer' of the Judge concerned which included both appointment to the Supreme Court and transfer to another High Court and that is clear by the use of a common expression 'transfer' in respect of both the events which follow it in that clause. Moreover, this argument now pressed before us runs counter to Article 222 of the Constitution which appears to be a complete Code on the topic of transfer of a High Court Judge. If transfer is a fresh appointment, Article 217(1) of the Constitution would immediately be attracted and that provision contains an entirely different procedure of consultation from what is contained in Article 222 I. therefore, do not find any merit in this contention.

1106. The next contention urged against the correctness of the majority decision in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) is the one that appealed to Untwalia, J. in that case, namely, that a transferred Judge cannot become a Judge of the High Court to which he is transferred without taking a fresh oath in accordance with Article 219 of the Constitution in the form prescribed in the Third Schedule to the Constitution. The gist of the argument may be summarised thus: Article 219 provides that every person appointed to be a Judge of a High Court shall before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule to the Constitution. The form of the oath in the case of Judges of High Court reads:

I, A. B., having been appointed Chief Justice (or a Judge) of the High Court at (or of)....Swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability,

knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws.

1107. It may be noted that the place where the High Court is situated or the State to which it pertains should be inserted in the blank space shown in the form of oath set out above, Clause (c) of proviso to Article 217(1) of the Constitution states that the office of a Judge of a High Court shall be vacated by his being appointed by the President to any other High Court within the territory of India. The argument is that since a Judge of a High Court has to take a fresh oath when he is appointed as a Judge of the Supreme Court he should also take a fresh oath when he is transferred to another High Court before he enters upon his duties there for the reason that he ceases to be Judge of a High Court to which he is originally appointed on being transferred and the oath taken earlier would come to an end on such transfer as the oath is with reference to the High Court concerned, (which is inserted in the blank space in the form of oath). It is argued that it is not possible for a person to function as a Judge unless the oath is operative. If a transferred Judge has therefore to take a fresh oath then it is urged that the order of transfer would become a fresh appointment for which his consent would be required by necessary implication as it is necessary in the case of a first appointment under Article 217(1). It is difficult to agree with this contention. What is the object of an oath? An oath is taken by a Judge in order to show his allegiance to the Constitution and to affirm that he will duly and faithfully discharge his duties as a Judge without fear or favour, affection or ill-will and that he will uphold the Constitution. The essential part of it is what he swears or affirms to do. The words "having been appointed Chief Justice (or a Judge) of the High Court at (or of)" in the form of oath are only descriptive of the person who takes the oath. The oath is not confined to the High Court where he enters his office. It will operate as long as he discharges judicial duties either in that High Court or in any other High Court to which he may be transferred under Article 222 of the Constitution or even when he discharges any other duty which he may be requested to do by the president as provided in para. 11(b)(i) of the Second Schedule to the Constitution. The oath binds him even after his retirement. A perusal of some of the provisions of the Constitution would establish this. Under Article 127 of the Constitution a High Court Judge can be asked to discharge the duties of Judge of a Supreme Court. Under Article 224A a retired High Court Judge can be asked to sit in the High Court where he had worked as a Judge before bis retirement or in any other High Court and decide cases. In neither of these two cases he has to take a fresh oath, even though he discharges judicial duties. It is contended that since in the first of these two cases he is not treated as a regular Supreme Court Judge but continues to be a High Court Judge and in the second case he is entitled to have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be a Judge of the High Court where he functions under Article 224A no fresh oath would be necessary. This contention overlooks the necessity for taking the oath. The necessity for the oath is that the person who discharges judicial duties in a superior court should perform those duties without fear or favour, affection or ill-will. If that is so. can we say that the effect of the oath comes to an end when he leaves the High Court which is mentioned in the form of oath taken by him or is confined to that High Court? Then it would mean that a High Court Judge who is requested under Article 127 or under Article 224A would not be bound by the oath whan he discharges judicial duties pursuant to those Articles. Such a construction cannot be permitted. The oath he has taken would be operating as long as he discharges any duty arising out of or transable to his status of being a Judge of a High Court. A Judge functioning under Article 127 and Article 224A cannot be freed from the obligations flowing from the oath even though a particular High Court is mentioned in the form of oath taken by him. The position cannot be different when a Judge of a High Court is transferred under Article 222. On such transfer he may cease to be a Judge of the High Court where he was working before such transfer but he continues to be a Judge nonetheless and goes to the Court to which he is transferred as a Judge and not as a newly appointed person who is still to blossom into a Judge by taking the oath as prescribed by Article 219 of the Constitution.

1108. Incidently we may refer to the decision of the High Court of Allahabad in Hira Singh v. Jai Singh AIR 1937 All 888 (KB) in which the question of a Judge not taking oath had arisen for consideration in a slightly different situation. In that case a preliminary objection was taken to the Constitution Of the Bench before which the case came up for hearing as the Bench consisted of Justice Uma Shankar Bajpai, who had been originally appointed as an addi-ditional Judge of that Court under the Government of India Act, 1915 and who after some extensions had been appointed as a permanent Judge on March 17, 1937 with effect from April 1, 1937. Part 3 of the Government of India Act, 1935 which came into force on April 1, 1937 provided that any Judge appointed before the commencement of that Part to any High Court would continue in office and should be deemed to have been appointed under that Part. One of the contentions, which appears to have been urged in this case, was that without taking a fresh oath as required by Section 220(4) of the Government of India Act, 1935, Bajpai, J. could not function as a Judge, That contention was negatived by the Full Bench in the following way at page 590:

All that Section 220(4) requires is that every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscr'be before the Governor or some other person appointed by him an oath according to the form prescribed. The oath is necessary before entering upon his office as a Judge. As already pointed out, Bajpai, J. entered upon his office as a Judge of this Court long ago and took the oath which was then prescribed under Clause 3 of our Letters Patent. The mere fact that he has now been made a permanent Judge does not mean that he "enters unon his

office" as a Judge of this Court afresh, necessitating a fresh oath which is required for a person who enters upon his office for the first time, If this were not the correct interpretation, then the result would be that every time that an additional Judge's term is extended, he would have to tnke a fresh oath. This is contrary to the established practice of this Court. It may also be pointed out that under Section 223 of the Act the powers of the Jud-ges of a High Court in relation to the administration of justice in this Court are the same as immediately before the commencement of Part 3 of this Act.

1109. This decision proceeded on the basis that an additional Judge once appointed does not change his status as a Judge even when his tenure is extended or is made permanent. We need not go to that extent in this case since we are concerned with a Judge who is transferred from one post to another equivalent post,

1110. I am of the view that no fresh oath need be taken by a Judge who is transferred before entering upon duties as a Judge in the High Court to which he is transferred since the oath already taken continues to bind him and the transfer is only traceable to the status which he had acquired after taking the oath earlier in the Court to which he was initially appointed. It is not correct to state that the effect of that oath comes to an end because he vacates his seat in the Court where he was functioning before his transfer. Since there is no necessity for a fresh oath after his transfer, even though as a matter of abundant caution the practice of taking fresh oath is prevailing now a days, it cannot be said that he is appointed afresh as a Judge in the Court to which he is transferred,

1111. There is one other ground to hold that the transfer does not result in a fresh appointment. If it is a fresh appointment in a new High Court with his consent, payment of an additional compensation under Article 222(2) of the Constitution to the Judge who becomes a Judge of that High Court under an order of transfer under Article 222(1) would become anomalous as the other Judges of that Court who are initially appointed to that Court would be getting the usual salary, allowances and other perquisites allowable in the case of a High Court Judge. It is only when a Judge is transferred in the public interest without his volition it can be said that payment under Article 222(2) would not be discriminatory as then he would be belonging to a different class. The payment under Article 222(2) can be justified only by holding that the transfer under Article 222(1) does not result in a fresh appointment in another High Court to which a Judge is transferred.

1112. If a Judge who is transferred under Article 222 of the Constitution is to be treated as having been appointed afresh in the High court to which he is transferred then he will have to be assigned a rank below all the other Judges who were working in that Court before he was transferred. It is only if it is held that he goes there as a person already appointed as a Judge though in another High Court then he can reasonably be assigned seniority over others who were appointed after he was appointed initially as a High Court Judge. Any other view would be irrational.

1113. The argument that a transfer can be made only with the consent of a Judge on personal grounds also doas not appeal to me. While explaining this ground, an illustration of a Judge who on grounds of health is seeking transfer from one High Court to another was given. The illogicality of this submission becomes obvious when we consider whether there can be any justification for paying such a Judge the compensation under Article 222(2) after he is so transferred. There is no merit in this submission,

1114. Relying upon Clause (2) of Article 222 of the Constitution which provides for payment of compensatory allowance in addition to his salary to a Judge who is transferred to another High Court from the Court to which he was originally appointed it is argued that transfer is a punishment or an injury for which compensation is provided under Article 222(2) of the Constitution. It is difficult to accede to this submission. A transfer under Clause (1) of Article 222 of the Constitution could not ever have been considered to be a punishment in disguise, the transfer being in the public interest. The transfers may not be on account of any conduct of a Judge which is not relished by the transferring authority. It may be on account of the public interest such as providing another High Court with a competent Judge who is able to discharge his duties effectively in that Court. Payment oi such compensatory allowance does not imply that a transfer involves an element of punishment, It is difficult to imagine that Article 222 was enacted by the Constituent. Assembly as a measure of punishment to an erring Judge. It may be that when a Judge is transferred in the public interest, he suffers some inconvenience but such inconvenience cannot be termed as a punishment. I am sure that the Chief Justice of India and the President will duly consider all aspects before ordering such a transfer.

1115. The following observations of Chandrachud, J, (as he then was) in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) fully explain the true legal position at pages 444-445 (of SCR): (at p. 2339 of AIR) thus:

Unquestionably, the fundamental principle on which these constitutional provisions and decisions rest cannot be allowed to.be violated or diluted, directly or indirectly. But then the question is Is there any need or justification, in

order to uphold and protect the" independence of the judiciary for construing Article 222(1) to mean that a Judge cannot be transferred from one High Court to another without his consent? I think not. The power to transfer a High Court, Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who, for some reason or the other, has fallen from its grace. The executive possesses no such power under bur Constitution and if it can be shown--though we see the difficulties In such showing that a transfer of a High Court Judge is made in a given case for an extraneous reason, the exercise of the power can appropriately be struck down as being vitiated by legal mala fides. The extraordinary power which the Constitution has conferred on the President by Article 222(1) cannot be exercised in a manner which is calculated to defeat or destroy in one stroke the object and purpose of the various provisions conceived with such care to insulate the judiciary from the influence and pressures of of the executive. The power to punish a High Court Judge, if one may so describe it, is to be found only in Article 218 read with Article 124(4) and (5) of the Constitution, under which a Judge of the High Court can he removed from his office by an order of the President passed after ah address by each House 6th Parliament, supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, has been presented to the President in the same session for such removal, on the ground of proved misbehaviour or incapacity. Thus, if the power of the President, who has to act on the advice of the Council of Ministers, to transfer 9 High Court Judge under Article 222(1) is strictly limited to cases in which the transfer becomes necessary in order to subserve public interest, in other words, If it be true that the President has no power to transfer a High Court Judge for reasons not bearing on public interest but arising out of whim, caprice or fancy of the executive or its desire to bend a Judge to its own way of thinking, there is no possibility of any interference with the independence of the judiciary if a Judge is transferred without his consent.

1116. The last sentence of the above passage is of great significance.

1117. It is clear from the above passage with which I respectfully agree, that an order of transfer made under Article 222 is liable to be struck down by the Court if it is shown that it has been made for an extraneous reason, that is, on a ground falling outside the scope of that Article. Under that Article a Judge can be transferred when such transfer subserves, public interest and the president "has no power to transfer a High Court Judge for reasons not bearing on public interest but arising out of whim, caprice, or fancy of the executive or its desire to bend a Judge to its own way of thinking". It is also clear from the above decision that "the power to punish a High Court Judge, if one may so describe it, is to be found only in Article 218 read with Article 124(4) and (5) of the Constitution under which a Judge qf a High Court can be removed from his office by an order of the President after an address by each House of parliament." is presented in accordance with those clauses on the ground of proved misbehaviour or incapacity. The question debated before us is whether under Article 222, it is open to the President to transfer a Judge from one High Court to another High Court on the ground of misbehaviour or incapacity and whether the said ground falls within the scope of 'public interest' which is the only relevant consideration on the basis of which a transfer can be made under that Article. It is argued that even though the observations made in the majority judgment which are extracted above point out that no valid transfer can take place under Article 222 On the ground of misbehaviour or incapacity of a Judge, the following passage at page 446 (of SCR): (at p. 2341 of AIR) in the same judgment suggests to the contrary,

Experience shows that there are cases, though fortunately they are few and far between, in which the exigencies of administration necessitate the transfer of a Judge from one High Court to another. The factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest of rare occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites. The voice of compassion is heard depending upon who articulates it. Though transfers in such cases are pre-eminently in public interest, it will be impossible to achieve that purpose if a Judge cannot be transferred without his consent. His personal interest may lie in continuing in a Court where his private interest will be served best, whereas, public interest may require that his moorings ought to be severed to act as a reminder that "the place of justice is a hallowed place".

1118. In Sankalchand Sheth's case MANU/SC/0065/1977 (supra) the main question for determination was whether a Judge could be transferred at all without his consent. The majority reached the conclusion that he could be transferred in public interest without his consent. The Court was not specifically concerned with the question whether such transfer could take place on a ground which could be the basis for Parliamentary proceedings for the removal of a Judge under Art, 218 read with Article 124(4) and (5) of the Constitution. Since this question has been directly raised in this case it requires to be examined more closely having regard to the scheme of the Constitutional provisions.

1119. Clause (b) of the proviso to Article 217(1) of the Constitution states that a Judge of a High Court may be removed from his office by the president in the manner provided in Clause (4) of Article 124 of the Constitution for the removal of a Judge of the Supreme Court. Article 218 of the Constitution provides that the provisions of Clauses (4) and (5) of Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the

substitution of references to the High Court for references to the Supreme Court. Clauses (4) and (5) of Article 124 read as follows:

124. (4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity,

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under Clause (4).

1120. Clause (5) of Art, 124 authorises the Parliament by law to regulate the procedure for the presentation of an address and for investigation and proof of the misbehaviour or incapacity of a Judge under Clause (4) thereof. In exercise of the said power Parliament has enacted the Judges (Inquiry) Act, 1968 (Act 51 of 1968) which is applicable to Judges of both the Supreme Court and High Courts. The procedure prescribed by that Act is an elaborate one.

1121. Sections 3 to 6 of the abovesaid Act lay down inter alia that the proceedings for removal of a judge can be commenced with a notice of motion for presentation of an address to the president praying for the removal of a Judge of the Supreme Court or of a High Court in the case of a notice given in the Lok Sabha, signed by not less than one hundred members of that House and in the case of a notice given in the Rajya Sabha, by not less than fifty members of that House. The next step is the consideration of the said notice by the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha as the case may be who may on the basis of the material before him either admit the motion or refuse to admit it. If the notice is admitted, the Speaker or the Chairman should keep the motion pending and constitute a committee of three members of whom one should be chosen from among the Chief Justice and other Judges of the Supreme Court, one from among the Chief Justices of the High Courts and one person who in the opinion of the Speaker or the Chairman as the case may be, is a distinguished Jurist. If notices of motion are given on the same day in both the Houses, no committee can be constituted unless the motion has been admitted in both the Houses and if it is so admitted by both the Houses then the committee should be constituted jointly by the Speaker and the Chairman. The committee so constituted has to frame charge and hold an enquiry in accordance with the procedure prescribed therefor. At the conclusion of the enquiry if the committee reports that the Judge is not guilty of the charges, the motion pending in the House cannot be proceeded with. If the committee finds that the Judge against whom the enquiry is instituted is guilty of any misbehaviour or suffers from any incapacity then the motion should be taken up for consideration by the House concerned. If thereafter the motion is adopted by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting and an address is presented to the President in the prescribed manner by each House of Parliament in same session, a Judge of the Supreme Court or a High Court can be removed from office under proviso (b) to Article 217(1) of the Constitution.

1122. We are concerned here with the transfer of a Judge whose stock-in-trade if we may use this expression, is his reputation. People accept the decision of a Judge not because his decision is always correct but because it is rendered by a person known for his wisdom, integrity. character and impartiality. It is only on account of these qualities of a Judge, people have faith in the judiciary. The litigants naturally expect the presiding officer of a Court to be a virtuous person. If there is a slight rumour which would adversely affect his reputation, he ceases to command the respect of the people. Even a correct judgment given by a Judge who is transferred would be viewed with suspicion, if it is known that a judge whose character and conduct are not above reproach is liable to be transferred from one High Court to another High Court even when his transfer is effected in the public interest and not on the ground of his character or conduct. Then, how can a Judge who is transferred command the respect of the Bar and the people in the State to which he is transferred when his moral personality stands destroyed by the very ad of transfer unless the order of transfer carries a postscript that he is not being transferred on any ground of misbehaviour or incapacity?

1123. The following words of the Bhagavad Gita are quite relevant here:

lHkkforL; pkdhfrej.kknfrfjP;rs II-34

(To the honoured, infamy is surely worse than death).

1124. If a Judge with a bad reputation is transferred, then it would not subserve any public interest at all since people in the State to which he is transferred will not have faith in him. More than all, in the absence of any procedure for an enquiry in which a Judge can clear his conduct, is it fair to expose him to public ridicule? Can payment of

compensation under Article 222(2) of the Constitution be of any avail to an honest Judge? Looking at the problem from another angle, can we say that the Constitution has provided for payment of a reward under Article 222(2) to a Judge who is transferred on the allegation of misbehaviour or incapacity which is not established at an inquiry? All the questions may be set at rest by reading down Article 222 as not conferring on the President the power to transfer a Judge on the basis of untested allegations or rumours about acts of misbehaviour or incapacity of the Judge and it appears that such a construction would no merely be in conformity with Articles 218 and 124(4) and (5) but also would be consistent with the independence of the judiciary As the law now stands it is not open to any single individual, whether it is the President or the Chief Justice of India or anybody else to take cognizance of any allegations of misbehaviour or of Incapacity of a Judge and to any legal action on their basis tinder the Judges (Inquiry) Act, 1968. One hundred Members of the Lok Sabha or fifty Members of the Rajya Sabha alone can initiate any action on such allegations. Naturally, all others are excluded from taking cognizance of them and acting on them. In the absence of any categorisation of acts of misbehaviour or incapacity into different classes -- like those on the basis of which Parliamentary proceedings for the removal of a Judge may be Initiated and those on the basis of which an order of transfer under Article 222 of the Constitution can be passed, it would be incorrect to hold that a transfer of a Judge can be made under Article 222 on mere allegations of misbehaviour or incapacity of a Judge. Article 218 and Article 124(4) and (5) of the Constitution make it clear that Article 222 cannot be resorted to in any such case, and if it is utilised by the President in that way, the transfer would have to be set aside On the ground of excess of jurisdiction. When once it is declared that a transfer of a Judge cannot be made at all on the ground of allegations of misbehaviour or of incapacity and can only be made in the public interest, the reputation of a transferred Judge would remain unsullied and no evil consequences such as those indicated above would follow.

1125. It should be stated here that the learned Attorney-General has fairly conceded that no transfer of a Judge under Article 222 is possible on any of the grounds which may form the basis of a charge in a parliamentary proceeding under Clause (4) and (5) of Article 124 read with Article 218 of the Constitution. It is, therefore, declared that a transfer based on any such ground being outside the scope of Article 222 is liable to be set aside. But a transfer made in the public interest in accordance with Article 222 but without the consent of the Judge who is transferred is unassailable.

1126. It was faintly suggested by one of the petitioners that Article 222 of the Constitution does not in terms apply to a Chief Justice of High Court and hence the transfer of a Chief justice was bad. This contention is based on the assumption that the word 'Judge' in Article 222 does not include within its scope a 'Chief Justice.'

1127. It is submitted that Chief Justice is different from other Judges of a High Court for the following reasons: (a) Article 216 of the Constitution states that a High Court should always have a Chief Justice. It may not have any other Judges; (b) a Chief Justice's post has to be filled up by making separate appointment under Article 217(1) even when it is filled up by a person who is already holding the post of a Judge and the method of consultation is different in his case a Chief Justice has to take a fresh oath: (c) when a Judge is appointed, the Chief Justice has to be consulted; (d) when the Chief Justice's post is vacant or when the Chief Justice is absent, any other Judge may be appointed to perform the duties of the Chief Justice under Article 223 and the Judge so appointed functions only as an acting Chief Justice; (e) under Article 229, the Chief Justice alone ia entrusted with the duty of appointing servants of the High Court and has control over them; (f) under the Second Schedule to the Constitution, the salary of a Chief justice is fixed at Rs. 4,000/- per mensem whereas other Judges get Rs. 3,500/- only; (g) under Article 159, a Governor has to make and subscribe the oath before the Chief Justice and only in his absence before the seniormost Judges available and (h) even in the official ranking assigned for ceremonial purposes, the Chief Justice is placed higher than the other Judges of a High Court. These points of distinction between a Chief Justice and a Judge of a High Court no doubt are there but they do not appear to be conclusive for deciding the question before us.

1128. The expression 'Judge' is not defined in the Constitution. We have, therefore, to go through all the relevant provisions of the Constitution to ascertain its true meaning. If we proceed on the basis that the expression 'Judge' does not include a 'Chief Justice,' several anamolous results follow. In Article 217(1) the procedure for appointment of a Judge is provided. It says that every Judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. This clause makes it clear that the expression 'Judge' includes a 'Chief Justice' also. If a Chief Justice is not a Judge, there would be no separate age of retirement for him. Clauses (a)(b) and (c) of the proviso to Article 217(1) would also become inapplicable to a Chief justice as the word 'Chief Justice' is not used in them. Similarly. Article 217(1) which prescribes qualifications of a Judge, Article 217(3) which provides the procedure for determination of the age of a Judge, Article 219 which requires a Judge to make and subscribe an oath, Article 220 which imposes restrictions on the right of persons who have held office as permanent Judges to practise in certain courts. Article 221 which prescribes and protects the salaries of Judges and Article 224A which provides for appointment of retired Judges to sit and act as Judges of a High Court would become inapplicable to a Chief Justice, Article 225 which has preserved the powers of Judges of High Courts which they were exercising before the

commencement of the Constitution becomes inapplicable to a Chief Justice. If the term Judge did not also include a 'Chief Justice' all Chief Justices of High Courts who were holding office immediately before the commencement of the Constitut ion had to vacate their offices on Jan, 26, 1950 because Article 378(1) and (2) referred to 'Judges' only. If the contention urged on behalf of the petitioners is accepted, the foregoing absurd results would ensue. Some other consequences of accepting this contention will be that the expression 'one Judge' occurring in Article 133(3) of the Constitution will not Include a 'Chief Justice' of a High Court and by analogy, the word 'Judges' in Article 145(2) and (3) will not include the 'Chief Justice of India.'

1129. In these circumstances the reasonable way to construe the above Articles of the Constitution is to interpret the word 'Judge' wherever it appears in the Constitution as including the 'Chief Justice' also except where a particular provision expressly or by necessary implication distinguishes a Chief Justice from a Judge. In all other places, the word 'Judge' should be considered as having been used in a generic sense. The conclusion is so self-evident that it is not necessary to support it by authorities. Article 222 of the Constitution, therefore, applies to all Judges of High Courts including a Chief Justice. Of course, a Chief Justice can only be transferred as a Chief Justice of another High Court, and not as a Judge.

1130. I may say a few words hero on the policy of appointing the Chief Justice in every High Court from outside the State. In our country we are used to the British Chief Justices presiding over the High Courts for more than a century. Many of them turned out to be distinguished Judges and the fact that they were functioning in a country which they had not known before did not act as any hindrance to their work. Even the ignorance of any of the local languages did not act as a serious obstacle to their functioning efficiently.

1131. The Fourteenth Report of the Law Commission having considered the question of appointment of Chief Justices of High Courts from outside the State observed in Chapter VI thus:

26. A large body of evidence before us has suggested that it should be made an invariable practice to fill a vacancy in the office of Chief justice by appointing a Judge from outside the State. Such course, it is said, will have the advantage of giving the Chief Justice of India a wide choice in recommending a person suitable for that office. It has also been pressed upon us that bringing a Chief Justice from outside the State will have a very healthy influence, in that, it will promote a sense of unity in the country and prevent the Chief Justice being swayed by local connections and local influences. It may be mentioned that Chief Justices from outside the State have been appointed in some of the States and these appointments have proved a success. Though the analogy may not be very pertinent, we may refer to the practice of appointing Governors who do not belong to the State, which has been in vogue since the advent of the Constitution.

27. On the other hand it has been urged with considerable force, that it would not be fair, that competent persons on the Bench of the State High Court should be shut out from the chance of occupying the office of the Chief Justice in their own States. It has also been pointed out that the proposed practice may prevent members of the Bar from accepting appointments as Judges, the opportunity of serving as Chief Justices in their own States being denied to them.

28. On the whole we are of the view that it would be difficult to lay down such an inflexible practice. It should, we think, be clearly understood, that the seniormost puisne Judge of a Court should not merely by reason of his seniority have an expectation of succeeding to the office of the Chief Justice, In every case of a vacancy in the office of the Chief Justice, the senior puisne Judge should be appointed to the office, only if he has the necessary qualifications. Indeed the Chief Justice of India may well bear in mind the desirability of appointing a Chief Justice from outside the State by reason of the consideration we have mentioned. Even in cases where the seniormost puisne Judge is fit to occupy the office, it would be doing no injustice to him to leave him out and appoint him to a similar office in another State.

1132. The 80th Report of the Law Commission observed in Chapter VI thus:

6.19. It would not be a healthy practice in case the seniormost Judge is considered not suitable for the office of Chief Justice to appoint a junior Judge from the same court as Chief Justice, In such an event, the proper course, in our opinion, would be to appoint some Judge from outside the State. It should also be ensured that the Judge so appointed as Chief Justice should have been on the High Court Bench for a sufficiently long time and should have that much seniority as a Judge as not to cause resentment in the senior Judges of the High Court that someone junior in service has been appointed in supersession of their claim. While appointing someone from outside the State as Chief Justice of the High Court, care must also be taken to see that his tenure as Chief Justice is not so long as to block the chances of not only the seniormost Judges but also of other Judges in the High Court. By the words "blocking the chances," we mean

hot only preventing the appointment of a person as Chief Justice but also substantially reducing the length of his term as Chief Justice. Of course, arithmetical exactitude and precision in these matters cannot be insisted upon.

1133. Neither of the above two Reports of the Law Commission, however, notices any impropriety in appointing Chief Justices from outside. Such practice has its own distinct advantages particularly in these days. Since the Chief Justice of India has got to be consulted before appointing a Chief Justice of a High Court one may feel assured that there will be very little room for anything prejudicial to the community of High Court Judges happening by the implementation of the policy of appointing Chief Justices of the High Courts from outside the State. The advantages of having some Judges in every High Court from outside have been considered by some high-power bodies earlier.

1134. The States Reorganisation Commission presided over by Justice S. Fazal Ali, former Judge of the Supreme Court of India in its Report prepared in the year 1955 observed at paragraph 861 thus:

861. Guided by the consideration that the principal organs of State should be so constituted as to inspire confidence and to help in arresting parochial trends, we would also recommend that at least one-third of the number of Judges in a High Court should consist of persons who are recruited from outside that State. In making appointments to a High Court Bench, professional standing and ability must obviously be the overriding consideration. But the suggestion we have made will extend the field of choice and will have the advantage of regulating the staffing of the higher judiciary as far as possible on the same principles as in the case of the Civil Service.

1135. In para 58 of the Summary of Conclusions and Recommendations given at the end of its Report, the States Reorganisation Commission recommended:

58. At least one-third of the number of Judges in the High Court of a State should consist of persons who are recruited from outside that State. (para 861).

1136. The Study Team on Centre-State Relationships (Shri M.C. Setalvad former Attorney-General was the Chairman of the Team) appointed by the Administrative Reforms Commission also considered the question of appointment of High Court Judges in its Report submitted in the year 1968. Dealing with the recommendations of the States Reorganisation Commission On the above questions, the Study Team observed:

We would nevertheless suggest that, without necessarily preparing panels, the recommendation of the States Reorganisation Commission should be given effect to as far as possible. Some "outside" appointments are made even now but these are few and far between. A serious effort to increase their number will make its own contribution to efficiency, independence and national integration. Unlike the suggestion for the panel, this proposal does not affront any canons of delicacy and discretion. And yet a couple of objections might be raised and need to be dealt with:

(a) obviously when appointing an "outsider", it will be necessary to consult the Chief Justice and the government of the State from which he hails. As the Chief Justice of the High Court in which the vacancy occurs will not have any personal knowledge of the suitability of the candidate, he will he unable to give his opinion although constitutionally required to do so. The objection is of a technical nature. The spirit behind the present procedure is that the opinion of the Chief Justice who knows the candidate's reputation and ability should be given due weight. We notice that "outside" appointments have been made in the past without any constitutional difficulties arising. The same could continue to happen in the future. Difficulties might arise if Chief Justices of High Courts to which "outsiders" are allocated object frequently to candidates so allocated. But the whole approach recommended here postulates an enlightened national policy on the problem to which Chief Justices can be expected to subscribe. Normally, therefore, a Chief Justice should not object to the allocation of a carefully selected man. There is in any case no virtue in making any Bench the monopoly of the local Bar irrespective of available merit there or not;

(b) it may be thought that the authority and prestige of a High Court would be affected in case members of an outside Bar are appointed to it. This is an insubstantial objection, because a High Court must command respect for the quality of justice that it dispenses and not for its ability to promote members of its Bar to the Bench. Leaving this aside, the proposal in any case does not envisage that more than one-third of the number of judges of a High Court will come from outside. This cannot (sic) affect the prestige and authority of the High Courts and the Chief Justices. Besides, any fancied diminution in the position of the Chief Justice on account of this one-third component from outside will be offset by the fact that candidates from his State may be going to other High Courts through a selection procedure in which he is associated.

(Vide Report of the Study Team on Centre-State Relations, Vol. I cages 188-190).

1137. Accordingly the Study Team recommended at page 195 Volume I of its Report that as far as practicable, one-third of the number of Judges of a High Court should be from outside.

1138. It appears from paragraph 13.21 of Volume I of the Report of the Study Team that the Chief Justices themselves had pressed for the trans-ferability and the formation of an all-India cadre of 'judges. The relevant part of that paragraph reads -.

13.21...Transferability and the formation of an all-India cadre of Judges was urged by the Chief Justices on the following grounds:

(i) that such a cadre would have the advantages of extending the field of choice of High Court Judges and of regulating the staffing of the higher iudi-ciary on the same lines as that of the civil service;

(ii) that a judiciary so recruited would be more independent having less local connections;

(iii) that the difficulty experienced in constituting division benches in hearing cases as one or more of the judges recruited from the State had been engaged in the case at an early stage either as counsel or as party or happened to be related to one or more of the litigants would be avoided;

(iv) that a unified cadre of High Court Judges with free transfers all over the country would help to break down the barriers bf regionalism which held sway in many parts of the country

1139. The foregoing shows that the Chief Justices did not find anything objectionable in the transfers of Judges provided they were made in accordance with Article 222 of the Constitution The Study Team, however, followed the recommendation made in the Fourteenth Report of the Law Commission but added.

We consider that it is important to make "outside" appointments a reality, and that once that is done it is not necessary to insist on a regular system of transfers

1140. The 80th Report of the Law Commission has also approved the above idea of having some Judges in every High Court from outside.

1141. The principle underlying this policy is not something new to oriental countries. In the latter half of the eighteenth century in China, there was in vogue a rule called the 'Law of Avoidance. "The 'Law of Avoidance required that no one be appointed to high positions in his native province and no two members of the same family be allowed to work in the same locality or service, so as to prevent nepotism and the forming of cliques". (Immanuel C.Y. Hsu: "The Rise of Modem China', Second Edition. p. 62)

1142. One of the arguments in favour of appointing one-third of the Judges in every High Coart from outside the State is that such a step would assist in bringing about national integration. It is my view that there is a flood deal of substance in this argument although some dismiss the idea very lightly, Clauses (a) to (e) of Article 51A of the Constitution need to be quoted here:

51A. It shall be the duty of every citizen of India--

(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities;....

1143. Article 51A of the Constitution which lays down the fundamental duties of the citizens of India was introduced into the Constitution with effect from Jan, 3, 1977 probably to remind Indiana of certain values which they were slowly neglecting during the period of thirty years following the independence of the country. Even in the year 1963 itself by the Constitution (Sixteenth Amendment) Act, 1963, the form of oath to be taken by a Judge which is set out in the Third Schedule to the Constitution was amended by adding the words "that I will uphold the sovereignty and integrity of India", The preamble of the Constitution was amended with effect from January 3, 1977 by substituting the words "unity and integrity of the Nation" in the place of the words "unity of the Nation" which were there earlier. These amendments had to be made to fight the divisive forces which were raising their ugly heads in different corners of India. The nation should be grateful to the makers of the Constitution for enacting the provisions relating to the Indian judiciary which have brought into existence an unitary judicial system in a federal Constitution. Law (dharma) has always been an unifying force in India. The entire country from Kashmir to Kanya Kumari possesses this great inner bond of unity. Judges and lawyers who are the votaries of Indian law should feel proud of their heritage. Just as the Indian soldier feel proud of defending the borders of the country treating the whole country as a single unit, Judges and lawyers should feel that they are a part of a single judicial system operating throughout India and that they are not just members of one State or another. They should be prepared to work in any part of India irrespective of the State in which they are born or brought up. Today no High Court can afford to remain isolated from other High Courts as a judicial island. Lawyers and Judges of one High Court should be prepared to receive with open arms lawyers and Judges of other High Courts. They should also be prepared to spare the services of their Judges to be utilised in other High Courts. It is only then the dream of an integrated Bar and of an integrated judiciary will be fully realised. The Indian judicial system in one way is a great forging instrument of unity which, if properly used, can assist the country in bringing about national integration which is no longer a mere slogan. National integration is an absolute necessity now. O national integration is not a matter of public interest, what else can be in the public interest.

1144. It is difficult to believe that Judges who day in and day out are applying decisions of English, American and Australian courts while administering justice will not be able to pick up the local laws in force in the State in which High Court to which they are transferred is situated. Are not the Judges of the Supreme Court who come from different States deciding cases from all the States in which very often they have to construe one local law or the other ? The argument that the efficiency of Judges will suffer if they are transferred is merely an argument of despair which has got to be rejected.

1145. The plea that a Judge of a High Court should always know the language of the region is again unsustainable. The Constitution makers knew that in India there were a number of regional languages. Yet they enacted Article 222 of the Constitution without any limitation. A Judge of one High Court who does not know the, regional language of another State may be transferred to the High Court of that State. It is well known that many Britishers who did not know any Indian language discharged their functions, very efficiently as High Court Judges in India before the commencement of the Constitution. The language of the High Courts has always been English. Even after the commencement of the Constitution, many Judges who did not understand the local language have functioned as High Court Judges to the satisfaction of all concerned. When the reorganisation of State took place in 1996, the States Reorganisation Commission consisting of Shri Justice Fazal Ali, Shri H.N. Kunzru and Shri K.M. Panikkar strongly pleaded as stated earlier for appointment of at least one-third of Judges of a High Court from outside the State. English is now the language of the Supreme Court and all the High Courts. Article 348 of the Constitution reads:

348(1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides--

(a) all proceedings in the Supreme Court and in every High Court.

(b) the authoritative texts -

(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State.

(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinance promulgated by the President or the Governor of a State, and

(iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State, shall be in English language.

(2) Notwithstanding anything in Sub-clause (a) of Clause (1), the Governor of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State:

Provided that nothing m this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in Sub-clause (b) of Clause (1), where the Legislature of a State has prescribed any language other that the English language for use in Bills introduced in or Acts passed by the Legislature of the State or in Ordinances promulgated by the Governor of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.

1146. Judges of one High Court trained in English language should not, therefore find any difficulty in carrying on their duties in other High Courts which are situated in other States. All the high-power bodies which have expressed their opinion in favour of transfers of Judges have felt that, the advantages flowing from the transfers of High Court Judges would outweigh the disadvantages, if any, including those flowing from the various regional languages of India. It is not possible to hold that the transfers of Judges would be opposed to the public interest on this ground also,

1147. It is pertinent to deal with a statement made in Sankalchand Sheth's Case MANU/SC/0065/1977 which reads as follows:

Policy transfers on a wholesale basis which leaves no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution

1148. On the basis of this it is argued that policy transfers as such are not permissible under Article 222 of the Constitution. I do not understand the above said observations as conveying that meaning and if they so convey that meaning, then it has to be observed that they are too broadly made. What the above statement means is that even where a transfer is made pursuant to a valid policy, each transfer should receive adequate consideration at the hands of the authorities concerned. All other relevant matters in relation to the Judge who is proposed to be transferred pursuant to the policy should be considered before ordering his transfer. If on such consideration it is found that he should not be transferred, the proposal should be given up and the question of transferring another Judge in furtherance of the policy may be taken up for consideration. By doing so the policy remains unaffected and the public interest to be served by the policy also would not suffer. But if it is argued that the above statement bars every, transfer made pursuant to a policy which is in the public interest then it has to be held that to the extent it bars such transfers is opposed to the provisions of Article 222 which empowers the President to transfer a Judge after due consultation with the Chief Justice of India, of course, in the public interest and is thus not binding as such a construction would curtail the width of the power under Article 222.

1149. I am of the view that in view of the foregoing reasons and opinions expressed by several expert bodies any transfer of a Judge of a High Court under Article 222 of the Constitution in order to implement the policy of appointing the Chief Justice of every High Court from outside the State concerned and of having at least one-third of the Judges of every High Court from outside the State, of course, after consultation with the Chief Justice of India would not be unconstitutional.

PART VIII

1150. In order to establish their case, learned Counsel appearing for Shri V.M. Tarkunde and Shri S.N. Kumar, called upon the Union Government to produce the records pertaining to the consultations made by the President under Article 217(1) of the Constitution in so far as the case of Shri S.N. Kumar was concerned. The demand made by them was opposed by the Union Government on the ground of privilege. It was contended by the Union Government that the documents whose discovery was sought being those containing communications made by high constitutional functionaries regarding a high level appointment it would not be proper to compel the Union Government to produce them.

1151. The question which relates to the circumstances in which the Government can claim that the documents, the production of which is demanded before a court of law, should not be compelled to be produced on the ground of privilege is of great constitutional importance. In Duncan v. Cammell, Laird & Company Ltd. (1942) AC 624, decided

during the Second World War by the House of Lords such a question arose for consideration. On June 1, 1939, the submarine, Thetis, which had been built by the respondents in that case under contract with the Admiralty was undergoing her submergence tests in Liverpool Bay, and while engaged in the operation of a trial dive sank to the bottom owing to the flooding of her two foremost compartments and failed to return to the surface with the result that all who were in her, except four survivors were overwhelmed. Ninety-nine men lost their lives. A large number of actions were instituted by those representing, or dependent on, some of the deceased against respondents and three other persons claiming damages for negligence. All of these actions, except two, were stayed until after the trial of two test actions, which were consolidated, the plaintiffs in those two test actions being the appellants in the above case. The respondents in their affidavits of documents objected to produce certain documents called for by the appellants on the ground that they (the respondents) had been asked by the Treasury Solicitor on behalf of the First Lord of the Admiralty not to produce the said documents which had come into their possession under a contract with the Government and to claim Crown Privilege In respect of them. The First Lord of the Admiralty also filed an affidavit stating that the documents in question had been considered by him and he had formed the opinion that it would be injurious to the public interest that any of the said documents should be dis-closed to any person. The documents, to the production of which objection was thus taken included (either in original or in copy) the contract for the hull and machinery of the Thetis, letters written before the disaster relating to the vessel's trim, reports as to the condition of the Thetis when raised, a large number of plans and specifications relating to the various parts of the vessel etc. The trial Judge declined to allow inspection of the documents and the Court of Appeal affirmed his decision. The House of Lords also upheld the claim of privilege by a unanimous decision, holding that a Court of law should uphold an objection taken by a public department called on to produce documents in a suit between private citizens if on grounds of public-policy they ought not to be produced and that documents otherwise relevant and liable for production must not be produced if the public interest required that they should be withheld. The House of Lords in that case laid down two tests on which documents may be withheld -- one based on the contents of the documents and the other namely the class to which the documents belonged, which on grounds of public interest must be withheld from production. It proceeded to lay down that an objection validly taken on the ground that it would be injurious to the public interest was conclusive. But it was held that the mere fact that the minister of the department did not wish the documents to be produced was not an adequate Justification for objecting to their production. Production could also be withheld when the public interest would otherwise be dandified as where disclosure would be injurious to national defence or to good diplomatic relations or where the practice of keeping a class of documents secret was necessary for the proper functioning of the public service. In such a case, it was held that the Court should not require to see the document for the purpose of ascertaining whether disclosure would be injurious to the public interest. It was further held that it was essential that the decision to object should be taken by the minister who was the political head of the department concerned and that he should have seen and considered the contents of the documents and himself formed the view that on grounds of public interest they ought not to be produced and such objection should ordinarily be taken in an affidavit of the minister. This decision, it may be seen, laid down that privilege could be claimed in respect of a document on two alternative grounds viz., (a) that the disclosure of the contents of the document would be injurious to the public interest by endangering national security or diplomatic relations and (b) that the document belonged to a class which should not be disclosed to ensure the proper functioning of public service. Viscount Simon who spoke for the House of Lords in this case expressed! his disagreement with the decision of the Privy Council in Robinson v. State of South Australia (No. 2) (1931) AC 704, in which it had been held that it was proper for a court to inspect the documents in respect of which privilege had been claimed to determine whether their production would be prejudicial to the public welfare. In the course of his speech, the noble Lord observed at page 641 thus:

As Lord Parker said in another connection : "Those who are responsible for" the national security must be the sole Judges of what the "national security requires" : The Zamora (1916) 2 AC 77 107. In Robinson v. State of South Australia (No. 2) (1931) AC 704, the Judicial Committee reversed the decision of the Supreme Court of South Australia, which had refused to order the inspection of documents which the Minister in charge of the department objected to produce of grounds of public policy, and remitted the case to the Supreme Court with the direction that it was one proper for the exercise of the Court's power of inspecting documents to determine whether their production would be prejudicial to the pub-lie welfare. I cannot agree with this view. Their Lordships' conclusion was partly based on their interpretation of a rule of Court which was in the same terms as Order XXXI, Rule 19A, Sub-rule (2), of the Rules of the English Supreme Court. This sub-rule provides: "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a Judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." In my opinion, the Privy Council was mistaken in regarding such a rule as having any application to the subject-matter. The doubt expressed on the point by du Parcq L.J. in the present case if fully justified. The withholding of documents, on the ground that their publication would be contrary to the public interest is not properly to be regarded as a branch of the law of privilege connected with discovery. "Crown privilege" is for this reason not a happy expression. Privilege, in relation to discovery, is for the protection of the litigant and could be waived by him, but the rule that the interest of the State must not be put in Jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation, and, indeed, is a rule on which the Judge should, if necessary, insist, even though no objection is taken at all.

1152. Nearly five years after the Judgment in Duncan's case (1942) AC 624 (supra) the Crown Proceedings Act, 1947 was passed by the British Parliament and the Crown privilege recognised under the common law was regulated by Section 28 of the said Act. But that section was, however, subject to the proviso that it could not override any rule of law which authorised or required the withholding of any document or the refusal to answer any Question on the ground that the disclosure of the document or the refusal to answering of the question would be injurious to the public interest.

1153. Robinson's case (1931) AC 7041 (supra) which was dissented from by the House of Lords as stated above arose out of an action in South Australia. The Judicial Committee had held in that case that a South Australian Rule which provided that where on an application for an order for inspection, privilege was claimed for any document it was lawful for the Court or a Judge to inspect it for the purpose of deciding as to the validity of the claim applied where privilege was claimed for an official document on the ground that its disclosure would be contrary to the interests of the public even though the claim was supported by a statement to that effect by the Minister responsible. It was further held that the Court had always in reserve, the power to inquire into the nature of the document for which protection was so sought and to require some indication of the injury which would result from its production. The Judicial Committee added that the claim to protection in the case of documents relating to trading, commercial or contractual activities of a State could rarely be sustained especially in time of peace and that documents would prejudice the case of the State in the litigation or assist the other party was a compelling reason for their production only to be over borne by the gravest reasons of State policy or security.

1154. In three cases which came before the Court of Appeal after Duncan's case (1942) AC 624 (supra) was decided by the House of Lords, while it was held that on matters touching national security and foreign affairs, the application of the principle enunciated in the Duncan's case (supra) in an unqualified manner was not open to question, doubts were entertained about its application without modification to a class of documents (See Merricks v. Nott-Bower (1964) 1 All ER 717, Re Grosvenor Hotel, London (No. 2) (1964) 3 All ER 345 and Wednesbury Corporation v. Ministry of Housing and Local Government (1965) All ER 186). When it was asserted by the Attorney-General that so long as the objection was taken in proper form, the Judge must treat the claim of privilege as conclusive, in Re Grosvenor Hotel's case (supra) Lord Denning, M.R. alter referring to the practice prevailing in Scotland and Commonwealth countries, observed at pages 361-362 thus:

In view of these developments, I think that it is open to the House and I believe to us, to reconsider the matter and I must say that, in my judgment, the law of England should be brought into line in this matter with that of Scotland and of the rest of the Commonwealth. The objection of a Minister, even though taken in proper form, should not be conclusive, If the Court should be of opinion that the objection is not taken in good faith, or that there are no reasonable, grounds for thinking that the production of the documents would be injurious to the public interest, the Court can override the objection and order production. It can, if it thinks fit, call for the documents and inspect them itself so as to see whether there are reasonable grounds for withholding them ensuring, of course, that they are not disclosed to anyone else. It is rare indeed for the Court to override the Minister's objection, but it has the ultimate power, in the interests of justice, to do so. After all, it is the Judges who are the guardians of justice in this land; and if they are to fulfil their trust, they must be able to call on the Minister to put forward his reasons so as to see if they outweigh the interests of justice.

1155. The privilege based not on their contents but on the class to which the documents belonged was held to be not acceptable. On balance however the Court of Appeal upheld the privilege in the light of the above observations.

1156. It is interesting to notice here the recommendation made by the General Council of the Bar in England in a memorandum issued by it in Feb., 1956 after a critical examination of the decision in Duncan's case (1942) AC 624 (supra). In para 15 of that memorandum the Council recommended thus:

We therefore recommend--

(1) A departmental head seeking the exclusion of any evidence should be required to state in his affidavit whether the adduction of such evidence would be prejudicial to the national security, including diplomatic relations, or some other head of public interest, which he should specify.

(2) In either case the departmental head should be required to state whether the evidence would be so prejudicial when adduced in open or in closed Court.

(3) Where his claim to privilege is based on ground of national security it should be conclusive.

(4) Where his claim is based on grounds of public interest other than national security it should be examinable by the Court.

(5) The Court should be given power to order a hearing or partial hearing in closed Court on the ground that publication of any evidence to be given in the course of the proceedings would be prejudicial to the national safety or the national nterest.

(Vide Appendix 4 to 'Law and Orders' by C.K. Alien, 2nd Edn.)

1157. Lord Chancellor Viscount Kilmuir also made a statement on June 6, 1956 in the House of Lords on the question of Crown privilege arising out of the decision in Duncan's case (1942) AC 624 (supra). In the course of that statement after referring to the two grounds on which privilege could be claimed according to Duncan viz., (a) that the disclosure of the particular document would injure public interest e.g., by endangering public security or prejudicing diplomatic relations and (b) that the document fell within a class which the public interest required to be withheld from production, Lord Kilmuir stated thus:

The claiming of Crown privilege on the first ground that I have mentioned has always been acceptable to the Courts and public opinion. Where, however, the claim has been made on the ground that the document belongs to a class, especially, in proceedings where the Crown's position seems very like that of an ordinary litigant, it has been criticised on the ground that the administration of justice is itself a matter of public interest and should be weighed against the other head of public interest, that is, 'the proper functioning of the public service.'

The reason why the law sanctions the claiming of Crown privilege on the 'class' ground is the need to secure freedom and candour of communication with and within the public service, so that Government decisions can be taken on the best advice and with the fullest information. In order to secure this it is necessary that the class of documents to which privilege applies should be clearly settled, so that the person giving advice or information should know that he is doing so in confidence. Any system whereby a document falling within the class might, as a result of a later decision, be required to be produced in evidence, would destroy that confidence and undermine the whole basis of class privilege, because there would be no certainty at the time of writing that the document would not be disclosed.

It is sometimes suggested that a claim for privilege on the class basis should be referred to and decided by a Judge. This suggestion goes much further than the position in Scotland, where the power of the Judge is only exercisable in very special circumstances' and does not permit any examination of the ground of the claim. This ground namely, 'the proper functioning of the public service', must in our view be a matter for a Minister to decide, with his knowledge of government and responsibility to Parliament, rather than for a Judge.

A Judge assesses the importance of a particular document in the case that he is hearing, and his inclination would be to allow or to disallow a claim for privilege according to the contents and the relevance of the document, rather than to consider the effect on the public service of the disclosure of the class of documents to which it belongs. The result would be that the same kind of document would sometimes be protected and sometimes disclosed, which would, as I have said, be destructive of the whole basis of the class privilege.

I would emphasise that claims of Crown privilege are made in respect of all documents falling within the class, irrespective of whether their production would be favourable or unfavourable to the Crown's interests. All Crown lawyers are familiar with cases in which the Crown's interests have in fact been prejudiced by the application of the rule.

The proper way to strike a balance between the needs of litigants and those of Government administration is, in our opinion, to narrow the class as much as possible by excluding from it those categories of documents which appear to be particularly relevant to litigation and for which the highest degree of confidentiality is not required in the public interest.

(Vide Appendix 4 to Law and Orders' by C.K. Alien, 2nd Edition, pp. 467-468).

1158. The three decisions of the Court of Appeal referred to above which had been decided by Lord Denning M.R. Herman and Salmon, L. JJ., came up for consideration again before the Court of Appeal in Conway v. Rimmer (1967) 2 All ER 1260 consisting of Lord Denning, M.R. Davies and Russell, L. JJ. The relevant facts of this case were these. The plaintiff, a probationer police constable was prosecuted by a Superintendent in the constabulary on a charge of

stealing an electric torch belonging to another probationer constable. The prosecution failed and the plaintiff was acquitted but soon afterwards he was dismissed from the police force as unlikely to become an efficient police officer. The plaintiff sued the Superintendent for malicious prosecution. On discovery in the action, the Home Secretary claimed Crown privilege for a class of documents which included the probationary reports relating to the plaintiff and the report leading to his prosecution; the privilege was claimed on the ground that discovery of documents of that class would be contrary or injurious to the public interest. The claim of privilege was in proper form. It was not suggested that the claim was not taken in good faith or that the Home Secretary was mistaken in thinking the documents to be of the class stated. The Registrar of the Court directed the defendant to produce the documents. But Browne, J., allowed the appeal by the defendant and the Attorney-General and disallowed the claim for discovery. It is this order which was questioned before the Court of Appeal, In this case, Lord Denning who was in the minority directed the production of the documents. The other two learned Judges, however, felt that Duncan's case (1942) AC 624 (supra) could not be departed from by the Court of Appeal and that the observations in the three cases referred to above questioning the validity of the privilege based on the class to which the particular document belonged were not binding. Davies L.J. with whom Russell, L.J. agreed observed at pp. 1271-72 thus:

I turn now to the 1964 trilogy of cases, namely, Merricks v. Nott-Bower (1964) 1 All ER 717; Re Grosvenor Hotel London (No. 2) (1964) 3 All ER 354; and Wednesbury Corporation v. Ministry of Housing and Local Government (1965) 1 All ER 186, mentioned earlier in this Judgment and decided in this Court by the same trinity of Judges, viz., Lord Denning, M.R., Harman and Salmon L. JJ. The judgment in those cases are, of course, most weighty and most interesting; but, with the greatest respect, I cannot accept them as decisions that English Law is other than I have suggested that it is. Some general observations may be made about those cases. In the first place, in not one of them did the Court order production of the documents in question or itself inspect them; so that, whether or not the observations made in those cases were obiter, as in that state of affairs I am inclined to think that they were, the Crown had no opportunity of challenging in the House of Lords the validity of the views expressed in this Court. Secondly, in each case the Court was much exercised about the form and sufficiency of the Minister's certificate or affidavit. In the present cave no such question arises. Third, all those decisions proceeded on the basis that there was a difference or dichotomy, as Harman, L.J. called it in Re Grosvenor Hotel, London (No. 2) (1964) 3 All ER at pp. 364, 365 between contents cases and class cases; though it would appear that Salmon, L.J. would make a sub-division between high "class" cases and low "class" cases (See (1964) 3 All ER at pp 370 and 371). I am bound to say that I can see no logical distinction, though there obviously may be a practical one, between high class cases and low class cases, any more than there is between class cases and contents cases. Fourth, all of the Judgments proceeded on the basis that the observations of Viscount Simon in Duncan's case (1942) 1 All ER 587, as to class cases were obiter and wrong. Fifth, very little weight was attached in nay of those cases to the decision in Auten v. Rayner (1958) 3 All ER 566. Finally, all the Judges were exercised in their minds as to desirability of the law of England in this respect being the same as that of Scotland and of Com' monwealth countries, such as Australia, Canada and New Zealand. Whether the law in those Commonwealth countries, whose Courts are, of course, influenced by Robinson v. State of South Australia (No. 2) (1931) All ER Rep 333; is precisely the same as the law of Scotland, as laid down In Glasgow Corporation v. Central Land Board 1056 SC (HL) 1 is, perhaps, open to doubt. That it is desirable that the law on this important constitutional matter should be the same every where is beyond question; but, in my judgment, the only tribunal in this country which can achieve that object is the House of Lords, who now have the power to alter or vary the decision at which, as I have said, in my opinion they arrived in Duncan's case (1942) 1 All ER 587.

1159. The appeal was dismissed in accordance with the opinion of the majority.

1160. The clock was thus again put back by the Court of Appeal. Conway's case (1967) 2 All ER 1260 (supra) was taken up in appeal before the House of Lords in Conway v. Rimmer (1968) 1 All ER 874 (HL), After a review of a number of decisions which had been rendered before Duncan's case (1942) AC 624 including Robinson's case (1931) AC 704 decided by the Privy Council and the decisions of the Court of Appeal subsequent to the decision in Duncan's case, the House of Lords reversed the decision of the Court of Appeal. It directed that the documents in question should be produced before the Court which had called them for its inspection and if it was found that their disclosure would not be prejudicial to the public interest or that any such possible prejudice would be insufficient to justify non-disclosure, an order for disclosure of the reports should be made.

1161. It is important to note that in this case one Lord after another rejected the contention that the possibility of future disclosure would affect candour. Lord Reid observed at page 831: "So far as I know, however, no one has ever suggested that public safety has been endangered by the candour or completeness of such reports having been inhibited by the fact that they may have to be produced if the interests of the due administration of justice should ever require production at any time" Lord Morris observed at page 891: "In many decided cases, however, there have been references to a suggestion that if there were knowledge that certain documents (e.g. reports) might in some circumstances be seen by eyes for which they were never intended the result would be that in the making of similar

documents in the future, candour would be lacking. Here is a suggestion of doubtful validity. Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report' would be encouraged rather than frustrated. The law is ample in its protection of those who are honest in recording opinions which they are under a duty to express. Whatever may be the strength or the weakness of the suggestion to which I have referred it seems to me that a Court is as well and probably better qualified than any other body to give such significance to it as the circumstances of a particular case may warrant". Lord Hodson observed at page 904: "It is strange if civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied other fellow subjects". Lord Fearce said at page 912: "There are countless teachers at schools and universities, countless employers of labour who write candid reports unworried by the outside chance of disclosure...."

Lord Upjohn observed at pages 914-915: "The reason for this privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high level communications, however, innocent of the prejudice to the State the actual contents of any particular document might be, that is obvious. It has nothing whatever to do, however, with candour or uninhibited freedom of expression, I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of the day". Commenting on this decision, H.W.R. Wade wrote : "Their Lordships heaped withering criticism upon this class "principle" which is that complete classes of official reports and documents ought to be kept secret, at whatever cost to the interests of litigants, merely because otherwise there would not be "freedom and candour of communication with and within the public service"" (Vide 'Crown Privilege Controlled at Last' by H.W.R. Wade (1968) 84 The Law Quarterly Review 171 at p. 172). Duncan's case (1942) AC 624 (HL) (supra) stood accordingly modified.

1162. In Rogers v. Home Secretary (1973) AC 388, the appellant required the production of a certain letter written about him to the Gaming Board for Great Britain which had the duty to make unusually extensive inquiries not only into the capacity and diligence of all applicants for licences to maintain gaming establishments but also into their character, reputation and financial standing and any other circumstances appearing to the Board to be relevant before issuing licences under the Gaming Act, 1968. Applications made by a Company of which the appellant was a director had been refused by the Board. It was the custom of the Board to obtain confidential information about applicants from the police. The appellant said that there came into his possession from an anonymous source a copy of a letter written about him to the Board by Mr. Ross, Assistant Chief Constable of Sussex. Obviously this letter had been abstracted by improper means from the files of the Board or of the Police. The appellant said that this letter contained highly damaging libellous statements about him and that he wished to take proceedings to clear his reputation. The means he phose for doing that was to seek to prosecute Mr. Ross for criminal libel. To succeed he bad to prove the letter. So he applied for its production, The Attorney-General opposed the summons and he succeeded. The House of Lords in appeal in the above case upheld the privilege. Lord Reid "observed in the course of his speech at pages 401-401 thus:

The ground put forward has been said to be Crown privilege. I think that that expression is wrong and may be misleading. There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a Court of Justice all relevant evidence. A Minister of the Crown is always an appropriate and often the most appropriate person to assert this public interest, and the evidence or advice which he gives to the court is always valuable and may sometimes be indispensable. But, in my view, it must always be open to any person interested to raise the question and there may be cases where the trial Judge should himself raise the question if no one else has done so. In the present case the question of public interest was raised by both the Attorney-General and the Gaming Board. In my judgment both were entitled to raise the matter. Indeed I think that in the circumstances it was the duty of the board to do as they have done.

The claim in the present case is not based on the nature of the contents of this particular letter. It is based on the fact that the board cannot adequately perform their statutory duty unless they can preserve the confidentiality of all communications to them regarding character, reputation or antecedents of applicants for their consent.

Claims for "class privilege" were fully considered by this House in Conway v. Rimmer 1968 AC 910. It was made clear that there is a heavy burden of proof on any authority which makes such a claim. But the possibility of establishing such a claim was not ruled out. I venture to quote what I said in that case at p. 952:

There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in Duncan v. Cammell Laird & Co. Ltd. (1942) AC 624, 642, whether

the withholding of a document because it belongs to a particular class is really 'necessary for the proper functioning of the public service'.

I do not think that "the public service should be construed narrowly. Here the question is whether the withholding of this class of documents is really necessary to enable the board adequately to perform its, statutory duties. If it is, then we are enabling the will of Parliament to be carried out.

1163. In a later case before the House of Lords i.e., Burmah Oil Co. Ltd. v. Bank of England (1979) 3 All ER 700 it was again laid down that there was no rule of law that a daim by the Crown on the grounds of public interest for immunity from production of a class of documents of a high level of public importance was conclusive and that the Court had the power to inspect the documents before deciding whether they should be disclosed after balancing the competing interests of preventing harm to the State or the public service by disclosure and preventing frustration of the administration of justice by withholding disclosure.

1164. In the last decision of the House of Lords to which our attention is drawn i.e., Science Research Council v. Nasse (1980) AC 1028, the question as to how far confidentiality could be a ground for claiming privilege in respect of any document arose for consideration. That case arose out of disputes between two employees and their employers which were raised before the Industrial Tribunal. The employees' complaint was that they had been discriminated against by their employers in the course of their employment. Before the Tribunal they were called upon for production of some documents. The Court of Appeal had allowed appeal of the employers holding that if the documents were disclosed it would be in gross breach of faith and could lead to industrial trouble. Dismissing the appeal, the House of Lords held that while no principle of public interest immunity protected such confidential documents and that they were not immune from discovering by reason of confidentiality alone, the Tribunal in the free exercise of its discretion to order discovery should have ngard to the fact that they were confidential and that discovery would be a breach of confidence, so that accordingly, relevance alone though a necessary ingredient did not provide an automatic test for discovery, the ultimate test being whether discovery was necessary for disposing fairly of the proceedings and in order to decide whether it was 'necessary, the tribunal should inspect the documents considering whether special measures such as "covering up" or hearing in camera should he adopted. Dealing with the rule of 'public interest immunity' claimed by a person who is called upon to produce any document, Lord Scarman observed in the above case thus:

Whatever may be true generally, of the categories of public interest, the "public interest immunity", which prevents documents from being produced or evidence from being given is restricted, and is not, in my judgment, to be extended either by demanding ministers or by the courts. And, though I agree with my noble and learned friend, Lord Edmund-Davies, in believing that a Court may refuse to order production of a confidential document if it takes the view that justice does not require its production, I do not see the process of decision as a balancing act. If tile document is necessary for fairly disposing of the case, it must be produced notwithstanding its confidentiality. Only if the document should be protected by public interest immunity, will there be a balancing act. And then the balance will not be between "ethical or social" values of a confidential relationship involving the public interest and the documents relevance in the litigation but between the public interest represented by the state and its public service i.e., the executive Government, and the public interest in the administration of justice : see Lord Reid. Thus my emphasis would be different from that of my noble and learned friends. "Public interest immunity" is, In my judgment restricted to what must be kept secret for the protection of government at the highest levels and in the truly sensitive areas of executive responsibility.

1165. In England, according to Prof. S.A. De Smith, as matters now stand "a government department can seldom expect to succeed in a claim based solely on prospective detriment to that facet of the public interest which requires candid expressions of opinion within the public service. In any event the Court will prefer to rest a decision to exclude evidence on a more general ground than "Crown privilege" -- e.g., that it is contrary to the public interest to require the disclosure in legal proceedings of information obtained in confidence for a limited purpose, Courts are likely to accept without question a Minister's certificate that disclosure would be 'injurious to national security or diplomatic relations, or that the document relates to Cabinet proceedings; but in any marginal case they can be expected to insist on privately inspecting the documents or classes of documents and then rejecting claims to exclude evidence of "routine" matters but accepting claims to exclude documents referring to matters of high policy. It is doubtful whether any material distinction is now to he drawn between "contents" claims and "class" claims."

1166. The scope of the powers of Courts in England where a claim to privilege is made is also explained at para 90 in Volume 13 of Halsbury's Laws of England, (Fourth Edition) thus:

90. Powers of Court.-- The decision whether to allow or reject the claim to Crown privilege, and if so to what extent, is and remains the decision of the Court, and the view of the political minister that the production or disclosure of

documents or information, whether because of their actual contents or because of the class of documents to which they belong is not conclusive. The Court will give full weight to the view of the minister in every case, but it has and is entitled to exercise a residual power, and indeed a duty, to examine the objection and the grounds raised by the minister to support his view that production would be injurious to the public interest. If, in spite of the certificate or affidavit of the minister, the Court is satisfied that the objection is not taken bona fide or that the grounds relied on by the minister are insufficient or misconceived or not clearly expressed or that there are no reasonable grounds for apprehending danger to the public interest, the Court has a residual power to override the objection. For this purpose, the Court is entitled to see the documents before ordering production, and the Court can see the documents without their being shown to the parties, but the minister should have a right to appeal before the documents are in fact produced.

The Court will more readily uphold an objection on the ground of the contents of a document, and for this purpose the minister need not go into any detail. But where the minister raises the objection to production on the ground that the documents belong to a class the production of which would be injurious to the public interest, he must describe with some particularity the nature of the class and the reasons why they should not be disclosed. For this purpose the proper test to be applied is whether the withholding of a document because it belongs, to a particular class is really necessary for the proper functioning of the public service, and the term "public service", in this context should not be construed narrowly. In considering a claim to Crown privilege in relation to a class of documents, the fact that the documents were communicated in confidence the Crown is a very material consideration, but nevertheless the Court may conclude that the public interest in such confidentiality is outweighed by the public interest that they should be disclosed in the administration of justice.

1167. In Australia too the very same position prevails. It is sufficient to refer to the observations of Gibbs, A.C.J. of the High Court of Australia in Sankey v. Whitlam 21 Aus LR 505, decided in Nov. 1978 at page 542 which we as follows:

What are now equally well established are the respective roles of the Court and of those usually the Crown, who assert Crown privilege. A claim to Crown privilege has no automatic operation; it always remains the function of the Court to determine upon that claim. The claim, supported by whatever material may be thought appropriate to the occasion does no, more than draw to the Court's attention what is said to be the entitlement to the privilege and provide the Court with material which may assist it in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege, in cases of defence secrets, matters, of diplomacy or affairs of Government at the highest level, it will often appear readily enough that the balance of the public Interest is against disclosure. It is in these areas that even in the absence of any claim to Crown privilege (perhaps because the Crown is not a party and may be unaware of what is afoot)(sic) a Court, readily recognizing the proffered evidence for what it is, can as many authorities establish of its own motion enjoin its disclosure in Court. Just as a claim is not essential neither is it ever conclusive although, in the areas which I have instanced the Court's acceptance of the claim may often be no more than a matter of form, It is not conclusive because the function of the Court once it becomes aware of the existence of material to which Crown privilege may apply is always to determine what shall be done in the light of how best the public interest may be served, how least itwill be injured.

1168. In Canada the prevailing view of law appears to be the same as stated above as can be seen from the decision of the Supreme Court of Canada in Regina v. Snider (1954) 4 DLR 483 at p 480 in which Rand, J. has stated thus:

Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the Court is whether they might, on any rational view, either as to their contents or the fact of their existence be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a Minister of the Crown avers its existence, then the Courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then such a declaration of the Minister must be taken to have been made under a misapprehension and be disregarded. To eliminate the Courts in a function with which the tradition of the common law has invested them and to hold them subject to any opinion formed, rational or irrational by a member of the Executive to the prejudice, it might be of the lives of private individuals, is not in harmony with the basic conceptions of our polity. But I should add that the consequences of the exclusion of a document for reasons of public interest as if may affect the interest of an accused person are not in question here and no implication is intended as to what they may be.

What is secured by attributing to the Courts this preliminary determination of possible prejudice is protection against Executive encroachments upon the administration of Justice; and in the present trend of government little can be more essential to the maintenance of individual security. In this important matter, to relegate the Courts to such a subserviency as is suggested would be to withdraw from them the confidence of independence and judicial appraisal that so far appear to have served well the organization of which we are the heirs. These are considerations which appear to me to follow from the reasoning of the Judicial Committee in Robinson v. South Australia (1931) AC 704.

1169. In the United States of America, the question relating to the limits of executive privilege came up for consideration before the Supreme Court in Mar-bury v. Madison 5 US 137 probably for the first time. In that case William Marbury and three others severally moved the U.S. Supreme Court for a rule of James Madison, Secretary of State for the United States, to show cause as to why a mandamus should not issue commanding him to cause co be delivered to them respectively their several commissions as Justices of the Peace in the District of Columbia. In the affidavit filed in support of the petition they pleaded that Adams the former President had nominated the applicants to the Senate for their advice and consent to be appointed Justices of the Peace; that the Senate advised and consented to the appointments, that commissions in due form were signed by the said President appointing them Justices, that the seal of the United States was in turn affixed to the said commissions and that Madison had declined to cause them to be delivered even though they had acquired the right to the offices. In the course of the proceedings certain questions were put to the Attorney-General Levi Lincoln relating to the Commissions and where they had been kept and on objection being raised to the questions 'the Court said that if Mr. Lincoln wished time to consider what answers he should make, they would give him time, but they had no doubt he ought to answer. There was nothing confidential to be disclosed. If there had been he was not obliged to answer it; and if he thought that anything was communicated to him in confidence he was not bound to disclose it nor was he obliged to state anything which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which ail the world have a right to know. If he thought any of the questions improper, he might state his objections'.

1170. In United States v. Burr 25 Fed. Cas 187 (No. 14694) (Cir Ct Va 1807) Chief Justice Marshall ruled:

that the President of the United States may be subpoenaed and examined as a witness and required to produce any paper in his possession, is not controverted.... The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the Court from enforcing its production....I can readily conceive that the President might receive a letter which would be improper to ex hibit in public, because of the manifest 'inconvenience of its exposure. The occasion for demanding it ought, in such a case, be very strong, and to be fully shown to the Court before its production could be insisted on.

1171. According to Wigmore the scope of the privilege in America, beyond secrets in the military or international sense is by no means clearly defined. Paragraph 2379 in Volume VIII of Wigmore on 'Evidence' reads:

Same: Who determines the Necessity for Secrecy, So far as the privilege has legitimate scope, it raises the question how the existence of the facts which make it applicable is to be determined. If it extends only (as it just limits prescribe) to matters involving international negotiations or military precautions against a foreign enemy, the presence of such matters in the documents or communications sought to be disclosed must by some authority be predetermined, before the privilege can be deemed applicable. If it extends to the larger scope indicated by the English rulings, still the existence of a necessity for secrecy must be in each Instance declared. Who shall make thus determination?

Obviously, and by analogy with other privileges, the, Court (ante, 2193, 2271, 2322; post, 2550). But the Judge (urges the learned incumbent of that office, in Beatson v. Skene) "would be unable to determine it without ascertaining what the document was," -- surely an unavoidable process; "which inquiry," however, It is added, "cannot take place in private," -- a singular assumption. It would rather seem that the simple and natural process of determination was precisely such a private perusal by the Judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of Justice? Cannot the constitutionally coordinate body of Government share the confidence? It is ludicrous to observe a Chief Magistrate, as in Beatson v. Skene, solemnly protesting his incompetence to share the knowledge of a fact which had never been secret at all and had for months been spread abroad by the hundred tongues of scandal.

The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and this has been insisted upon by the highest judicial personages both in England and the United States:

. . .

Conclusion: The privilege, when recognised, should therefore be subjected to the following limitation:

(1) Any executive or administration regulation purporting in general terms to authorise refusal to disclose official records in a particular department when duly requested as evidence in a court of justice should be deemed void (on the logic of 1355, 2195, ante).

(2) Any statute declaring in general terms that official records are confidential (ante § 2378, n.7) should be liberally construed to have an implied exception for disclosure when needed in court of justice.

(3) The procedure in such cases should be: A letter of request (like a letter rogatory, ante, § 2195a) from the head of the Court to the head of the Department (accompanying the subpoena to the actual custodian), stating the circumstances of the litigation creating the need for the document; followed (in case of refusal) by a reply from the Departmental head stating the circumstances deemed to justify the refusal; and then a ruling by the Court, this ruling to be appealable and determinative of the privilege.

1172. Writing about the immunity claimed by President Nixon against the demand for disclosure of certain types of documents, Raoul Berger writes in his book entitled 'Executive Privilege: A Constitutional Myth' (1974) at page 264 thus:

"Candid interchange" is yet another pret ext for doubtful secrecy. It will not explain Mr. Nixon's claim of blanket immunity for members of his White House staff on the basis of mere membership without more; it will not justify Klein-dienst's assertion of immunity from congressional inquiry for two and one-half million federal employees. It is merely another testimonial to the greedy expan-siveness of power, the costs of which patently outweigh its benefits. As the latest branch in a line of illegitimate succession, it illustrates the excesses bred by the claim of executive privilege. And in practice it has realised Lord Pearce's pregnant observation: "What a complete lack of common sense a general blanket protection of wide class may yield". Conway v. Rimmer (1968) 1 All ER 874, 910. The problem will not be met by pruning a branch here and there; the axe must be put to the root of a claim that is altogether without constitutional warrant, leaving it to the good sense of Congress and the people -- and, if need be, the courts -- to work out an accommodation for such matters as confidential communications between the President and his immediate advisers, excluding any communications with respect to illegal acts. To leave it with the executive branch to decide is to court more of the "horrors" revealed by recent history.

1173. Professor Arthur Schlesinger Jr states: "The secrecy system has become much less a means by which Government protects national security than a means by which the Government safeguards its reputation, dissembles its purposes, buries its mistakes, manipulates its citizens, maximizes its power and corrupts itself" (Quoted by Curt Mathews, St Lewis Post-Despatch Feb. 26, 1973, Section 1-12B P. 1).

1174. Now a few words about the legitimacy of the rule of 'official secrecy' may be mentioned. The tendency in all the democratic countries in recent times is to liberalise the restrictions placed on the right of the citizens to know what is happening in the various public offices. The emphasis now is more on the right of a citizen to know than on his 'need to know' the contents of official documents. It is pertinent to refer to the practice prevailing in Sweden. In his article entitled 'Laws on Access to Official Documents', Donald C. Rowat writes:

When I visited Sweden in 1973 to study its unique system of openness, I was lucky enough to accompany a reporter who worked for the Swedish national press agency, as he made his daily rounds of three Government departments. To my amazement, all incoming and outgoing documents and mail were laid out in a special press room in each department for an hour every morning for reporters to examine. If any reporter wanted further information on a case, he simply walked down the hall to look at the department's files. No special permission was needed. Such a system of open access is so alien to the tradition of secrecy elsewhere as to be almost unbelievable.... Sweden's long experience with the principle of openness indicates that it changes the whole spirit in which public business is conducted. It causes a decline in public suspicion and distrust of officials, and this in turn gives them a greater feeling of confidence. More important, it provides a much more solid foundation for public debate, and gives citizens in a democracy a much firmer control over their Government.

(Vide Indian Journal of Public Administration, Vol. XXV, No. 4, October-December, 1979 at pages 990-991)

1175. The position in Sweden appears to represent an extreme case of openness of administrative process.

1176. Max Weber (1864-1920) who was very critical of the rule of official secrecy observed:

Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions": in so far as it can, it hides its knowledge and actions from criticism. The treasury officials of the Persian Shah have made a secret doctrine of their budgetary Article and even use secret script. The official statistic of Prussia, in general, make public only what cannot do any harm to the intentions of the power-wielding bureaucracy. The tendency towards secrecy in certain administrative fields follows their material nature everywhere that the power interests of the domination structure towards the outside are at stake, whether it is an economic competitor of a private enterprise or a foreign potentially hostile polity, we find secrecy. The pure interest of the bureaucracy in power, however, is efficacious far beyond those areas where purely functional interests make for secrecy. The concept of the "Official Secret" is the specific invention of the bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude, which cannot be substantially justified beyond these specifically qualified areas. In facing a Parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the Parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of parliamentary investigation is one of the means by which Parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence a powerless Parliament at least in so far as ignorance somehow agrees with the bureaucracy's interests'.

(H.H. Gerth and C. Wright Mills (trans.), from Max Weber, Essays in Sociology, London, Routledge and Kegan Paul, 1948, pp. 233-4) By courtesy of Dr. S.R. Maheshwari).

1177. In India many intellectuals have always thought that as far as possible there should be openness in administration. Opposing the Official Secrets (Amendment) Bill which came up for discussion in the Imperial Legislative Assembly in March, 1903, Gopal Krishna Gokhale pleaded:

The proper and only remedy worthy of the British Government is not to gag newspapers as proposed in this Bill but to discourage the issue of, confidential circulars which seek to take away in the dark what has been promised again and again in Acts of Parliament, the Proclamations of Sovereigns and the responsible utterances of successive Viceroys. From the standpoint of the rulers, no less than of the ruled, it will be most unfortunate if Indian papers were thus debarred from writing about matters which agitate the Indian community most. What happened, for instance, last year when those circulars were published? For some time before their publication, the air was thick with the rumour that Government had issued orders to shut cut Indians from all posts in the Railways Department, carrying a salary of Rs. 30 and upwards a month. It was impossible to believe a statement of this kind, but it was not possible to contradict it effectively when it was practically on every tongue. The damage done to the prestige of the Government was considerable and it was only when the circulars were published that the exact position came to be understood. The circulars, as they stood, were bad enough in all conscience but they were not so bad as the public had believed them to be. What was laid down in them was not that Indians were to be shut out from all appointments higher than Rs. 30 a month but that Eurasians and Europeans were to have, so far as practicable, a preference in making appointments to such posts. The fear that such lamentable departures from the avowed policy of Government might be dragged into the light of day, acts at present as an effective check on the adoption of unjust measures, and I think it will have a disastrous effect on the course of administration; if this check were to be done away with and nothing better substituted in its place. (Abstract of the Proceedings of the Council of the Governor General of India Assembled for the purpose of Making Laws and Regulations, Vol. XLII, 1903, pages 280-281).

1178. Saiyad Muhammad and Asutosh Mukherjee also opposed the Bill. Those speeches gave ample support to the movement which stood for the freedom of the press in India. Few persons have the vision of these great leaders. The need for making access to information about the activities of Government more liberal has been explained by Dr. S.R. Maheshwari in his book entitled "Open Government in India" (1981) at pp. 05-96 thus:

Administrative India puts the greatest weight on keeping happenings within its corridors secret, thereby denying the citizens access to information about them.

Such orientations produce deep contradictions in the larger socio-political system of the land which itself is in a state requiring nourishment and care. As the latter is still relatively new and in its infancy, its growth processes inevitably get retarded for want of information about the Government, which means from the Government. Over-concealment of governmental information creates a communication gap between the governors and the governed, and its persistence beyond a point is apt to create an alienated citizenry. This makes democracy itself weak and insecure. Besides, secrecy renders administrative accountability unenforceable in an effective way and thus induces administrative behaviour which is apt to degenerate into arbitrarinees(sic) and absolutism. This is not all.

The Government, today, is called upon to make policies on an ever increasing range of subjects, and many of these policies must necessarily impinge on the lives of the citizens. It may sometimes happen that the data made available to the policy makers is of a selective nature, and even the policy-makers and their advisors may deliberately suppress certain viewpoints and favour others. Such bureaucratic habits get encouragement in an environment of secrecy; and openness in governmental work is possibly the only effective corrective to it, also raising, in the process, the quality of decision-making. Besides, openness has an educational role inasmuch as citizens are enabled to acquire a fuller view of the pros and cons of matters of major importance, which naturally helps in building informed public opinion, no less ' than goodwill for the Government.

1179. It may be necessary to deal with the question of official secrecy in greater detail in a case where the constitutionality of the claim for official secrecy, independently of the power of the Court to order discovery of official documents in judicial proceedings, arises for consideration. We are concerned in this case with the power of the Court to direct the disclosure of official documents in Judicial proceedings.

1180. We shall now turn to the Indian law, In the State of Punjab v. Sodhi Sukhdev Singh MANU/SC/0006/1960, a Constitution Bench of this Court had occasion to examine the limits of the privilege of the Government in the light of Sections 123 and 162 of the Indian Evidence Act, 1872. Section 123 reads:

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Section 162 reads:

162. A witness summoned to produce a document shall, if It is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the interpreter disobeys such direction, he shall be held to have committed an offence under Section 166 of the Indian Penal Code, 1860 (45 of 1860).

1181. The decision in Sodhi Sukhdev Singh's case MANU/SC/0006/1960 (supra) was rendered in the light of the development of the law on the above question in England up to the year 1960. Gajendra-gadkar, J. (as he then was) speaking for the majority observed in that case at pages 393-395 (of SCR) : (at pp. 505, 506 of AIR) thus:

Thus our conclusion is that reading Sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Section 123 or not.

1182. In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not. We are not Impressed by Mr. Seervai's argument that the Act could not have intended that the head of the department would permit the production of a document which belongs to the noxious class. In our opinion, it is quite conceivable that even in regard to a document falling within the class of documents relating to affairs of State the head of the department may legitimately take the view that its disclosure would not cause injury to public interest. Take for instance the case of a document which came into existence quite some time before its production is called for in litigation; it is not unlikely that the head of the department may feel that though the character of the document may theoretically justify his refusing to permit Its production, at the time when its production is claimed no public injury is likely to be caused. It is also possible that the head of the department may feel that the injury to public interest which the disclosure of the document may cause is

minor or insignificant, indirect or remote; and having regard to the wider extent of the direct injury to the cause of justice which may result from its non-production he may decide to permit its production. In exercising his discretion under Section 123 in many cases the head of the department may have to weigh the pros and cons of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. That is why we think it is not unreasonable to hold that Section 123 gives discretion to the head of the department to permit the production of a document even though its production may theoretically lead to some kind of injury to public interest. While construing Sections 123 and 162, it would be irrelevant to consider why the enquiry as to injury to public interest should not be within the jurisdiction of the Court, for that clearly is a matter of policy on which the Court does not and should not generally express any opinion.

1183. In this connection it is necessary to and that the nature and scope of the enquiry which, in our opinion, it is competent to the court to hold under Section 162 would remain substantially the same whether we accept the wider or the narrower interpretation of the expression "affairs of State". In the former case the Court will decide whether the document falls in the class of innocuous or noxiow(sic) documents; if it finds that the document belongs to the innocuous class it will direct its production; if it finds that the document belongs to the noxious class it will leave it to the discretion of the head of the department whether to permit his production or not. Even on the narrow construction of the expression "affairs of State" the Court will determine its charac-ter in the first instance; if it holds that it does not fall within the noxious claim which alone is included in the relevant expression on this view an order for its production will follow; if the finding is that it belongs to the noxious class the question about its production will be left to the discretion of the head of the department. We have already stated how three views are possible on this point. In our opinion, Mr. Seervai's contention which adopts one extreme position ignores the effect of Section 162, whereas the contrary position which is also extreme in character ignores the provisions of Section 123. The view, which we are disposed to take about the authority and jurisdiction of the Court in such matters is based on a harmonious construction of Section 123 and Section 162 read together; it recognises the power conferred on the Court by Clause (1) of Section 162, and also gives due effect to the discretion vested in the head of the department by Section 123."

1184. A similar question arose again before this Court in State of U.P. v. Raj Narairi MANU/SC/0032/1975, Ray, C.J. speaking for himself and Alagiriswamy, Sarkaria and Untwalia, JJ. observed at pages 348-349 (of SCR): (at p. 875 of AIR) thus:

The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be Withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweigh's the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. (See Rogers v. Home Secretary (1973) AC 388 at p. 405). To illusirate the class of documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security to the State and high level inter-departmental minutes. In the ultimate analysis the contents of the document are so described that it could be seen at once that in the public interest" the documents are to be withheld. (See Merricks v. Nott Bower (1964) 1 All ER 717.

It is now the well settled practice in our country that an objection is raised by an affidavit affirmed by the head of the department. The Court may also require a Minister to affirm an affidavit That will arise in the course of the enquiry by the Court as to whether the document should be withheld from disclosure. If the Court is satisfied with the affidavit evidence that the document should be protected in public interest from production the matter ends there. If the Court would yet like to satisfy itself the Court may see the document. This will be the inspection of the document by the Court. Objection as to production as well as admissibilily contemplated in Section 162 of the Evidence Act is decided by the Court in the enquiry as explained by this Court in Sukhdev Singh's case MANU/SC/0006/1960.

In his concurring judgment, Mathew, J. said at pages 359 and 361 (of 1975-3 SCR) : (at pp. 883, 884 of AIR 1975 SC) thus:

When a question of national security is involved, the court may not be the proper forum to weigh the matter and that is the reason why a Minister's certificate is taken as conclusive. "Those who are responsible for the national security must be the sole Judges of what national security requires."

As the executive is solely responsible for national security including foreign relations, no other organ could judge so well of such matters. Therefore, documents in relation to these matters might fall into a class which per se might require protection. But the executive is not the organ solely responsible for public interest. It represents only an important element in it; but there are other elements. One such element is the administration of justice. The claim of the executive to have exclusive and conclusive power to determine what is in public interest is a claim based on the assumption that the executive alone knows what is best for the citizen. The claim of the executive to exclude evidence is more likely to operate to subserve a partial interest, viewed exclusively from a narrow departmental angle. It is impossible for it to see or give equal weight to another matter, namely, that justice should be done and Been to be done. When there are more aspects of public interest to be considered, the court will, with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates.

The power reserved to the court is a power to order production even though public interest is to some extent prejudicially affected. This amounts to a recognition that more than one aspect of public interest will have to be surveyed. The interests of Government for which the Minister speaks do not exhaust the whole public interest. Another aspect of that Interest is seen in the need for impartial administration of justice. It seems reasonable to assume that a court is better qualified than the Minister to measure the importance of the public interest in the case before it. The court has to make an assessment of the relative claims of these different aspects of public interest. While there are overwhelming arguments for giving to the executive the power to determine what matters may prejudice public security, those arguments give no sanction to giving the executive an exclusive power to determine what matters may affect public interest. Once considerations of national security are left out, there are few 'matters of public interest which cannot safely be discussed in public. The administration itself knows of many classes of security documents ranging from those merely reserved for official use to those which can be seen only by a handful of Ministers of officials bound by oath of secrecy.

. . .

There was some controversy as to whether the Court can inspect the document for the purpose of coming to the conclusion whether the document relates to affairs^ of State. In Sodhi Sukhdev Singh's case (1961) 2 SCR 371 this Court has said that the court has no power to inspect the document. In the subsequent case (Amar Chand Butail v. Union of India MANU/SC/0330/1964 this Court held that the normal method of claiming privilege was by an affidavit sworn by the head of the department, and that, if no proper affidavit, was filed the claim for privilege was liable to be rejected. But, this Court inspected the document to see whether it related to affairs of State. It might be that the court wanted to make sure that public interest is protected, but whatever be the reason, the court did exercise the power to inspect the document.

In England, it is now settled by the decision in Con way v. Rimmer (1968) 1 All ER 874 that there is residual power in court to decide whether the disclosure of a document is in the interest of the public and for that purpose, if necessary, to inspect the document, and that the statement of the head of the department that the disclosure would injure public interest is not final.

1185. It seems that by this decision the law in India was brought in line with the decision of the House of Lords in Conway's case (1968) 1 All ER 874 (supra).

1186. After hearing the arguments on the question of privilege, this Court directed the Government to submit the documents in respect of which privilege was claimed for its inspection. Those documents included the correspondence between the Chief Justice of the High Court of Delhi, the Chief Justice of India and the Minister of Law & Justice and some official notings relating to the question -of reappointment of Shri S.N. Kumar as a Judge of the High Court of Delhi.

1187. The above order was made as the documents in question had no concern with either the security of the State or with the diplomatic relations between our country and any foreign country. They no doubt related to a 'high level' appointment, but it was felt by us that that fact by itself was not sufficient in the circumstances of the case to prevent the Court from directing the Government to produce the documents for its inspection before deciding the question of discovery.

1188. The question whether these documents should be allowed to be disclosed as prayed for by the parties concerned, depended upon our view on the question whether such disclosure would subserve the public interests. It is accepted on all hands that the documents in question were 'high level' documents relating to the appointment of a Judge of a High Court and any order to be made ph the question of disclosure had to be made after considering the pros and cons of all

relevant matters. Having inspected the documents the Court had to consider whether their disclosure would create or fan ill-informed or captious, public or political criticism or whether the business of the Government would be exposed to the gaze of those ready to criticise without adequate knowledge of the background or perhaps some axe to grind, as observed by Lord Reid in Conway v. Rimmer (1968) 1 All ER 874 (supra). The wise words of Lord Keith in Burmah Oil Co.'s case (1979) 3 All ER 700 (supra) that the public interest might 'demand, though no doubt only in a very limited number of cases, that the inner working of government should be exposed to public gaze, and there may be some, who would regard this as likely to lead, not to captious or ill-informed criticism, but to criticism calculated to improve the nature of that working as affecting the individual citizen' also had to be kept in view by the Court while dealing with this case. The Court had to strike a balance between the public interest in the proper functioning of the public service and the public interest in the administration of justice. The Court also considered whether the disclosure would lead to any other further consequence of anybody taking any further action on the basis of these documents. The ruling in Rid-dick v. Thames Board Mills Ltd. (1977) 3 WLR 63, was also examined. In that case, Lord Denning has observed (at page 75) thus:

In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J., Bray on Discovery, Ist Edn. (1885), p. 238:

A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit:...nor to use them or copies of them for any collateral object....If necessary an undertaking to that effect will be made a condition of granting an order....

Since that time such an undertaking has always been implied, as Jenkins J. said in Alterskye v. Scott (1948) 1 All ER 469, 471. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. The modern authorities are well discussed 03 Talbot, J. in Distillery Co. (Biochemicals) Ltd. v. Times Newspapers Ltd. (1975) QB 613, 621 and I would accept all he Bays, particularly as to the weighing of the public interests involved: see p. 625.

1189. Ours is an open society which has a government of the people, which has to be run according to the Constitution and the laws. The expression 'affairs of State' should, therefore, receive a very narrow meaning. Any claim for interpreting it with a wider connotation may expose Section 123 of the Evidence Act to be challenged as being unconstitutional.

1190. In this case the questions involved are: (1) whether there was divergence of opinion between the opinion of the Chief Justice of the Delhi High Court and the opinion of the Chief Justice of India (2) Whether the opinions expressed by them were relevant for deciding the question of fitness of Shri S.N. Kumar for appointment as additional Judge or permanent Judge of the High Court of Delhi (3) Whether the consultations made under Article 217(1) were proper and (4) Whether the decision of the President not to appoint Shri S.N. Kumar as an additional Judge or permanent Judge could be characterised as perverse? The pleadings in the case naturally could not give us a complete: picture in view of the secrecy involved In the process of recommendation and the claim of privilege made on behalf of the Government. The standing of the parties concerned to question the decision of the President was also raised apart from the question of non-justiciability of the issue itself. Since Shri S.N. Kumar himself took active interest in the litigation and asked for relief, the absence of locus standi of Shri V.M. Tarkunde (the petitioner) did not matter much. On the question of justiciability, we felt that an additional Judge who was not reappointed could move the Court for a direction to the Government to consider the question of his reappointment in a fair way for the reasons recorded elsewhere in this judgment. We felt that the issue involved the performance of a duty which was judicially identified and its breach was capable of judicial determination and that it was possible to grant relief, though in a limited way, if circumstances warranted it. When we considered the contentions of the parties against the background of the facts and the important questions of constitutional law and their application involved in this case, we felt that a decision not to direct disclosure of the documents would result in graver public prejudice than the decision to direct such disclosure and that the public interest involved in the administration of justice should prevail over the public interest of the public service in the peculiar circumstances of the case. We also felt that in the circumstances of this case if disclosure was not ordered, there would be room for many undesirable conjectures and surmises about the entire process of consultation under Article 217(1). Accordingly by our order made earlier in the course of these proceedings we directed the disclosure of the documents after carefully considering all aspects of the case including the weighty reasons of our learned brother Fazal Ali, J. to the contrary.

PART IX

1191. The next important and delicate question for consideration is whether the non-appointment of Shri S.N. Kumar as an additional Judge even though the arrears of work in the High Court of Delhi justified the appointment of more number of Judges is legal and proper. Article 217(1) of the Constitution which empowers the President to appoint Judges of High Courts does not make any distinction between the tests that should be applied in the case of appointment of a permanent Judge and the tests to be applied in the case of the appointment of an additional Judge, as to the fitness of the person to be appointed. The same tests have to be applied even when a person who has already been appointed as an additional Judge is to be considered for appointment as a permanent Judge or for appointment as an additional Judge for another period although as already mentioned an additional Judge has two factors in his favour which have to be taken into consideration by the appointing authority in the context of the manner in which Article 224 of the Constitution has been operated all these days. Since the appointment in question is to the post of a Judge, questions of integrity and of character of the person proposed for the post do assume large importance in taking a decision. The appointing authority cannot merely act on mere absence of evidence of lack of integrity or character of the person concerned. The appointing authority should on the other hand feel positively assured about the integrity and good character of such person. Having regard to the importance of the office of a Judge of a High Court, the constitutional and legal immunities that a Judge enjoys and the need for infusing confidence in the mind of the people who approach courts seeking impartial justice, the appointing authority has to take sometimes hard decisions and it is likely that in that process some person who is really honest may not be appointed on account of some doubt expressed by one or the other amongst the functionaries who have to be consulted under Article 217(1) of the Constitution or on account of some other relevant material that may be available to the appointing authority. Hence if a person is not appointed as a Judge after the usual process of consultation is over it does not necessarily mean that in fact he lacks integrity or character. If the matter had been placed in the above light in this case, perhaps the task of the Court would have been less onerous. But in the course of the arguments, serious allegations of political vendetta, conspiracy, malice, fraud etc. were made against the Prime Minister, Law Minister and the Chief Justice of the Delhi High Court. A deeper probe into the case has, therefore, become necessary.

1192. The first submission was that as there was an uncontradicted news item appearing in a newspaper according to which the Prime Minister had expressed dissatisfaction with the Judges appointed by the Government which was in office prior to her becoming the Prime Minister in Jan., 1980, the action taken in respect of Shri S.N. Kumar who had been appointed by the previous Government was traceable to the said reaction of the Prime Minister. It is difficult to accept this submission because there were about sixty such additional Judges appointed by the previous Government and out of them It is seen that only four -- one of the Allahabad High Court, one of the Rajasthan High Court and two of the Delhi High Court including the petitioner have not been re-appointed as additional Judges. If the policy was not to appoint such Judges, as a matter of policy, in the ease of others also a similar decision would have been taken. But that has not been the case. As can be scan from the list of Judges of the High Courts as on January 1, 1980, there were 12 additional Judges in the Delhi High Court. Of them one died in 1960 and nine (including Mr. Justice Wad) had been either made permanent or continued as additional Judges by the present Government. Only two i.e. Shri S.N. Kumar and Shri O.N. Vohra have not been continued. Hence it is difficult to draw an inference that it is on account of any political ground that Shri S.N. Kumar has not been continued. This argument that the Prime Minister took a hostile attitude towards Shri S.N. Kumar on account of political ground is inconsistent with another argument urged before us, namely, that the Law Minister had tried to mislead the Prime Minister when he wrote on March 3, 1981 that "the letter of the Chief Justice of Delhi High Court makes a serious complaint against the integrity of Shri S.N. Kumar and I deliberately avoid going into the merits or the details at this stage as I am proposing a short extension in his tenure presently". The argument is that even though the Chief Justice of the Delhi High Court had not made any serious complaint, the Minister for Law had stated so in order to mislead the Prime Minister. Whether factually he had tried to mislead her or not will be dealt with later. But the statement that he was misleading the Prime Minister who, according to the learned Counsel for Shri S.N. Kumar, had made up her mind to take some action prejudicial to Shri S.N. Kumar appears to be incongruous. Perhaps it would have been acceptable if the case was that the Prime Minister was favourably disposed towards Shri S.N. Kumar but the Law Minister had tried to mislead her.

1193. The next allegation is that the Chief Justice of the Delhi High Court and the Minister for Law had entered into a conspiracy to do harm to Shri S.N. Kumar. This aspect of the matter also will be discussed later on. But this contention is, however, inconsistent with another argument that the Law Minister had tried to put undue pressure on the Chief Justice of the Delhi High Court to furnish some particulars which were against Shri S.N. Kumar and secured the letter of May 7, 1981. Conspiracy presupposes the existence of a voluntary combination of two or more persons to achieve some unlawful object or to bring about some result injurious to some other person or persons. If there were only two in a given case and one of them had exerted pressure on the other to secure some information it would not be a case of conspiracy but a case of extortion of some information by one from the other. The preceding discussion shows that there is inherent inconsistency in some of the contentions which are urged before us.

1194. In the instant case, we are concerned with the Chief Justice of India, the Chief Justice of the Delhi High Court and the Law Minister each of whom is holding a very high office and each of whom is entrusted with high

responsibilities. Each one of them has to express his candid opinion on the matter in issue. It is not unknown that on the same matter any two honest persons may have two different opinions. There is no allegation in the case that either the Chief Justice of the Delhi High Court or the Law Minister had any personal ill-will against Shri S.N. Kumar. There is no allegation also to the effect that the Chief Justice of the Delhi High Court had anything to gain by colluding with the Law Minister. He had been appointed as the Chief Justice of the Delhi High Court before Feb. 19, 1981 on which date he wrote the first letter expressing his opinion against the re-appointment of Shri S.N. Kumar. Further the Chief Justice of the Delhi High Court is not impleaded as a respondent in the case. It is wholly improper and opposed to all canons of judicial process to make any comment against him without giving an opportunity to defend himself. Under the Constitution, he is under a duty to express his opinion on the question of appointment of a Judge in the High Court of Delhi. Such opinion should be about all relevant aspects including the reputation and integrity of the person concerned. In discharge of his constitutional obligation, the Chief Justice of the Delhi High Court wrote to the Law Minister on Feb. 19, 1981 as follows:

SECRET & CONFIDENTIAL

CHIEF JUSTICE
HIGH COURT OF DELHI
D.O. No. 275-HCJ/PPS

New Delhi, the 19th February, 1981 My dear Shiv Shankerji,

Mr. Justice S.N. Kumar was appointed an Additional Judge of this Court for a period of two years , vide Notification No. 50/8/78-Jus., dated 6-3-1979, issued by the Government of India, Ministry of Law, Justice & Company Affairs (Department of Justice). He assumed the charge of his office in the afternoon of March 7, 1979.

Normally extension of the tenure of an Additional Judge is recommended keeping in view the pendency in Court. The pendency in this Court still justifies the appointment of Additional Judges. There have, however, been serious complaints against Mr. Justice S.N. Kumar, both oral and in writing. These complaints have been received by me direct as well as through you. I have examined these complaints and find that some of the complaints are not without basis. Responsible members of the Bar and some of my colleagues, whom I would rather not name, have also complained about Mr. Justice Kumar. I have no investigating agency to conclusively find out whether the complaints are genuine or not. All the same the complaints have been persistent.

There is one other factor which has been brought to my notice. It is rather unfortunate that Mr. Justice Kumar has also not been very helpful in disposing of cases. Some responsible members of the Bar and some of my colleagues have also expressed doubts about Justice Kumar's integrity.

In the above circumstances, it is my very painful duty not to recommend an extension for Justice Kumar. You may, however, examine the matter at your end and take such steps as you think proper.

With regards,

Yours sincerely,
Sd/-
(PRAKASH NARAIN)

Shri P. Shiv Shanker,
Minister of Law, Justice
And Company Affairs,
Government of India,
Shastri Bhavan, New Delhi.

1195. A reading of the aforesaid letter shows that it was being written in anguish and with a feeling of sincerity. It is not shown that the Chief Justice of the Delhi High Court had made any statement which was false to his knowledge, or which he did not believe to be true or which he believed to be untrue. A Chief Justice of a High Court has no machinery to investigate into complaints but he has got to state about the fitness of the person to be appointed as a Judge. It is seen that he has relied on the statements of some of his colleagues and some of the members of the Bar. He has no doubt not given their names. It is not also possible to expect him to give out their names having regard to the

constraints of law which applies to persons who make such statements. It is significant that even the Chief Justice of India has not given the names of Judges and of lawyers who were consulted by him as stated in his letter dated May 22, 1981. There is no reason to disbelieve the statement of the Chief Justice of the Delhi High Court that he had heard some statements which suggested that the integrity of Shri S.N. Kumar was in doubt. The said statement may be in fact not true. We cannot go into the correctness or otherwise of those statements in proceedings of this character. It is enough to state that it is not shown that the Chief Justice of the Delhi High Court had not heard such statements at all. In this situation if the Chief Justice of the Delhi High Court had conveyed whatever he had heard and had not recommended continuance of Shri S.N. Kumar, he cannot be considered as having committed any act of impropriety even though Shri Kumar had not in fact done anything which was improper as a Judge. If Shri Kumar is a victim of false rumour he deserves sympathy but it is not open to condemn the action of the Chief Justice of the Delhi High Court which he had to discharge in the public interest and true to his oath of office.

1196. The next aspect of this part of the case relates to the question whether there was full and proper consultation with the functionaries mentioned in Article 217(1) of the Constitution. In the case of the High Court of Delhi which is situated in the Union Territory of Delhi, consultation with the Governor does not arise (vide SECTION 4 of the Delhi High Court Act, 1966). The only two authorities who have to be consulted by the President are the Chief Justice of the Delhi High Court and the Chief Justice of India. The process of consultation referred to in Article 217(1) requires that the authorities concerned should be given sufficient information and also sufficient opportunity to furnish their opinion. The question whether such information was furnished and whether such opportunity was given depends upon the facts of each case. In the instant case the letter dated Feb. 19, 1981 written by the Chief Justice of the Delhi High Court was made available to the Chief Justice of India. On that the Chief Justice of India observed on March 3, 1981: "I would like to look carefully into the charges against Shri S.N. Kumar. The letter of the Delhi Chief Justice dated Feb. 19, 1981 seems to me too vague to accept that Shri Kumar lacks integrity." The Chief Justice of India, however, recommended that Shri S.N. Kumar may be appointed for a period of six months so that he could enquire into the matter in the meanwhile. On the same date i.e. March 3, 1981, the Law Minister put up a note for the consideration of the Prime Minister suggesting that Shri S.N. Kumar may be appointed as an additional Judge for three months so that a final decision could be taken within that period. It is true that the Law Minister has stated in this note that the Chief Justice of the Delhi High Court had made 'serious complaint' against the integrity of Shri S.N. Kumar. The word 'serious' according to the Shorter Oxford Dictionary means 'requiring earnest thought, consideration or application'. Any remark against the reputation or integrity of a person to be appointed as a Judge of a High Court is a matter which requires earnest consideration. It is, therefore, difficult to hold that the Law Minister had made any misrepresentation to the Prime Minister in recording the aforesaid note.

1197. After Shri S.N. Kumar was re-appointed as an additional Judge with effect from March 7, 1981. the Law Minister wrote on M ar. 9, 1981 to the Chief Justice of the Delhi High Court bringing to his notice the note of the Chief Justice of India made on Mar. 3, 1881 that the letter of the Delhi Chief Justice dated Feb., 19, 1981 seemed to him too vague to accept that Shri Kumar lacked integrity and added:

2. In the light of these observations of the Chief Justice of India, I shall be grateful for your further comments on the question of continuance or otherwise of Shri Justice S.N. Kumar, His term expires on 6-6-1981 and I would be grateful if your comments reach me by 15-4-1981.

1198. It is seen from the letter dated Mar. 28, 1981 written by the Delhi Chief Justice to the Chief Justice of India that the Chief Justice of India had also written a letter dated Mar. 14, 1981 (which is not placed before us) to the Delhi Chief Justice about the same subject and that the Chief Justice of the Delhi High Court had met the Chief Justice of India on Mar. 26, 1961 (this date is mentioned in the letter of the Chief Justice of India dated May 22, 1981 which will be referred to later on). After that meeting the Chief Justice of the Delhi High Court wrote to the Chief Justice of India the letter dated March 28. 1981. referred to above. It reads:

SECRET

CHIEF JUSTICE
HIGH COURT OF DELHI
NEW DELHI
D. O. No. 292-HCJ/PPS

March 28, 1981

My dear Chief Justice,

I am in receipt of your letter dated 14th March, 1981 with regard to Mr. Justice S.N. Kumar. Since then I have also had an opportunity to discuss this delicate matter with you.

There were three points mentioned in my D. O. No. 275-HCJ/PPS dated 19th February, 1981 addressed to the Law Minister, a copy of which was forwarded to you. I had also mentioned in that letter that I have no investigating agency to conclusively find out whether the complaints are genuine or not. Understandably there will be some who would support the allegations and there will be some who would refute them. Therefore, it is natural that there may be variance between the views that may be expressed by different people. Indeed, my experience is that people are hesitant in speaking out frankly.

With regard to the complaints about Justice Kumar s integrity and general conduct, the matter has already been discussed between us. About Justice Kumar not being very helpful in disposing of cases, I enclose a statement of disposal by Justice Kumar in 1980. Just by way of comparison I have also included the figure of disposal in the same period of my other two colleagues whose cases for re-appointment are under consideration.

With warm regards,

Yours sincerely,
Sd/-
(PRAKASH NARAIN)

End: 1

Hon'ble

Mr. Justice Y. V. Chandrachud,

Chief Justice of India,

5, Krishna Menon Marg,

New Delhi,

1199. Along with this letter, a statement of cases was sent as stated in its last paragraph. On the same date i.e. Mar. 28, 1981 the Delhi Chief Justice wrote to the Law Minister enclosing a copy of the letter written by him to the Chief Justice of India. That letter runs as under:

SECRET

CHIEF JUSTICE
HIGH COURT OF DELHI
NEW DELHI
D. O. No. 293-HCJ/PPS
March 28, 1981

My dear Shiv Shankerji,

I am in receipt of your D. O. No, 50/2/ 81-Jus, dated 19th March 1981.

I have received a letter from the Chief Justice of India with regard to my observations and recommendations made in my D. O. No. 275-HCJ/PPS dated 19th Feb., 1981, addressed to you, a copy of which was sent to the Chief Justice of India, asking me to furnish him with "details and concrete facts in regard to the allegations against Justice Kumar." I have since had an opportunity to discuss the entire matter in detail with the Chief Justice of India. After the discussion I have addressed a letter to the Chief Justice, a copy of which is enclosed. Perhaps you will consider this to be sufficient 'comments' on my part as desired by you in your letter under reply about the observations of the Chief Justice of India which you have quoted in your letter.

With regards,

Yours sincerely.
Sd/-
(PRAKASH NARAIN)

End: 1

Shri P. Shiv Shanker,

Minister of Law, Justice

And Company Affairs,

Government of India,

Shastri Bhavan,

New Delhi.

1200. On April 15, 1981, the Law Minister wrote to the Chief Justice of the Delhi High Court asking for any material which provided the basis for his recommendation. It reads;

Confidential

D. O. No. 50/2/81-Jus

April 15. 1981

My dear Chief Justice,

I am to hand your d. o. letter No. 293-HCJ/PPS dated 28th Mar., 1981 and a copy of your letter to the Chief Justice of India bearing the same date, regarding Shri Justice S.N. Kumar, Additional Judge, Delhi High Court. The Chief Justice of India had felt that the reasons given in your earlier letter were vague and wanted more concrete particulars. It is true that you have no investigating agency to conclusively establish the truth of complaints. Nevertheless, you must have had some material which provided the basis on which you concluded that Justice Kumar's reputation for integrity was not above board and recommended that he may not be continued. In view of the observations of the Chief Justice of India asking for concrete material, it would be necessary for us to have it with your comments. I would, therefore, be grateful, if it be furnished to me at the earliest.

2. I would also request you to send me your comments promised in your letter No. 268-HCJ/PPS dated 12th November, 1980 on the complaints of Shri Sabir Hussain.

3. From the statement of disposal of cases sent by you, it is observed that it is really in the second half of 1980 that there has been a sharp drop in the disposals of Justice Kumar. Could there be any special reason for this? I may please be informed whether the nature of cases assigned to Justice Kumar, in the terms of time normally required for their disposal, was roughly similar to the nature of cases disposed of by Justice Vohra and Justice Wad.

4. I shall be grateful for an early reply.

With regards,

Yours sincerely,
Sd/-
(P. Shiv Shanker)

Shri Justice Prakash Narain,

Chief Justice,

Delhi High Court,

New Delhi.

1201. In reply to this letter the Chief Justice of the Delhi High Court wrote on May 7, 1981 a letter by way of reply which has given rise to some serious controversy in this case. That letter reads:

SECRET

(For Personal Attention Only)

CHIEF JUSTICE
HIGH COURT OF DELHI
NEW DELHI
D. O. No. 298-HCJ/PPS
New Delhi, the 7th May, 1981

Dear Mr. Minister,

I am in receipt of your D. O. No. 50/2/ 81-Jus., dated 15th April, 1981.

Hon'ble the Chief Justice of India had made certain observations with regard to my recommendation about Mr. Justice S.N. Kumar and the same were communicated to me by you for my comments in your D. O. No. 50/2/81-Jus., dated 19th March, 1981. The Chief Justice had also written to me a letter dated 14th March, 1981, asking for "details and concrete facts in regard to the allegations against Justice Kumar." As I wrote to you in my D. O. No. 293-HCJ/PPS, dated 28th March, 1981, I discussed the matter with Hon'ble the Chief Justice and as desired by him, in reply to his letter, wrote my D. O. No. 292-HCJ/PPS dated March 28, 1981, a copy of which was forwarded to you. Accordingly, it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis far me to conclude that Justice Kumar's integrity was not above board, I give below some facts,

In the first half of 1980, Justice Kumar was sitting singly and was doing mostly Original Side matters but also some Appellate Side matters. Chance remarks came to my knowledge about his conduct in Court as well as about his integrity. Somewhere early in May, 1980, one of my colleagues met me and said that he was rather perturbed about information with him to the effect that if a substantial amount was paid to Justice Kumar, suits brought by a particular party against an insurance company would be decided in favour of that party. I had not paid much attention to the earlier reports but when this was brought to my notice, and I was at that time not the Chief Justice. I thought to myself that after the summer vacations, to save Justice. Kumar from any embarrassment, he should be put on a jurisdiction other than original jurisdiction. Therefore, when as Acting Chief Justice I constituted the Benches for second half of 1960 I put Justice Kumar in a Division Bench to sit on the Appellate Side and Writ Jurisdiction. In my view this was a safe way to finish the rumours if the same were incorrect and thus safeguard the reputation of a Judge, Surprisingly enough, Justice Kumar did not release the original suits, regarding which allegations had been made, from his board and continued to deal with these suits even in the second half of 1980. These suits were Suit No. 1489 of 1979, Suit No. 1417 of 1978 and Suit No. 1408 of 1979 filed by Jain Sudh Vanaspati Ltd. and Jain Export Pvt. Ltd. against the New India Assurance Co. Ltd. In August, 1980. the same colleague of mine who talked to me earlier and another colleague mentioned that doubts were being expressed about the integrity of Justice Kumar vis-a-vis the aforesaid cases and some others. Since I was only acting as Chief Justice at that time, I did not want to take any precipitate action. I, however, made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations. This made me look into the matter more carefully when to my astonishment I found that it was not only the three suits mentioned above but that there were other Single Bench matters also which had been retained by Justice Kumar on his Board despite being put in the Division Bench. There is fairly a long list of these cases. In some of these the parties involved were rich and influential including some former princes. After I was appointed Chief Justice early in January, 1981. I looked into this matter a little more deeply and made further inquiries. Some of the lawyers were non-committal and understandably so. Others, however, asserted with some force that Justice Kumar's reputation was not above board. I talked to some of my other colleagues besides the two who had earlier spoken to me. They also said that unconfirmed

reports have been circulating in the Bar which were not very complimentary to Justice Kumar. This made me conclude that the reputation for integrity of Justice Kumar was not what should be for Judge of the High Court. To my mind, reputation of integrity is just as important as a person actually being above-board.

With regard to the complaint of Mr. Sabir Hussain. Advocate, I had looked into the relevant files besides showing the complaint to Justice Kumar. My colleague had of course, no comments to make nor could I ask him for the same. The litigation referred to in Mr. Sabir Hussain's complaint ended by the suit being decided in his favour as is apparent from the judgment and decree in. Suit No. 550 of 1975. The learned Judge did not, however, give his decision on all the prayers or with regard to all the parties to the suit. From the record I could not find any evidence of alleged partiality. It is correct that the learned Judge took over six months in pronouncing judgment after the case was closed. I would not like to comment further on the merits of the decision because that is a judicial matter. But it is correct that the judgment does not deal with all the matters raused in the suit or regarding which evidence was adduced. It is also correct that all the evidence adduced has not been discussed in the judgment. The inferences made by Mr. Sabir Hussain from such a judgment are possible but it is a matter which should only be commented upon judicially.

With regard to the disposal statement for the second half of 1980, I may mention that no special type of work was allocated to the Bench of which Mr. Justice Kumar was a member. The Bench disposed of eleven main cases and 7 Misc. petitions. Normally when matters are heard by a Division Bench, alternate judgments are written by the two members of the Bench. Credit, however, is given to both the Judges for the total disposal by the Bench. To clarify, if 18 matters were disposed of by the Bench, 9 judgments would normally be written by each Judge in regular matters but each Judge will get credit of 18. So far as motion matters are concerned. short orders admitting or dismissing a case are dictated in open Court by the senior of the two Judges. No credit is given for disposal of motion matters.

Except for the Division Bench doing Tax matters or Criminal Appeals, other Division Benches have writ matters, L. P. As, and other types of civil matters listed before them. There is no special type of work assigned to any particular Judge or Bench in our High Court. Normally the distribution of Work is in the broad categories of criminal work tax work and civil matters. Sometimes, depending upon the special aptitude of a Judge, one particular type of cases are listed before that Judge in greater number.

There was no special distinction between the work that was being done by the Bench of which Justice Kumar was a member and the Benches of which Justice Vohra and Justice Wad were the members. This would be evident from a reading of the classification of cases disposed of by the various Benches which are all broadly mentioned as Main Gases in the statement of disposal sent by me to Hon'ble the Chief Justice, I enclose for your ready reference the break up of the Main Cases. You will notice that the Division Bench of which Justice Wad was a member heard and disposed of 11 Writ Petitions. 79 Letters Patent Appeals, 11 Sales Tax References, 1 Civil Misc. (Main), 2 Criminal Contempt Petitions and 5 Income-tax References besides 7 Misc. Petitions. The Bench of which Justice Vohra was a member disposed of 8 Regular First Appeals, 55 First Appeals from Orders, 3 Company Appeals, 10 Civil Writ Petitions, 7 Criminal Appeals, 18 Letters Patent Appeals, 3 Civil Revisions etc. etc. The Bench of which Justice Kumar was a member disposed of 1 Letters Patent Appeal, 9 Civil Writ Petitions and 1 First Appeal from Order besides 7 Misc. Petitions.

In my original letter to you I had mentioned about other complaints regarding Justice Kumar besides the complaints about integrity. These pertain to his conduct with counsel in Court. Generally speaking an incident in Court is nothing more than exchange of, at the worst, hot words. Unfortunately incidents in Justice Kumar's Court have been occurring more frequently than in others. In some cases I am told, and in one I have verified, a senior counsel had to go to the extent of recording the incident and making his comments about unfair conduct of the Judge on affidavit which was placed on the record of the case. It created an unhappy situation.

In view of what I have written above and my talks with you, it is now for the Government to see whether it would like Justice Kumar to continue-as a Judge of the Delhi High Court. As far as I am concerned, my views have already been expressed in my letters dated 19th February. 1961.

With regards.

Yours sincerely,
Sd/-
(PRAKASH NARAIN)

Encl: 3

Shri P. Shiv Shanker,

Minister of Law, Justice & Co. Affairs,

Government of India, New Delhi

1202. Three statements are enclosed to this letter showing the number of cases disposed of by Shri S.B. Wad, Shri O.N. Vohra and Shri S.N. Kumar. After the above letter of May 7, 1981 was received, the Law Minister recorded a note on May 19, 1981 asking for the opinion of the Secretary (Justice) which reads as follows:

Last evening I spoke to the Chief Justice of Delhi High Court for an early reply to my letter dated .... in view of the fact that the time left for the decision of cases of S/Shri Justice Vohra, S.N. Kumar and S.B. Wad was very short. He assured me that he would send his reply within a day or two and said that the matter necessarily involved a little time as he had to wade through the proceedings of the "Kissa Kursi Ka" case and make a few enquiries. He requested me that his reply may be kept secret for personal attention only, as he desired in his earlier letter dated 7th May, 1981. In fact, I recall that before issuance of the letter dated 7th May, 1981, he informed me to treat it secret though at that moment I did not try to probe the implications and details of his request. When he made the request now, for keeping the letter secret, I asked him as to what exactly he meant by 'secret for personal attention only' as indicated in the 7th May, 1981 letter. In the context during the discussions he requested that his letter may be avoided from being brought to the notice of CJI for the following reasons:

1. For reasons stated in the opening portion of his letter dated 7th May, 1981.

2. He felt highly embarrassed and perplexed after he addressed the original letter dated 19-2-1081 about Shri S.N. Kumar as the contents of that letter came clearly to be known to Shri S.N. Kumar and certain of his colleagues on the bench as a result of which it embarrassed him in discharge of his duties and functions. He felt that the contents of his letter dated 7th May, 1981 would also get into the hands of Shri S.N. Kumar and certain of his other colleagues and he would thereby be put to greater embarrassment which might create problems for him in future in the discharge of his duties as Chief Justice.

3. He felt that the Chief Justice of India had already started wrongfully denigrating him for his letter of February 81 as some of his friends conveyed to him the feelings of the C. J. I.

He categorically informed me that he could not afford to spoil his relations with the CJI on the one hand and on the other could not desist from expressing without fear or favour what he felt of certain matters and if he is going to be suspect for discharging his functions fairly and conscientiously, then his functioning as the Chief Justice would never be smooth vis-a-vis CJI.

In view of the above, Secretary (J) may examine immediately as to whether it is inevitable to furnish the letters of the Chief Justice of Delhi to the CJI for his comments or would it be sufficient if on the basis of his previous endorsements, we address a letter to the CJI for his advice, making him available, if need be the material available with us including the purport of the IB report. In the latter case drafts may be put up.

Sd/-
(P. Shiv Shankar)
19-5-81

Secretary (Justice)

1203. Thereafter on May 21, 1981, the Law Minister wrote to the Chief Justice of India requesting him to give his opinion on the continuance of Shri S.N. Kumar. It has to be mentioned here that by then an interim order had been passed by this Court asking the Union Government to take a decision on the continuance of Shri S.N. Kumar ten days before the expiry of his tenure as Additional Judge which was to come to an end on June 6, 1981 i.e. on or before May 27, 1981. It is admitted that the letter of May 7, 1981 written by the Delhi Chief Justice to the Law Minister was not sent to the Chief Justice of India along with the letter of May 21, 1981. The letter of Feb. 19, 1981 referred to above was, however, sent But the letter of May 21, 1981 contained a reference to the meeting which had taken place between the Delhi Chief Justice and the Chief Justice of India in para 3 thereof. The letter of May 21, 1981 reads:

D. O. No. 50/2/81-Jus May 21, 1981 My in his letter dated 19th February, 1981 the Chief Justice of the Delhi High Court (copy enclosed) had recommended that Justice Kumar may not be given any extension. By another letter of the same date he had recommended an extension of two years for Justice Wad.

2. You had advised on 3rd March, 1981 as below:

I have recommended, for reasons mentioned in the concerned file, that Shri O. N. Vohra's term should be extended by six months. Shri Vohra is senior to Shri S.N. Kumar and Shri S.B. Wad. In the interests of propriety, the term of these two Judges should also be extended by six months.

I would like to look carefully into the charges against Shri S.N. Kumar. The letters of the Delhi Chief Justice dated February 19, 1981 seem to be too vague to accept that Shri Kumar lacks integrity.

True, that there are no complaints against Shri Wad. But, since he is junior to the other two Judges, his term ought not to be extended, longer than that of the other two. That is to say, Shri O. N. Vohra, Shri S.N. Kumar and Shri S.B. Wad should all be extended by six months.

3. In regard to complaints regarding Justice Kumar's integrity and general conduct, the Chief Justice of the High Court discussed the matter with you as mentioned in his d. o, letter No. 292-HCJ dated 28th March, 1981, to you, a copy of which he had sent to me. In that letter he had also mentioned the disposals of Justice Kumar,

4. When you had tendered your advice dated 3rd Mar., 1981 the following I. B. report regarding Shri S.N. Kumar had been brought to your notice: --

(Extract from I. B. report omitted) An extract of a further report received is enclosed.

5. You will please see that in your advice dated 3rd Mar., 1981 you desired to look carefully into the charges against Shri S.N. Kumar. In terms thereof if you were pleased to make any inquiries, I shall be grateful to have the details.

6. I would be grateful for your urgent advice in regard to the continuance or otherwise of the terms of Justice S.N. Kumar and Justice S.B. Wad.

With regards,

Yours
Sd/-
(P. Shiv Shanker)

Shri Y. V. Chandrachud,
Chief Justice of India,
Supreme Court,
New Delhi.
Ends: As above

1204. The Chief Justice of India was camping at Simla then. The Government of India had to take a decision as per the interim order of this Court on or before May 27, 1981. In view of the urgency involved, the Chief Justice of India sent his reply as per letter of May 22, 1981 through a special messenger from Simla to the Law Minister which reads as follows:

CHIEF JUSTICE OF INDIA

SUPREME COURT OF INDIA
NEW DELHI
CAMP: SIMLA
MAY, 22 1981

CONFIDENTIAL

By Special Messenger

My dear Shiv Shanker,

I am in receipt of your letter (D. O. No. 50/2/81-Jus) dated May 21, 1981 seeking my advice in regard to the continuance or otherwise of the terms of Justice S.N. Kumar and Justice S.B. Wad who are at present functioning as additional Judges of the Delhi High Court and whose terms were extended by a period of three months with effect from March 6, 1981.

Shri Prakash Narain, Chief Justice of the Delhi High Court, had written a letter dated February 19, 1981 to you, a copy of which was sent to me. The Chief Justice had recommended in that letter that Justice Kumar's appointment should not be extended further for three reasons : (1) that serious complaints were received against Justice Kumar orally as well as in writing; (2) that Justice Kumar was not very helpful in disposing of cases; and (3) that some responsible members of the Bar and Bench had expressed doubts about Justice Kumar's integrity. By my letter dated March 14, 1981 to the Delhi Chief Justice I requested him to furnish further details and concrete facts in regard to the allegations against Justice Kumar since the result of the enquiries made by me was quite at variance with what the Chief Justice had stated in his (sic) of March 19.

The Chief Justice met me on March 26, 1931 when he told me that Justice Kumar was very slow in his disposals and that he doubted his integrity because even after Justice Kumar's allocation was changed from the original side to the appellate side, he still continued to hear the part-heard cases on the original side. The Chief Justice did not mention any thing adverse in regard to Justice Kumar's political leanings or affiliations. By my request the Chief Justice promised to send a statement showing the disposals of Justice Kumar.

I have made the most careful and extensive enquiries in regard to both of these matters and I am satisfied that there is no substance in any one of them. I have with me a detailed statement of the disposals of Justice Kumar from which it would appear that no charge can be made against him that he is slow in his disposals. Justice Kumar was sitting with Justice T.P.S. Chawla for quite some time during the period under consideration and it is a matter of wide knowledge that Justice Chawla takes an enormously long time over the cases which come before him. Sitting with Justice Chawla as a junior Judge, Justice Kumar could have done precious little to hasten the disposal of cases which came before the Bench.

As regards the complaint of the Chief Justice that Justice Kumar's integrity was doubtful since he continued to take old part-heard matters even after the allocation of his work was changed, I have made enquiries not only from members of the Bar but from the sitting Judges of the Delhi High Court which show that it is a common practice in the Delhi High Court that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. Justice Kumar therefore did nothing out of the way or unusual in taking up part-heard cases after the allocation of his work was changed.

I find it therefore difficult to agree that Justice Kumar's term should not be extended for the reasons mentioned by the Chief Justice of the Delhi High Court, I disagree with the learned Chief Justice on enquiries made by me that Justice

Kumar is either slow in his disposals or that his integrity is doubtful.

I must mention' that I also made independent enquiries in regard to Justice Kumar's integrity generally and apart from the reason for which the learned Chief Justice thought that Justice Kumar lacked integrity. Not one member of the Bar or of the Bench doubted the integrity of Justice Kumar. On the other hand several of them stated that he is a man of unquestioned integrity.

You have annexed to your letter an extract of a further report from the I. B. which says that:

(Portion relating to I. B. report omitted)

On my return on May 26, 1981 I will get into touch with Justice Kumar and make enquiries from him as also from other persons who are likely to be in the know of the matter. Until then it is impossible for me to tender any opinion one way or the other.

I would therefore propose that Justice Kumar's term, and consequently Justice Wad's term, should be extended by a further period of three months.

With regards,

Yours sincerely,
Sd/-
(Y. V. Chandrachud)

Shri P. Shiv Shanker,
Minister for Law, Justice
and Company Affairs,
New Delhi.

1205. This letter recommends a further extension by three months to Shri S.N. Kumar pending further enquiry by the Chief Justice of India on the contents of some I. B. report. But the Chief Justice of India is categorical that the three reasons viz. "(1) that serious complaints were received against Justice S.N. Kumar orally as well as in writing; (2) that Justice Kumar was hot very helpful in disposing of cases; (3) that some responsible members of the Bar and the Bench had expressed doubts about Justice Kumar's integrity" given by the Chief Justice of the Delhi High Court were unsustainable. The letter refers to the meeting of Mar., 26, 1961 between the Chief Justice of India and the Chief Justice of the Delhi High Court. The rest of the contents are self-explanatory. This letter is followed by the letter of May 20, 1981 by the Chief Justice of India to the Law Minister which runs as under:

Chief Justice of India

Supreme Court of India
New Delhi
May 29, 1981

Confidential

My dear Shiv Shanker,

While in Simla, I received your letter dated May 21, 1981 in connection with the extension of the term of Justice S.N. Kumar and Justice S.B. Wad whose term as Additional Judges of the Delhi High Court is due to expire on June 6, 1981. Immediately on receipt of your letter I sent a reply to you dated May 22, 1981, recommending, for the time being, that the term of the two Judges be extended by a further period of three months. In so far as Justice Wad is concerned there was no difficulty in recommending the extension of his term for the normal period of two years or until the occurrence of a permanent vacancy but that could not be done since he is junior in appointment to Justice S.N. Kumar and a further report from the I. B. was enclosed along with your aforesaid letter in regard to Justice Kumar. I had stated in my reply that after my return to Delhi I will make enquiries into the allegations contained in the I. B. report against Justice Kumar and shall thereafter tender my advice on the question regarding the further extension of his term.

The report of the I. B. contains the following information in regard to Justice Kumar:

(Portion relating to I. B. report omitted)

I have already stated in my reply of 22nd that I do not agree that Justice Kumar's term should not be extended as an additional Judge for the reason either that he is slow in his disposals or that he lacks integrity.

I, therefore, recommend that the term of Justice S.N. Kumar as an Additional Judge should be extended by a further period of two years.

As a consequence, the term of Justice S.B. Wad should also be extended by a further period of two years.

With regards,

Yours sincerely,
Sd/-
(Y. V. Chandrachud)

Shri P. Shiv Shanker, Minister of Law, Justice
and Company Affairs,
New: Delhi.

1206. This letter recommends an extension of two years to Shri S.N. Kumar instead of three months' extension recommended in the letter of May 22, 1981. But by the time the letter of May 29, 1981 was received, the Law Minister had recorded his note on May 27, 1981, the relevant pert of which reads:

In my letter to the C. J. I. dated 21-5-1981, I categorically requested to have the details of inquiries that he might have made in terms of his advice dated 3-3-1981. I desired the details consciously as 1 did so with the Chief Justice of Delhi High Court since, the C J. I. termed the letter of C. J. Delhi dated 19-2-81, addressed to me as too vague to accept that Shri Kumar lacks integrity. I regret that notwithstanding my specific request as to details, the C. J. I. did not furnish me the same and on the contrary reading his letter dated 22-5-81 would reveal that he became a victim of his own charge of vagueness made by him against the Chief Justice of Delhi. C.J.I. does mention that C. J. Delhi met him on 26-3-1981; He also refers about the common practice in the Delhi High Court that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. I presume that when C. J. Delhi and the C. J. of the Supreme Court met, the former must have informed the latter about the details that he had mentioned to me in his letter dated 7-5-81. This presumption is raised on the basis of the letters from the Chief Justice, Delhi. Even assuming that there is a prevalent practice as referred to by the C. J. I. the C. J. I. himself says that such cases should be those on which substantial amount of time has been already spent. The C. J. I. surprisingly has left the matter there, without further probing as to whether the part-heard matters which Justice Kumar chose to handle as a single Judge notwithstanding his having been allocated to the Division Bench were such on which substantial amount of time had already been spent by him. The C. J. I. in his advice proceeds from the premises that taking up part-heard cases after the allocation of work is changed does not amount to lacking in integrity. If it were that simple I would not have joined issue, but the details furnished by the C. J. Delhi in his latter dated 7-5-81 go further.

The C. J. I. also observes that he made inquiries in regard to Justice Kumar's integrity generally. The C. J. I. states that in his general inquiries no member of the Bar or the Bench doubted the integrity of Justice Kumar. I regret that the letter of C. J. I. is not only lacking in details as desired by me but too vague. The premises on which he does not doubt the integrity of Shri Justice Kumar is wholly different.

In the matter of assessment of integrity, I prefer that the views of C. J. Delhi be given credence as it is in his association that the Judge concerned discharges his duties and that he has a better occasion and opportunity to watch his working and conduct. The correspondence from the C. J. of Delhi addressed to me furnishes clear details which cannot easily be brushed aside.

I therefore agree with the observations contained in the note of the Secretary (Justice) and opine that Shri Justice S.N. Kumar may not be continued any further as Additional Judge of the Delhi High Court after the expiry of the present tenure on 7-6-1981 and thus recommend accordingly.

1207. In the earlier part of the aforesaid note, the Law Minister has stated that he "would avoid going to the I. B. Reports or Shri Kumar's disposals or even the behaviour in the Court and prefer to confine to the question of reputation and integrity" of Shri S.N. Kumar. The consultation process thus came to an end.

1208. The two questions to be considered here are whether the Union Government committed an error amounting to an unfair act in not sending the letter of May 7, 1981 of the Chief Justice of the Delhi High Court to the Chief Justice of India and whether on account of not sending that letter, the consultation process is vitiated. The note of May 19, 1981 of the Law Minister containing the reasons given by the Delhi Chief Justice for requesting the Law Minister not to send

the letter of May 7, 1981 to anybody else is confirmed by the following letter dated May 29, 1981 written by the Law Minister to the Delhi Chief Justice:

D. O. No. 50/2W/81/-Jus. Part

May 29, 1981

My dear Chief Justice,

When you spoke to me on 10th May, 1981, you had requested me that the letter that you were proposing to send to me regarding Justice O. N. Vohra should be kept secret for personal attention only. You had made a similar request about letter dated 7th May, 1981 regarding Justice S.N. Kumar. On my request you elucidated that when you marked your letter dated 7th May, 1981, "secret for Personal Attention only" what you were particular about was that the letter may not be brought to the notice of Chief Justice of India for the following reasons:

1. For the reasons stated in the opening portion of your letter dated 7th May, 1981.

2. You felt highly embarrassed as the contents of your letter dated 19th Feb., 1981 about Shri Kumar came clearly to be known to Shri S.N. Kumar and some of his colleagues on the Bench. You felt that the contents of your letter dated 7th May, 1981 might also get known to them and cause you further embarrassment.

3. You felt that the Chief Justice of India had already started wrongfully denigrating you for your letter of Feb, 19, 1981.

2. You mentioned that you could not desist from expressing without fear or favour what you felt about certain matter but at the same time you were particular that your relations with the Chief Justice of India should not be spoiled.

3. For similar reasons' you were particular that your letter regarding Shri O. N. Vohra should not be sent to him as also for the additional reason that a senior counsel whose name figured therein had enjoined secrecy. Your letter regarding Shri O. N. Vohra dated 22nd May, 1981 has since been received by us.

4. In view of the emphasis laid by you on keeping these letters confidential from the Chief Justice of India we have not shown these to him. This is for favour of your information.

With regards,

Yours sincerely,
Sd/-
(P. Shiv Shanker)

Shri Prakash Narain,
Chief Justice,
Delhi High Court,
New Delhi.

1209. The note of the Law Minister D/- 19-5-1981 and the letter of May 29, 1981 written by the Law Minister to the Delhi Chief Justice which refer to the request of the Delhi Chief Justice clearly establish that the letter of May 7, 1981 was not sent to the Chief Justice of India not as part of any conspiracy or pact between the Law Minister and the Delhi Chief Justice but at the request of the Delhi Chief Justice. It is not also shown as to what advantage the Law Minister was deriving by withholding the said letter from the knowledge of the Chief Justice of India unless we start with the assumption that for some undisclosed reason the Law Minister was bent upon treating Shri S.N. Kumar with an 'evil eye and an un-even hand' and for that reason he kept back the letter from the knowledge of the Chief Justice of India. The Delhi Chief Justice has given three reasons for requesting the Law Minister not to send the letter outside his office. The first reason is, according to the Delhi Chief Justice, contained in the first para of the letter of May 7, 1981. That para refers to the meeting which had taken place between the Chief Justice of India and himself on Mar. 26, 1981 on all relevant points relating to the proposal of reappointment of Shri S.N. Kumar and the fact that he had written the letter of Mar., 28, 1981 to the Law Minister 'as desired' by the Chief Justice of India. That there was full and frank discussion

between the Chief Justice of India and the Delhi Chief Justice with reference to the very particulars referred to in the letter of May 7, 1981 is clear by the following facts : (i) The statement "with regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us" which is found in the letter of March 28, 1981 written by the Delhi Chief Justice to the Chief Justice of India (ii) the reference to the meeting in the letter of the same date addressed by the Delhi Chief Justice to the Law Minister enclosing a copy of the above said letter dated Mar. 28, 1981, (iii) the reference to the meeting in the letter of the Law Minister to the Chief Justice of India dated May 21, 1981 and (iv) the reference to the meeting in the letter of the Chief Justice of India dated May 22, 1981 written from Simla. This is further supported by the affidavit dated July 17, 1981 of Shri S.N. Kumar himself which had been filed long before the date on which documents in question were directed to be disclosed by the Court i.e. in Oct., 1981. The relevant part of the aforesaid affidavit of Shri S.N. Kumar reads:

Hon'ble the Chief Justice of India, on the other hand discussed the matter with me at length about my work and other general matters. I gave him full and true information and supplied him relevant papers for his consideration. Since the Government has not disclosed the reasons for its action I have no other course open but to apprise this Court briefly of what is in my knowledge. It was alleged that I was slow and that it was improper for me to continue to deal with original work while sitting on the appellate side. A comparative assessment of work disposed of by eight Judges who sat on the original side with me showed that the work disposed of by me was nearly maximum. I disposed of 827 matters during 256 sittings out of which 385 were civil suits and 442 miscellaneous matters.

Regarding the second allegation, I say that on the contrary it would be, improper for a Judge not to finish a part-heard matter. I acted in accordance with the well established practice of Court. I know that two Judges of this Court threatened issuing of contempt notice to the officer concerned who removed a part-heard matter from their lists. The practice is so well understood that the Registry of the Court itself fixes cases accordingly in routine. Furthermore a perusal of the proceedings in the part-heard matters would reveal the ridiculous nature of the allegations.

1210. Then Shri S.N. Kumar refers to the proceedings in Suit No. 5/1980, Suit No. 87/1975, Suit Nos. 1408, 1409 and 1417/1979, Suit No. 304/1974, Suit No. 327/1979, Ex. No. 11/1978, C. C. P. No. 13/ 1979 and Suit No. 73/1979. Thereafter he says:

20. As stated above I informed the Chief Justice of India that the old established practice in Delhi High Court is that a part-heard matter goes with the Judges and is heard by him whether he goes over from the appellate side to the original side or vice versa. A bunch of over 30 part-heard Regular Division Bench matters were heard during January and Feb., 1981 on Fridays by me sitting with Chawla, J. while I was holding Court singly on the Original Side w.e.f. 5-1-1981. L.P.A. 32 of 1980 was heard during February, 81 by me while sitting with Mr. Chawla, J. Even on 24th April, 1981 (Friday) when the aforesaid material was sent to the Chief Justice of India by me the following part-heard matters were posted in the Division Bench of which I was a member:

(1) Civil Writ No. 557/79 and Civil Writ No. 1231 of 1979

(2) Civil Writ No. 61/80 with C. Ms.

Practically every week once from Jan., 81 till the end of May, 81, I was sitting in the Division Bench with Chawla, J. to finish part-heard matters.

1211. When a question was put by the Court as to who gave the particulars of the cases referred to above the learned Counsel mentioned that they were given by the Chief Justice of India. That means that the Chief Justice of India had been furnished all the particulars by the Delhi Chief Justice earlier at the meeting which took place on Mar., 26, 1981 and the Chief Justice of India had also the explanation of Shri S.N. Kumar. It is not necessary for us here to assess correctness or otherwise of the conflicting versions of the Chief Justice of the Delhi High Court and of Shri S.N. Kumar bearing oh the matters referred to above but the aforesaid particulars are sufficient to hold that sufficient information was available with the Chief Justice of India to record his opinion on the question of appointment of Shri S.N. Kumar and no material of any substantial importance had been kept back from the knowledge of the Chief Justice of India. The letter of May 7, 1981 written by the Chief Justice of the Delhi High Court, to the Law Minister which is quoted above more or less contained the same particulars. There would have some reason to complain if the material contained in the letter of May 7, 1981 was favourable to Shri S.N. Kumar and the Chief Justice of India had recommended that Shri S.N. Kumar should not be appointed in ignorance of the contents of the letter of May 7, 1981. On the other hand, oh the basis of the material which Had been made available to him; the Chief Justice of India had made a report favourable to Shri S.N. Kumar. There appears to be not much substance in the submission that Shri S.N. Kumar was denied the benefit of a further refutation by the Chief Justice of India of the allegations in the letter of May 7, 1981 and that he had

suffered thereby. Such reiteration would not have added any further strength to his case. It cannot, therefore, be said that the process of consultation had become defective or that Shri S.N. Kumar had been prejudiced by reason of the Government keeping back the letter dated May 7, 1961 from the knowledge of the Chief Justice of India out of respect to the wishes of the Chief Justice of the Delhi High Court.

1212. One of the arguments urged on the basis of the Law Minister's note dated May 19, 1981 may be disposed of here. That argument is that since the Chief Justice of the Delhi High Court had stated that he was looking into the file of the 'Kissa Kursi Ka' case in which Shri O. N. Vohra had convicted late Shri Sanjay Gandhi (son of the Prime Minister) who was later on acquitted by the Supreme Court, the Chief Justice of the Delhi High Court was looking into irrelevant papers at the instance of the Law Minister or the Prime Minister to find out some material against Shri O. N. Vohra who was also not continued as additional Judge and hence his opinion given against Shri S.N. Kumar also was a motivated one. Apart from the above reference to his looking into the file of 'Kissa Kursi Ka' case, we do not have any other material to draw the above conclusion except the fact that Shri Vohra also had not been continued. It is not known what opinion was expressed by the Delhi Chief Justice on that material. Shri Vohra himself has not questioned the decision taken in his behalf. The Court cannot go outside the record. Prejudice and passion cannot be allowed to overtake reason. It is not open to the Court to draw an adverse inference against the Chief Justice of the Delhi High Court who is not before the Court. Any attempt to do so would be an un-judicial act. There is, therefore, no merit in this contention.

1213. It is, however, contended that the Law Minister had tried to 'pre-empt' the decision on the issue by making up his mind on May 27, 1981 not to reappoint Shri S.N. Kumar even before the Chief Justice of India wrote his final letter dated May 29, 1981 recommending reappointment of Shri Kumar for a period of two years instead of three months as stated in the letter dated May 22, 1981. There does not appear to be any undue haste or impropriety on the part of the Law Minister in making his recommendation not to appoint Shri Kumar on May 27, 1981 for two reasons: (1) that the Government had to take a decision on that question on or before May 27, 1981 as directed by the interim order referred to above and (2) that the Law Minister had expressly kept out of consideration the I. B. reports while taking his decision, as can be seen from the note of May 27, 1981 on which alone the Chief Justice of India had reserved his opinion in his letter dated May 22, 1981 which showed that on the other questions he had finally expressed his opinion. Another point which may be noticed here is that the granting of extension to a Judge pending enquiry into a material aspect of the case may not strictly be in consonance with the Constitution. It may be irregular to issue a warrant of appointment pending inquiry into the fitness of the person to be appointed as a Judge. Hence it cannot be said that there was any transgression of ordinary rules of official conduct on the part of the Government in finally processing the file by May 27, 1981.

1214. The President has taken his decision on a consideration of the material before him and in doing so he is not shown to have relied on any irrelevant ground. The President, as observed earlier, is entitled to arrive at his own decision on the question of appointment of a Judge after consultation with the dignitaries mentioned in Article 217(1) of the Constitution. He is not, however, bound by the opinion of any of them although he is expected to give due regard to the opinions expressed by them. The President in the instant case has, as stated by the learned Attorney General, out of prudence decided not to reappoint Shri S.N. Kumar as the opinions of the two constitutional dignitaries were conflicting on the question of integrity, a question vital to the appointment of a Judge, There appears to be no constitutional impropriety in the decision of the President. The reason for not reappointing Shri Kumar is not an irrelevant one. Moreover there is a distinction between the appointment of a Judge without proper and effective consultation as required by Article 217(1) and a non-appointment of a person as a Judge preceded by defective consultation. In the former case the validity of the appointment may be open to question but in the latter case ordinarily no petition will lie except under an extraordinary case like the one here where the scope of Article 224 of the Constitution was not correctly understood by the authorities. Every one of the authorities viz. the Law Minister, the Chief Justice of India and the Chief Justice of the Delhi High Court has discharged his duties in this case with a sense of responsibility. But it is unfortunate that they could not arrive at a unanimous opinion. If the reasons had been irrelevant, probably the Court could have asked the Government to reconsider the matter. But that is not the case here.

1215. Shri R. K. Garg, learned Counsel for Shri Kumar strenuously urged before us that Shri S.N. Kumar was ready to establish his innocence and an opportunity should be given to him to do so. His anxiety in making that submission is quite understandable. But unfortunately the Court cannot undertake this function in view of the restricted scope of the jurisdiction of this Court in this case. In spite of the limitations which appeared to exist at the earlier stages of this case, this case has turned out to be remarkable for two reasons. First the Court directed for the purpose of deciding this case the disclosure of the documents relating to the appointment to a high constitutional office which may not have been possible in any other Commonwealth country even now and secondly the Court has come to the conclusion that it is open to the Court to determine whether the decision not to reappoint Shri S.N. Kumar was due to cogent reasons or not in the peculiar circumstances of this case even when the relevant constitutional provisions are silent about it. In these

two respects, this case should be considered as an important milestone in the development of administrative law in our country. The Court, however, cannot proceed further in this case and try to find out the truth or otherwise of the complaints said to have been made against Shri S.N. Kumar. It is true that if the complaints are really untrue, then Shri Kumar has paid the penalty for no fault committed by him. But it should be a matter of some consolation that the Chief Justice of India has exonerated him fully. It is also made clear that the Court has declined to grant the prayer of Shri S.N. Kumar without expressing any opinion one way or the other on his integrity or efficiency. The result of this case should demonstrate to all those who are today holding the posts of Judges and to those who aspire after judge ships how difficult it is to maintain the fair image of a Judge. The decision of the President not to appoint Shri S.N. Kumar as an additional Judge of the High Court of Delhi cannot, therefore, be interfered with.

PART X

1216. The validity of the circular letter dated Mar., 18, 1981 sent by the Law Minister to all the Chief Ministers is seriously assailed before us by the petitioners. It is contended by them that the letter amounts to a threat to all the additional Judges whose consent for being appointed as permanent Judges in High Courts other than the one in which they were working is sought. The Government contends that the letter does not contain any such threat and that it had been sent in order to implement the policy of the Government to have some Judges in every High Court who belong to other States. By the letter in question, the Law Minister has requested the Chief Ministers of States (except North-Eastern States) and the Governor of Punjab to ascertain the wishes of all additional Judges working in their High Courts and persons whose names have been recommended for appointment as Judges of High Courts whether they are willing to work in High Court outside their States. The circular letter reads:

D. O. No. 66/10/81-Jus.

Minister of Law Justice
and Company Affairs, India
New Delhi-10001
>March 18, 1981

My dear,

It has repeatedly been suggested to Government over the years by several bodies and forums including the States Re-organisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. In this context, I would request you to--

(a) obtain from all the Additional Judges working in the High Court of your State their consent to be appointed as Permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as Permanent Judges; and

(b) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of Government either in regard to their appointment or in regard to accommodation in accordance with the preference given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court.

With regards,

Yours sincerely,
Sd/-
(P. Shiv Shanker)

To

1. Governor of Punjab

2. Chief Ministers (by name) (except North-Eastern States)

1217. In its Fourteenth Report, the Law Commission suggested that the whole country should be treated as a single unit for the purpose of selection of Judges of the High Court. The relevant part of the report reads:

59. Further, the whole country must be treated as a single unit for the purpose of selection as it is vitially important that the best available talent which the country is capable of providing be mobilized for the task of meeting a situation which has undoubtedly assumed the proportions of an emergency. If suitable persons of the necessary merit and character are in the opinion of the appointing authority not available in the State, the authority should not hesitate to draw upon persons available in other States. Selections from the Bar must necessarily be of persons of outstanding merit commanding a large practice who may well be willing to make a pecuniary sacrifice and render public service by accepting these judgeships. An effort should be made to persuade suitable senior practitioners to accept these judgeships at least for a short period as a public duty. Their position at the Bar must be of such eminence that it could not be suggested that acceptance by them of judgeships was likely to increase their earnings on their reverting to the Bar". (Vide Para 59 in Chapter 6 of the 14th Report of the Law Commission of India, Vol. I)

1218. The advantages gained by having persons from other States as Judges of High Court were stated by the Law Commission presided over by Justice H.R. Khanna, in its 80th Report thus:

6.21. We may next deal with the question of having in each High Court about one-third of judges from outside the State. Recommendation for this purpose was made by the States Reorganisation Commission. The Law Commission presided over by Mr. Setalvad in its fourteenth Report observed in this connection:

The recent creation of various zones in the country and the efforts to treat the States forming part of these zones as one unit for various purposes would, we hope, lead to the States forming part of each zone to be recruiting ground for appointments to the High Courts from the members of the Bar in these States. It is hoped that in this manner the expectation of the States Reorganisation Commission that at least one-third of the High Court judges would be persons drawn from out-side the State will be realised.

Likewise, the Study Team on Centre-State Relations appointed by the Administrative Reforms Commission also suggested that so far as practicable one-third of the number of judges of a High Court should be from outside.

We have given the matter our earnest consideration and are in substantial agreement with the recommendations mentioned above. In our opinion, there should be a convention, according to which one-third of Judges in each High Court should be from another State. This would normally have to be done through the process of initial appointments and not by transfer. It would also in the very nature of things be a slow and gradual process and take some years before we reach the proportion.

6.22. Evolving such a convention would, in our opinion, not only help in the process of national integration but would also improve the functioning of various High Courts, It would secure on the Bench of each High Court the presence of a number of judges who would not be swayed by local considerations or affected by issues which may rouse local passions and emotions. As observed by us in one of our earlier Reports, one of the essential things for the due administration of justice is not only the capacity of the Judges to bring a dispassionate approach to cases handled by them, but also to inspire a feeling in all concerned that a dispassionate approach would underlie their decision. Quite often, cases which arouse strong emotional sentiments and regional feelings come up before courts of law. To handle such cases, we need Judges who not only remain unaffected by local sentiments and regional feelings, but also appear to be so. None would be better suited for this purpose than Judges hailing from other States. It is a common feeling amongst old lawyers that apart from cases with political overtones, the English Judges showed a sense of great fairness

and brought a dispassionate approach in the disposal of judicial cases handled by them. We in India are in the fortunate position of having a vast country. There can, therefore, be no difficulty in having a certain percentage of Judges who hail from other States. The advantages gained by having persons from other States as Judges would be much greater compared with any disadvantage which might result therefrom

1219. While rejecting the contention that the transfers of High Court Judges during the emergency in the year 1976 had been made in the interests of national integration, Chandrachud, J. (as he then was) observed in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) thus:

As regard the first, no one can deny that whatever measures are required to be taken in order to achieve national integration would be in public interest. Whether it is necessary to transfer Judges from one High Court to another in the interest of national integration is a moot point. But that is a policy matter with which courts are not concerned directly. One may, however, venture the observation that there are numerous other ways of achieving national integration more effectively than by transferring High Court Judges from one High Court to another. Considering the great inconvenience, hardship and possibly a slur, which a transfer from one High Court to another involves, the better view would be to leave the Judges untouched and take other measures to achieve that purpose. If at all, on mature and objective appraisal of the situation it is still felt that there should be a fair sprinkling in the High Court judiciary of persons belonging to other States, that object can be more easily and effectively attained by making appointments of outsiders initially. I would only like to add that the record of this case does not bear out the claim that any one of the 16 High Court Judges was transferred in order to further the cause of national integration,

(emphasis added)

1220. Untwalia, J. observed in that very case at page 507 of (1978) 1 SCR : at p. 2388 of AIR 1977 SC thus:

The purpose of national integration, if otherwise it is a good thing to be achieved, or the need of particular High Court for a Judge possessing a particular type of proficiency or some such grounds of public interest can well be achieved at the time of the initial appointments; as for example, a member of the Bar practising in a particular High Court may be appointed at the very threshold, if he so agrees to be appointed, a Judge of another High Court so that after retirement he may come back and resume his practice in the High Court where he was so doing. I shall, perhaps, be crossing my permissible limits if I embark to write an essay or a thesis on the various aspects of the needs of such public interest highlighting the minus points also in them, nor will it serve any useful purpose.These are matters of policy decision entirely within the realm of the governmental power.

(emphasis added)

1221. These two extracts from the decision in Sankalchand Sheth's caseMANU/SC/0065/1977 (supra) clearly state that if as a matter of policy the Government propose to appoint some Judges in every High Court from outside the State, it is a matter within the realm of the Government. They have not stated that it is constitutionally impermissible to do so.

1222. The objections raised by the petitioners to the opinions of the Law Commission referred to above are that they could not be relied on as the said opinions had not been tested by the 'purifying process' of an argument at the Bar and secondly the recruitment of members of the Bar or of the subordinate judiciary functioning outside the State would be unconstitutional as there would be no possibility of an effective consultation with the Chief Justice of the High Court and the Governor of the concerned State as they would have no opportunity of personally assessing the qualities of members of the Bar and the subordinate judiciary working outside their jurisdiction.

1223. The Report of the Committees of the Law Commission are entitled, to great respect as they are prepared by experienced persons after taking into consideration all relevant aspects and sometimes the evidence collected by them from several sources. If they are to be excluded many opinions expressed in many of the books relied on by the petitioners themselves have to be excluded. Reports of the Law Commission can be looked into to understand the history of the legislation, the object with which certain legal provisions are enacted and what advantages may be derived by adopting a particular policy. Reports of the Law Commission have been made use of by this Court earlier to understand the history of the legislation which was under consideration and the object with which it was passed. (Vide Balchand Jain v. State of Madhya Pradesh MANU/SC/0172/1976. The second limb of this argument overlooks the fact that the Constitution does not state that the Chief Justice of the High Court and the Governor of the State should personally know the persons recommended under Article 217 of the Constitution and that they cannot collect information about them by any other source such as the Chief Justice of the High Court having jurisdiction over the area where they are working or the Governor of the other State. In the true nature of things such personal knowledge

cannot be insisted upon. If that is insisted upon, the consultation with the Chief Justice of India itself may turn out to be ineffective for the very same reason for he cannot be expected to have personal knowledge about many persons whose names are recommended by the Chief Justices of the various High Courts and Governors, In the context of Article 217, it has to be held that the functionaries who have to express opinion under that Article can ascertain all relevant information about a person proposed for the appointment by any other reasonable means and they need not know them personally. Any other view would result in the exclusion of a large body of lawyers who are not practising before the High Courts from consideration for appointment as High Court Judges, which certainly could not have been the intention of the Constitution makers.

1224. The next contention urged in this connection is that this is an indirect attempt to transfer some additional Judges from one High Court to another, It cannot be so for the reason that the transfer of an additional Judge (appointed under Article 224(1)) unless the arrears have been cleared off and the transfer of an acting Judge (appointed under Article 224(2)) in any event would not be possible at all. An additional Judge is appointed for a term not exceeding two years only with a view to clearing off the arrears in a High Court. If that is the sole object of appointing him, how can he be transferred as an additional Judge in the public interest from that Court to another Court unless the purpose for which he is appointed is achieved namely, clearing off the arrears? Moreover when his stay as an additional Judge is very short it would not subserve the interest of efficiency of public service if he is made to work in more than one High Court during that short period unless there is not sufficient work to be assigned to him in the High Court in which he is initially appointed as an additional Judge. The case of an acting Judge appointed under Article 224(2) of the Constitution is a self-evident one. An acting Judge is appointed to act as a Judge until the permanent Judge in whose place he is appointed has resumed his office. He cannot, therefore, be transferred under Article 222 contrary to the express terms of Article 224(2). In view of this declaration the petitioners cannot entertain any suspicion that the circular letter has been issued to achieve the object of transferring additional Judges, during their tenure fixed under Article 224(1). This, however, does not come in the way of an additional Judge or an acting Judge being appointed as a permanent Judge either in his own High Court or in any other High Court before the tenure specified under Article 224(1) or Article 224(2), as the case may be, comes to an end.

1225. I also do not find any substance in the submission made on behalf of some of the petitioners that the circular letter of the Law Minister suggests that the additional Judges who have not given their consent would Toe under a disadvantage in the matter of their continuance as additional Judges or of their appointment as permanent Judges in their own Court. The learned Attorney-General has stated before the Court that 'beyond any inherent or incidental advantage that the implementation of the policy of appointing outside Judges may confer, no other advantage or disadvantage is to be visited oh any person by reason of his having given consent or his refusal in response to the inquiry stated in the impugned letter of 18th March, 1981'. In view of the above statement, I take it that the portion in paragraph 3 of the letter, namely, 'it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of Government either in regard to their appointment or in regard to accommodation in accordance with the preference given' does not carry with it any sinister design. It is submitted on behalf of the Government that such a statement had to be made because the necessary consultations under Article 217(1) of the Constitution had yet to be made. This explanation is accepted -reserving liberty to any additional Judge, who is prejudiced by his not giving consent, to approach the Court for appropriate relief if an occasion arises to do so.

1226. There is also no merit in the contention, that since the circular letter had been addressed without the previous consultation of the Chief Justice of India, Article 217(1) and Article 222 of the Constitution had been violated. The letter as can be seen from its tenor is intended to find out whether any additional Judge is willing to be appointed as a Judge in any other High Court. Such appointment has to be made only in accordance with Article 217(1) of the Constitution. Before making such appointment, the President has to consult all the functionaries mentioned in Article 217(1) including the Chief Justice of India. Article 222 of the Constitution does not come into picture at all as no transfer is contemplated under the letter. The letter relates to initial appointments only. In the circumstances there is no error committed by the Law Minister in writing the impugned letter to the Chief Ministers.

1227. All the contentions of the petitioners regarding the circular letter of the Law Minister dated March 18, 1981, therefore fail.

PART XI

1228. We are concerned in the case of Shri K. B. N. Singh with the question whether the order of his transfer as the Chief Justice of the High Court of Madras is valid or not. Earlier it has been held that the consent of the Judge to be transferred is not necessary under Article 222 of the Constitution and that such transfer can be made in the public interest as laid down by the majority in Sankalchand Sheth's case MANU/SC/0065/1977) (supra). The order in question is an administrative order which is passed by the President in accordance with the opinion expressed by the Chief

Justice of India, who is the sole authority to be consulted under Article 222. In this case also as per directions of this Court, the relevant papers have been produced by the Union Government. It is urged that the manner in which consultation is made in this case is not in accordance with law as the President had not initially asked the Chief Justice of India to give his opinion on the question of transfer of Shri K. B. N. Singh but the Chief Justice of India had on his own accord advised the Union Government to transfer him first to the High Court of Rajasthan and later on to the High Court of Madras. Article 222 does not lay down the procedure to be followed for effecting a transfer. Even granting that the proceedings for transfer of a Judge are initiated by the Chief Justice of India the order of transfer would not be bad as under Article 217(1) of the Constitution which is couched in almost the same language, an appointment of a Judge would not be bad only because the Chief Justice of a High Court who is one of the authorities to be consulted initiates the proposal. In fact the' practice has been that the Chief Justice of the High Court invariably initiates it. This contention is not therefore one of substance. The crux of the question is whether the authority exercising the power of transfer has brought to the knowledge of the authority to be consulted all the relevant material with it and has given sufficient opportunity to tender his opinion. There is no allegation that the Government had kept back any relevant information from the Chief Justice of India. The Chief Justice of India himself says In his counter-affidavit that there was full and effective consultation with him. A fair reading of the letter of the Chief Justice of India dated December 7, 1930 shows that there was prior discussion about the question of transfers of Chief Justices of High Courts and that there was a suggestion by the Government that there should be a transfer of all Chief Justices of High Courts so that in every High Court there was a Chief Justice who hailed from outside the State, This suggestion stems from the proposed policy of the Government which is clear from the statement of the Law Minister in the Lok Sabha on July 24, 1980, the relevant part of which reads: "...Policy is whether we should have the Chief Justice from outside. This is the policy. How we should have is a matter of mechanism." There are similar references to it in some other speeches of the Law Minister both in the Lok Sabha and in the Rajya Sabha. Even though it appears from some of the speeches of the Law Minister that such a policy had not taken a final shape, the Chief Justice of India had been told that the Government had an idea to bring into force such a policy before the middle of 1980. From certain notings on the file relating to the appointment of Chief Justice of the Delhi High Court which were disclosed by the Union Government as per orders of the Court dated November 18, 1981 it is evident that, there was discussion between the Central Government and the Chief Justice of India about the policy of appointing the Chief Justice of every High Court from outside the State. The first note of the Law Minister dated May 15, 1980 where he specifically refers to the said policy refers to the discussion he had with the Chief Justice of India on it. The next note in that file is of the Chief Justice of India. It is dated June S, 1980 and the relevant part of it reads:

It would become necessary in the very near future to evolve an All India policy for appointments of Chief Justices in the various High Courts. The difficulties in taking any ad hoc decision on that question are of such grave magnitude that it would be impossible at this stage to appoint an outsider as a Chief Justice either of the Delhi High Court or of the Andhra Pradesh High Court....

1229. This note is followed by the note of the Law Minister dated July 21, 1980. In that it is stated:

The Chief Justice of India and I had a detailed discussion yesterday morning on the question of appointment and transfer of Chief Justices of the High Courts so that the position of the Chief Justice of a High Court is held by an outsider as a matter of policy. This would avoid discriminatory treatment which would have otherwise invited undue criticism....

In view of the discussion with the C.J.I., it appears desirable to appoint Shri Justice Prakash Narain as the Permanent Chief Justice of the Delhi High Court and Shri Justice Kuppuswami as Permanent Chief Justice of Andhra Pradesh High Court, subject to the general policy decision on having the Chief Justice from outside that High Court. It is clearly understood that subject to the general policy decision and the mechanism that would be evolved to give effect to that policy, Shri Justice Prakash Narain and Shri Justice Kuppuswami would be transferred to different High Courts....

1230. Then there is a long note dated July 31, 1980 of the Chief Justice of India in which he has observed thus:

... The heart of the matter however is whether as a general All India policy, a Judge of a High Court ought never to be appointed as the Chief Justice of that High Court. I am prepared to keep an open mind on this question because the pros and cons of the issue has still to be thrashed out. But the better view may be that transfers of sitting Chief Justices may be made only in appropriate cases, that is to say, when a strong case for the transfer has been made out. Similarly, appointments of Chief Justices may be made from outside, whenever the circumstances warrant. This involves the assessment of each individual situation as and when it arises....

At this stage it is unnecessary to say anything more on the subject except to clarify that though I recognise the need to evolve an All India policy for appointments of Chief Justices in the various High Courts, I do not think that it will be either feasible or proper to transfer each and every sitting Chief Justice of the High Court to another High Court or to appoint an outside Judge as the Chief Justice whenever a vacancy of a Chief Justice arises. Such a course will introduce numerous complications the general nature of which I have discussed with the Law Minister. The question is so replete with practical difficulties and involves a question of such high principle that a very careful thought shall have to be given to it before a final decision is taken.

I, therefore, reiterate my earlier recommendation that Mr. Justice Prakash Narain should be appointed as the permanent Chief Justice of the Delhi High Court and Shri Justice Kuppuswami as the permanent Chief Justice of the Andhra Pradesh High Court. I consider it unnecessary to add that these appointments should be "subject to the general policy" of appointing Chief Justices from outside, because if, eventually, a decision is taken that every Chief Justice must come from outside, it will naturally become necessary to consider the transfer of Mr. Justice Prakash Narain and Mr. Justice Kuppuswami.

1231. The above notings show that the Chief Justice of India who had been apprised of the proposed policy of the Government had not opposed the transfer of Chief Justices of High Courts as a matter of policy but only had expressed certain points which needed to be considered before taking a final decision on the question.

1232. In this letter dated December 7, 1980 however the Chief Justice of India says "though I am firmly opposed to wholesale transfers of the Chief Justices of the High Courts, I take the view, which I have expressed from time to time that such transfers may be made in appropriate cases for strictly objective reasons." It is true, the Chief Justice of India stated that he was opposed to 'wholesale transfers' but he does not appear to have opposed the policy of having the Chief Justice of every High Court from outside the State. This statement may mean that at the same time the transfers or appointments of all the Chief Justices of all the eighteen High Courts in accordance with the policy may not be advisable. There may be a Chief Justice who has only three or four months of service before his superannuation. There may be a Chief Justice who is ailing and who cannot, therefore, be moved to another High Court immediately. Moreover the Chief Justice of India has to get into touch with each one of the Chief Justices before an order of transfer is made in his case to ascertain from him his problems. There may be some difficulty in finding out a suitable High Court for a Chief Justice because the question of adjustment of seniority between him and the other Judges of that Court may pose a problem. It is probably on account of these difficulties the Chief Justice of India stated that he was opposed to a 'wholesale transfer' of the Chief Justices. This statement cannot be read as conveying the meaning that the Chief Justice of India wanted that only some particular Chief Justices should be transferred or that the: policy should be implemented in the case of particular High Courts. There is no doubt that a policy decision should ultimately be applicable to all High Courts. But it can be applied by stages. A policy or fur that matter a law may have to be applied by stages in different areas and in the case of different institutions or bodies by reason of administrative compulsions and such application cannot be considered as either arbitrary or capricious or unconstitutional. Sometimes the application of a policy or a law in all areas or in respect of all institutions to which it is ultimately intended to apply simultaneously may defeat the very policy or law, even though it may be otherwise beneficial. The difficulties involved in such 'whole-sale' application might have given rise to the difficulty expressed by the Chief Justice. This appears, to be a reasonable construction to be placed, on the said statement of the Chief Justice of India. One should remember that the said statement is in a letter and not in a statute and is one made in the context of previous correspondence and discussions which have gone on for some tune, in an informal way. Moreover a policy is not something which should take the form of a formal statute or a written coda It can be gathered from a course of action or conduct and it can take its birth when the first step is taken in its direction.

1233. The question of policy is a matter entirely for the President to decide. Even though the Chief Justice of India is consulted in that behalf by the President since the policy relates to the High Courts, his opinion is not binding oft the President. It is open to the President to adopt any policy which is subject only to the judicial review by the Court. Under Article 222 of the Constitution the Chief Justice of India has to be consulted on the question whether a particular Judge should be transferred and where he should be transferred while implementing the said policy. If the Government requests the Chief Justice of India to give his opinion on a transfer to implement the said policy which is really in the public interest he cannot decline to do so. Even though the Chief Justice was opposed to the 'wholesale transfers' of Judges there is no bar for the Government treating the recommendation for transfers made by the Chief Justice of India as a part of the implementation of its policy. That the transfer of Shri K. B. N. Singh was on account of the policy of the Govt. can be gathered from the following statements in the affidavit filed before this Court: In paragraph 8 of the affidavit dated September 16, 1S81 of Shri K. B. N. Singh. It is stated: "When the deponent -wanted to know why he might be transferred to Madras, the Hon'ble Chief Justice of India merely said that it was the Government policy, but gave no clue as to what necessitated his transfer from Patna to Madras,." In para 2 (g) of the affidavit of the Chief Justice of India he has stated: "I deny that when Shri K. B. N. Singh wanted to know over the telephone on January 5,

1981, I stated merely that it was the 'Government policy'...." In paragraph 8 of the rejoinder affidavit dated October 16, 1981 of Shri K. B. N. Singh, it is stated "at one point he also said that it was Government policy to effect transfer in batches of two or three."

1234. It is seen that the two Chief Justices -- Shri M. N. Ismail and Shri K. B. N. Singh were transferred at the first instance. Some other transfers probably would have followed but for the filing of these petitions. It is already held that the policy of having the Chief Justice in every High Court from outside the State is not unconstitutional and that it could be achieved by resorting to Article 222 of the Constitution. The transfer ordered pursuant to that policy cannot therefore be considered as either discriminatory or not being in the public interest. In fact such transfers are in the public interest, for reasons already stated.

1235. It is seen from the counter-affidavit of the Chief Justice of India that the transfer of Shri K. B. N. Singh had not been recommended by him on the basis of any allegation of misbehaviour or of incapacity which can form a basis for action under Article 218 read with Article 124(4) and (5) of the Constitution. The relevant part of that counter-affidavit reads:

It is true that he (Shri K. B. N. Singh) said that it was possible that some baseless complaints may have been made to me and that he would like to remove any wrong impression which those complaints may have created. I told him that I do not go by baseless complaints, that I did not believe that his conduct was blameworthy but that if he wanted to explain any matter, which according to him had created dissatisfaction about the working of the High Court, he was free to do so. Thereupon Shri K. B. N. Singh told me how certain persons connected with the High Court were influenced by communal considerations and how he, on his own part, did not permit communal or any other extraneous considerations to influence him administratively or judicially. I assured him that I did not hold that he himself was to blame but that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction.

1236. The foregoing clearly shows that the Chief Justice of India had never formed an opinion that there was any error committed by Shri K. B. N. Singh, Hence there can be no basis for the apprehension in the mind of Shri K. B. N. Singh that the transfer was being used as a measure of punishment in his case. If it had been a selective transfer ordered without regard to the public interest it would have been unconstitutional. But this is not such a transfer. The order does not attach any stigma to Shri K. B. N. Singh. It is a bona fide one made in implementation of a perfectly valid policy which may be implemented in instalments.

1237. It is true that earlier the Chief Justice of India had recommended that Shri K. B. N. Singh should be transferred to the Rajasthan High Court. That was a part of the chain of transfers then proposed. It had not taken a final Shape since Shri K. B. N. Singh had not yet been informed about it and his views had not yet been ascertained. But when it was decided to transfer Shri M.M. Ismail to the Kerala High Court, the Chief Justice of India felt that the services of Shri K. B. N. Singh being a senior Chief Justice were required by the High Court of Madras. There is nothing unusual about this alteration but on the other hand shows that the Chief Justice of India had an open mind on the question of transfer until he made his final recommendation.

1238. The next submission made in this case is that the procedure followed in connection with the impugned order of transfer is not fair. Chandrachud, J. (as he then was) has dealt with the question of procedure to be followed before ordering the transfer of a Judge under Article 222 of the Constitution in Sankalchand Sheth's case MANU/SC/0065/1977 (supra) at page 456 of (1978) 1 SCR: at p. 2349 of AIR 1978 SC thus:

Article 222(1) postulates fair play and contains built-in safeguards in the interests of reasonableness. In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under an obligation to consult the Chief Justice of India which means and requires that all the relevant facts must be placed before the Chief Justice. Thirdly, the Chief Justice owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before he tenders his opinion to the President. In the discharge of this constitutional obligation, the Chief Justice would be within his rights, and indeed it is his duty whenever necessary, to elicit and ascertain further facts either directly from the Judge concerned or from other reliable sources. The executive cannot and ought not to establish rapport with the Judges which is the function and privilege of the Chief Justice. In substance and effect, therefore, the Judge concerned cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed.

1239. It is evident from the above passage that the duty of considering every relevant fact pertaining to a Judge is of the Chief Justice of India on the question of his transfer under Article 222 of the Constitution. In his counter-affidavit the

Chief Justice of India has given the particulars of the enquiry he had made before recommending that Shri K. B. N. Singh should : be transferred to Madras. He first talked to Shri K. B. N. Singh over the telephone on January 5, 1981 and informed him about the proposal to transfer him to Madras. Again on January 8, 1981 Shri K. B. N. Singh met the Chief Justice of India at New Delhi and the question of transfer was again discussed. The relevant part of the counter-affidavit of the Chief Justice of India reads:

2 (f). It is true, as stated by Shri K. B. N. Singh in paragraph 8 of his affidavit, that I conveyed to him on the evening of January 5, 1981 over the telephone that it was proposed to transfer Shri Justice M. M. Ismail to Kerala and that he, Shri K. B. N. Singh, may have to go to Madras. I telephoned Shri K. B. N. Singh on January 5, 1981 in order to apprise him of the likelihood of his transfer to Madras and to ask him if he had anything to say on the question of his proposed transfer.

(g) I deny that when Shri K. B. N. Singh wanted to know over the telephone on January 5 why he may be transferred to Madras, I stated merely that it was the "government policy" and gave no clue as to what necessitated his transfer from Patna to Madras. I conveyed to him specifically that it was proposed to transfer Shri Justice M. M. Ismail from Madras and it was necessary to appoint an experienced and senior Chief Justice in his place.

(h) It is true that Shri K. B. N. Singh told me over the telephone that his mother was bed-ridden and was not in a position to go with him to Madras. I deny that he told me of any other personal circumstance by reason of which it would be difficult for him to go on transfer to Madras. The only difficulty which he mentioned then or at any other time was that his mother was old and bed-ridden and would not therefore be able to go to Madras. He told me that if his transfer was insisted upon, he would prefer to resign. I requested: him not to act in haste and to give the matter a close thought. I added that I was making a note of the difficulty mentioned by him and that it will have to be taken into consideration before a final decision was taken. I requested him to come to Delhi to discuss the question of his transfer.

(3) Shri K. B. N. Singh has stated in paragraph 9 of his affidavit that he met me in Delhi three or four days later, told me of his acute and insurmountable personal difficulties in the event of his transfer to Madras, that he was with me for about 10-15 minutes and that I was noncommittal in the matter of his transfer. Shri K. B. N. Singh saw me at my residence on January 8, 1981 at 7-30 p. m. He was with me for quite some time much longer than 10 or 15 minutes. I discussed with him the question of his mother's advanced age and illness, which was the only personal difficulty which he mentioned in the matter of his proposed transfer to Madras. I told him that I was unable to agree with him since there were other dependable persons in his family who could look after his mother and that, in any case, his brother Shri S. B. N. Singh who was practising in the High Court was quite capable of looking after the mother. He replied that his mother had a special attachment to him and he could not leave her to the care of his brother or other members of the family. It is true that he said that it was possible that some baseless complaints may have been made to me and that he would like to remove any wrong impression which those complaints may have created. I told him that I do not go by baseless complaints, that I did not believe that his conduct was blameworthy, but that if he wanted to explain any matter, which according to him had created dissatisfaction about the working of the High Court, he was free to do so. Thereupon Shri K. B. N. Singh told me how certain persons connected with the High Court were influenced by communal considerations, and how he, on his own part, did not permit communal or any other extraneous considerations to influence him administratively or judicially. I assured him that I did not hold that he himself was to blame but that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. There are many more matters which he mentioned on the evening of January 8, 1981 but they do not directly bear upon the matters in issue herein and I will, therefore, not refer to them.

(4) The statement contained in paragraph 10 of the affidavit of Shri K. B. N. Singh that he had not conveyed to me his consent to the proposed transfer is true. I however deny that he was not consulted regarding his transfer to Madras. I had discussed the matter with him threadbare on more than two or three occasions. I deny that no reason, ground etc. necessitating or justifying his transfer was disclosed to him or discussed with him by me. On my part, I conveyed to him that his transfer was made in public interest, that it was not made by way of punishment and that it was also necessitated by the transfer of Shri Justice Ismail from Madras to Kerala.

1240. Although Sri K. B. N. Singh has not fullly accepted the facts narrated in the passage extracted above, there is no reason for not accepting in its entirety the statement made by the Chief Justice of India. The above passage clearly shows that the Chief Justice of India had acted strictly in accordance with the procedure indicated by him in Sankalchand Sheth's case MANU/SC/0065/1977 (supra). There is, therefore, no ground to hold that the case of Shri K. B. N. Singh's transfer was not considered by the Chief Justice of India in a fair and reasonable way.

1241. The next submission made on behalf of Shri K. B. N. Singh is that all aspects of the case were not placed before the President by the Chief Justice of India. This again is met by the statement of the Chief Justice of India in his counter-affidavit that "there was full and effective consultation between me and the President of India on the question of Shri K. B. N. Singh's transfer from Patna to Madras as the Chief Justice of the Madras High Court Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer". At the hearing the Court was informed that the President had not discussed the matter personally with the Chief Justice of India. The expression "President" should be understood here in the constitutional sense. The discussion must have taken place with the Minister concerned. It is not possible to accept the submission that no such discussion could have taken place at all after Shri K. B. N. Singh met the Chief Justice of India on the evening of January 8, 1981 because the Prime Minister had taken the decision on January 6, 1981 and there was no written record in support of it From the records produced before us it is seen that discussion has gone on between the authorities concerned sometimes over telephone and sometimes at a meeting. No minutes are kept of many such discussions. It cannot, therefore, be said that either there was no time to discuss or no such discussion had taken place a all. It has to be borne in mind that the Chief Justice of India asked Shri K. B. N. Singh to meet him at New Delhi to discuss the matter further and accordingly Shri K. B. N. Singh met him on January 8, 1981. If the Chief Justice of India had felt that any representation to be made by Shri K. B. N. Singh was irrelevant he would not have called him for discussion at New Delhi After discussing the matter with him he must have discussed the matter before the decision was taken on January 9, 1981 with the other authority concerned.

1242. In the course of the discussion referred to above all matters which had come to the knowledge of the Chief Justice of India, must have been placed before the person with whom the discussion had taken place. All official acts must be deemed to have been done in accordance with law. There is, therefore, no merit in this contention also.

1243. The last submission on the above question was that whereas the Chief Justice of India had recommended that Shri K. B. N. Singh should be transferred as a part of selective transfers, the President had treated them as part of the policy of having a Chief Justice in every High Court from outside the State which had not taken a final shape and therefore there was no consensus on the object to be achieved by the transfer. As already observed, the question of policy is within the realm of the Government. Therefore, even if the Chief Justice of India considered that the recommendation made by him was one of six or seven transfers suggested by him, which would mean for the time being a partial implementation of the policy, it cannot be said that the transfer of Shri K. B. N. Singh is bad, for all aspects relating to Shri K. B. N. Singh were considered by the appropriate authority before ordering the transfer. The transfer in question is not a stray case of transfer. A few other transfers were in contemplation at the relevant time and they necessitated consideration of individual cases separately. The transfers of Shri M.M. Ismail and Shri K. B. N. Singh were ordered. In all probability but for these petitions some more transfers would have materialised by now. We have to note that Article 222 of the Constitution is not confined only to policy transfers involving all Judges. Even individual Judges may be transferred for administrative reasons in the public interest. In the circumstances of the cast, it is difficult to hold that the transfer was an act of victimisation. One Other contention raised in this case is that the Chief Ministers of Tamil Nadu and Bihar had not been consulted in accordance with a memorandum issued by the Government. The question whether there can be any memorandum supplementing the provisions of Article 222 is a matter of doubt. But since the Court is informed that both the Chief Ministers had been consulted about the transfer of Shri K. B. N. Singh, there is no need to probe into this point any further.

1244. The decision to transfer a Judge under Article 222 of the Constitution, as already stated, is an administrative one. It is not alleged that any of the functionaries participating in that decision had any ill will against Shri K. B. N. Singh. The existence of mala fides may have been a ground to set aside the impugned order of transfer provided it had been alleged and established. In E. P. Royappa v. State of Tamil Nadu MANU/SC/0380/1973, while rejecting a contention against an order of transfer which had been impugned in that case, Bhagwati, J. has observed thus:

Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order or credibility.

1245. In this case, no such allegation of mala fides is made against any authority. On the other hand the" material available in the case clearly establishes that due procedure had been followed and all facts that justify the transfer have been affirmatively proved. It is shown that the authorities concerned felt satisfied about the need for the transfer. In view of the above finding, Shri K. B. N. Singh cannot derive much assistance from the observations made in the Barium Chemicals Ltd. v. Company Law Board MANU/SC/0037/1966, and in Rohtas Industries Ltd v. S. D. Agarwal MANU/SC/0020/1968. On the facts and in the circumstances of the case it is not possible to hold that the order of transfer of Shri K. B. N. Singh as the Chief Justice of the High Court of Madras is illegal and void.

PART XII

1246. Now the question is what relief can be granted in these cases. In the earlier part of this judgment there is a detailed discussion about the continued neglect on the part of the Government in not making a proper review from time to time' of the number of permanent Judges necessary for each High Court and the irregular exercise of power under Article 224(1) of the Constitution in appointing additional Judges even though it was necessary to appoint permanent Judges, Even according to the Government there is need to appoint at least 150 Judges to clear off the arrears within two years. Article 216 of the Constitution, as observed earlier, confers power on the President to appoint adequate number of Judges in every High Court. In the United States of America the conditions in which a writ of mandamus may be issued to a Governor or the President are set out in paragraphs 140, 141 and 153 in Vol. 52 of the American Jurisprudence 2d. under the title 'Mandamus' thus:

140. Governor.

The question of how far the governor of a State is subject to the supervisory control of courts through the writ of mandamus is one of gravity and importance, which the courts regard as extremely delicate, and the solution of which they undertake with great reluctance. In some jurisdictions the courts refuse to issue the writ against a governor under any circumstances, whether the act sought to be enforced is regarded as ministerial or otherwise, on the theory that interference with his action constitutes a violation of the doctrine of separation of powers, or upon the ground that issuance of a writ is inexpedient because of possible difficulty in enforcing it. Under this view, a writ is not issuable against an executive for the purpose of compelling him to perform a duty, even though it is imposed upon him by statute. This reasoning has been "rejected in many jurisdictions, which allow the maintenance of mandamus proceedings against a governor under certain, circumstances. All courts agree that the remedy is' not available to control the performance by a governor of political functions or functions requiring the exercise of discretion, but some will issue the writ to require the performance of ministerial duties, or to restrain an act in violation of law-Needless to say, mandamus will not issue to compel the performance by a governor of an act which does not fall within his prescribed duties, or which has already been performed.

141.-- Political and discretionary functions.

State governors are invested by law with important governmental or political powers and duties belonging to the executive branch of the government, and the due performance thereof is entrusted to their official honesty, judgment and discretion. As to these purely executive or political functions devolving upon the chief executive officer of the State, and as to any other duties necessarily involving the exercise of official judgment and discretion, the doctrine is incontroverted that mandamus will not lie to control or compel his action. Applying the foregoing rule, the courts have denied the writ when sought to compel the governor to call an election; count or reject votes cast at an election; issue a commission or certificate of election to office; make an appointment to office; rescind an order removing or suspending an officer; recommend the passage of a particular law; sign or veto bills; institute a proceeding for the transfer of a federal prisoner to the State court; grant a pardon; approve a parole; borrow funds; sign or approve a warrant; issue bonds; subscribe to stock as required by statute; appoint a commission to appraise property which is sought to be condemned; allot or pay over money received from the Federal Government; approve a contract; or perform other like duties.

If it is the constitutional or statutory duty of a governor to exercise his discretion with respect to a certain matter, he may be required by mandamus to do so, but, of course, the writ does not lie to direct the manner in which his discretion shall be exercised....

153. President of United States.

As is also true in the case of a State governor, which in most respects is a similar office, mandamus does not lie to control the administrative or executive discretion of the President of the United States, and if the President delegates one of his functions to another officer, an order by the latter is an administrative order of the President, which cannot be vacated by mandamus. The celebrated case of Marbury v. Madison, 5 US 137 is generally considered as authority for the view that the courts have no jurisdiction to issue a writ of mandamus against the President to compel him to perform any act incidental to his office, whether purely ministerial in its character or not, although the writ may issue against the heads of departments of the Federal Government when the act to be performed is purely ministerial, not involving judgment or discretion. On the other hand, in a later case in the Federal Supreme Court, although the case did not involva the President , the Attorney-General of the United States in his argument, although appearing in behalf of

the officer to whom the writ of mandamus was prayed, conceded that such a writ might be issued against the President of the United States to compel him to perform a merely ministerial duty....

1247. Para 28 of Halsbury's Laws of England (4th Edn.), Vol. I, page 32 reads:

28. Duty and discretion. The repository of a statutory power may be endowed with a discretion whether to act, and, if so, how to act. A discretionary power is typically conferred by words and phrases such as "may", "it shall be lawful", "if it thinks fit" or "as it thinks fit",. A statutory discertion is not, however, necessarily or, indeed, usually absolute: it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether to act and how to act. Moreover, there may be a discretion whether to exercise a power, but no discretion as to the mode of its exercise; or a duty to act when certain conditions are present, but a discretion how to act. Discretion may thus be coupled with duties. On the other hand, duty unaccompanied by any discretion requires action in a prescribed manner and form to be taken when the conditions precedent exist; performance of such a duty is a mere ministerial act.

1248. It is true that the words in Article 216 of the Constitution are undoubtedly empowering, 'but it has been so often decided as to have become an axiom that in public statutes words only directory, permissory or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice". (Vide R v. Tithe Commissioners (1849) 14 QB 459 at p. 474. Earl Cairns said in Julius v. Bishop of Oxford (1880) 5 AC 214 at pp. 222-223), construing the words (it) 'shall be lawful' thus:

But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.

1249. In Padfield v. Minister of Agriculture, Fisheries and Food (1968) 1 All ER 694, the House of Lords had to construe the provisions of the Agriculture Marketing Act, 1958 which provided for a committee of investigation to be constituted, which was to consider and report on certain kinds of complaint "if the Minister in any case so directs". The complaint of the appellants who were members of the south east regional committee of the Milk Marketing Board was that the board's terms and prices for the sale of milk to the board did not take fully into account the variations between the producers and the cost of bringing milk to a liquid market. In effect the complaint was that the price differential worked unfairly against the producers in the popular south-east region where milk was more valuable, the cost of transport was less and the price of laud was higher. There had been many previous requests to the board but these had failed to get the board in which the south-east producers were in a minority to do anything about the matter. The Minister declined to refer the matter to the committee. Thereafter the appellants applied to the Court for an order of mandamus commanding the Minister to refer the complaint to the Committee for investigation. The Divisional Court made an order against the Minister. But the Court of Appeal by a majority (Diplock and Russel L JJ. Lord Denning M. R. dissenting) set aside the order of the Divisional Court On further appeal to the House of Lords, the appeal was allowed and the case was remitted. The House of Lords held that the complaint was a substantial and a genuine complaint, neither frivolous, repetitive nor vexatious, the reasons of the Minister for not referring the matter to the Committee of investigation namely that the complaint raised wide issues, that his reasons were unfettered so that in effect it was sufficient that he should bona fide have considered the matter, were not good reasons in law, and indeed left out of account the merits of the complaint and showed that he was not exercising his discretion in accordance with the intention of Section 19 of the Act of 1958. The matter was remitted to the Queen's Bench Division to require the Minister to consider the application of the appellants in accordance with law. Lord Upjohn in his concurring judgment observed that even if the words in a statute conferred an unfettered discretion on the Minister, it ought not to make any difference in this case. He said at pages 718-719 thus:

My Lords, I believe that the introduction of the adjective "unfettered" and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the Minister's attitude, bona fide though it be. First, the adjective nowhere appears in Section 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective, I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely, that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the, executive, namely that in exercising their powers the latter must act lawfully, and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion on the Minister rather than by the use of adjective.

1250. The importance of the decision in Padfield's case (1968) 1 All ER 694 (supra) was underscored by Lord Denning M.R. in Breen v. Amalgamated Engineering Union (1971) 2 QB 175 at p. 190 thus;

The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations, which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture Fisheries and Food (1968) AC 997 which is a landmark in modern administrative law.

1251. Notwithstanding the principle of separation of powers found entrenched in the Constitution of the United States of America, as can be seen from the last part of para 141 of Vol. 52 of the American Jurisprudence 2d. under the title 'Mandamus' if it is the constitutional or statutory duty of a governor or the President to exercise his discretion with respect to a certain matter he may be required by mandamus to do so but the manner in which he has to discharge that duty cannot be directed by the courts. As observed in the English decisions referred to above it is manifest that a statutory discretion is not necessarily or indeed usually absolute, it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision . is taken, whether to act and how to act. I am of the view that the power conferred on the President by Article 216 of the Constitution to appoint sufficient number of Judges is a power coupled with a duty and is not merely a political function. In the instant case ordinarily the court would have been reluctant to issue any mandamus to the Government to comply with the duty of determination of the strength of Judges of High Courts. But having regard to the undisputed total inadequacy of the strength of Judges in many High Courts, it appears to be inevitable that the Union Government should be directed to determine within a reasonable time the strength of permanent Judges required for the disposal of cases instituted in them and to take steps to fill up the vacancies after making such determination.

1252. At this stage it should be mentioned that Shri P.R. Mridul made a statement on behalf of the Minister of Law, Union of India in the course of his arguments as follows:

The Union Government has decided to increase the number of posts of permanent Judges in the various High Courts keeping in view the load of work, the guidelines prescribed and other relevant considerations. In fact in 1980 itself, on the basis of institution, disposal and arrears of cases and the guidelines prescribed, the Governments of seven States where the problem was more acute, had been addressed to consider augmentation of the Judge strengths of their High Courts. It has been decided that where necessary the guidelines prescribed will be suitably relaxed by taking into account local circumstances, the trend of litigation and any other special or relevent factors that may need consideration. The Union Government will take up the matter with the various State Governments so that after consulting the Chief Justices of the High Courts, they expeditiously send proposals for the conversion of a substantial number of posts of Additional Judges into those of permanent Judges.

The Union Government has also decided that ordinarily further appointments of Additional Judges will not be made for periods of less than one year.

PART XIII

1253. For the reasons given above, I am of the view that the Union Government, which has the responsibility of appointing sufficient number of Judges in every High Court should be directed to review the strength of permanent Judges in every High Court, to fix the number of permanent Judges that should be appointed in that High Court on the basis of the workload and to fill up the vacancies by appointing permanent Judges. While making these appointments, the Union Government should first consider the cases of the additional Judges who are now in office for appointment as permanent Judges in those vacancies. A writ in the above terms shall be issued to the Union Government All the other reliefs prayed for in these petitions are refused, There shall be no order as to costs.

PART XIV

1254. In the course of the hearing of these cases several other questions of great importance touching the administration of Justice such as the conditions of service of judicial officers, particularly of the members of the subordinate judiciary, their salaries and allowances, housing conditions etc. which needed to be looked into very urgently came up for discussion. Similarly many facets of the conduct of Judges and of lawyers were also discussed. During the hearing many useful remarks came to be made both on the side of the Bar and on the side of the Bench. AH this exercise was done with a view to emphasising the importance of the independence of the judiciary and the independence of the Bar

which are fundamental to a Republican Constitution whose main characteristic ought to be virtue. An observation of David Hume is worthy of note here. He said:

To balance a large State of society whether Monarchical or Republican, on general laws, is a work of so great difficulty that no human genius however comprehensive, is able by the mere dint of reason and reflection, to effect it. The judgments of many should unite in this work; experience must guide their labour; time must bring it to perfection; and the feeling of inconvenience must correct the mistakes which they inevitably fall into in their first trials and experiments.

1255. We have come across in these cases many such mistakes, though committed honestly without realising the import or importance of some of the provisions of the Constitution. Perhaps there was no occasion to think about them so far. It is hoped that at least hereafter in any step that is taken in the matter of appointment of Judges, the clear implications of the Constitution are kept in view by all concerned.

1256. These cases have made us think about ourselves and our learned brothers in the superior judiciary of the country. We are made to realise that we are all mortals with all the human frailties and that only a few know in this world the truth behind the following statement of Michel De Montaigne: "Were I not to follow the straight road for its straightness, I should follow it for having found by experience that in the end it is commonly the happiest and the most useful track". It is true that the Judges of the High Courts and the Supreme Court hold their tenure not at the pleasure of the President but till they attain the prescribed age of retirement; that their removal is possible only after following an elaborate procedure: that their salaries and allowances and pension are charged on the consolidated funds of the States or of the Union; that no discussion can take place in the legislatures with respect to their conduct in the discharge of their duties except on a motion for their removal; that they have the power to punish a person for contempt of court and they are protected by a host of other provisions of law which arc intended to make them feel and to remain independent of any external agency such as the executive. These, as far as they go, are necessary for ensuring the independence of the judiciary. But if the judiciary should be really independent something more is necessary and that we have to seek in the Judge himself and not outside, A Judge should be independent of himself. A Judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and ill-will, hatred and contempt and fear and recklessness. In order to be a successful Judge these elements should be curbed and kept under restraint and that is possible only by education, training, continued practice and cultivation of a sense of humility and dedication to duty. These curbs can neither be bought in the market nor Injected into human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go the independence of the judiciary will not suffer. But with all these measures being there still a Judge may not be independent. It is the inner strength of Judges alone that can save the judiciary. The life of a Judge does not really call for great acts of self-sacrifice; but it does insist upon small acts of self-denial almost every day. The following sloka explains the true traits of men with discretion which all Judges should possess:

fuUnUr uhfrfui.kk ;fn ok LroUr
y{eh% lekfo'kr xPNr ok ;FksVe A
v|o ok ej.keLr ;xkUrj ok
U;k;;kRiFk% ifopyfUr in u /khjk% AA(In Hindi)

(Let men trained in ethics or morality, insult or praise; let lakshmi (wealth) accumulate or vanish as she likes; let death come today itself or at the end of a yuga (millennium), men with discretion will not deflect from the path of rectitude).

1257. This is only an ideal. It is difficult to attain it but every Judge should at least endeavour to set his eyes on that goal.

BY THE COURT

1258. In view of the majority decision all the transferred cases and writ petitions are dismissed with no order as to costs.