PETITIONER:
SUBHASH SHARMA AND OTHERS

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT26/10/1990

BENCH:
MISRA, RANGNATH (CJ)
BENCH:
MISRA, RANGNATH (CJ)
VENKATACHALLIAH, M.N. (J)
PUNCHHI, M.M.

CITATION:
1991 AIR 631 1990 SCR Supl. (2) 433
1991 SCC Supl. (1) 574 JT 1990 (4) 245
1990 SCALE (2)836

ACT:
Constitution of India: Articles 32, 124 and 217--Appointment of Judges of High Courts and Supreme Court--"Consultation" with Chief Justice of India--Primacy of--Fixation of Judges strength--Justiciability--Referred to Nine Judge Bench.

HEADNOTE:
In these petitions in the nature of public interest litigation under Article 32 of the Constitution, the relief asked for is one for mandamus to the Union of India to fill the vacancies of Judges in the Supreme Court and the several High Courts of the country and ancillary orders or directions in regard to the relief of filling up of vacancies.
In response to the rule, the Union of India, relying upon S.P. Gupta v. Union of India, [1982] 2 SCR 365, raised a preliminary objection as to the justiciability of the issue. The objection, however, was later withdrawn by the succeeding Attorney General who made a statement that it was the constitutional obligation of the Union of India to provide the sanctioned Judge strength in the superior courts and default, if any, was a matter of public interest, and the writ petitions requiring a direction to the Union of India to fill up the vacancies were maintainable.
Disposing of the petitions, this Court,
HELD: (1) The ratio in S.P. Gupta's case left the matter of fixing Up Of the Judge strength to the President of India under the constitutional scheme, and the choice of Judges to the prescribed procedure, but once the sanctioned strength was determined it was the obligation of the Union of India to maintain the sanctioned strength in the superior Courts. [437H; 438A]
(2) It is too late in the day to dispute the position that justice has to be administered through the courts and such administration would relate to social, economic and political aspects of justice. The Judiciary therefore becomes the most prominent and outstanding wing of the Constitutional System for fulfilling the mandate of the Constitution.
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For its sound functioning, it is necessary that there must be an efficient judicial system and one of the factors for providing the requisite efficiency is ensuring adequate strength. [440E-F]

(3) For the availability of the appropriate atmosphere where a Judge would be free to act according to his conscience it is necessary that he should not be over burdened with pressure of work which he finds it physically impossible to undertake. This necessarily suggests that the judge strength should be adequate to the current requirement and must remain under constant review in order that commensurate Judge strength may be provided. [441F-G]

Bradley v. Fisher, 80 US 335 1871, referred to.

(4) It is a matter for immediate attention of all concerned--and of Government in particular--that the Administration of Justice is made a plan subject and given appropriate attention. [444C]

(5) Backlog in Courts has become a national problem. The adjudicatory process is being blamed for not equalling itself to the challenge of the times. There is a general complaint that the judicial system is on the verge of collapse. It is, therefore, the obligation of the constitutional process to keep the system appropriately manned. There is no justification for the sluggish move in such an important matter. [447C-D]

(6) If in a given case the Chief Justice of the High Court has recommended and the name has been considered by the Chief Minister and duly processed through the Governor so as to reach the hands of the Chief Justice of India through the Ministry of Justice and the Chief Justice of India as the highest judicial authority in the country, on due application of his mind, has given finality to the process at his level, there cannot ordinarily be any justification for reopening the matter merely because there has been a change in the personal of the Chief Justice or the Chief Minister of the State concerned. This has to be the rule and the policy adopted by the Union of India should immediately be given up. [448B-D]

(7) In the functioning of public offices there is and should be continuity of process and action and all objective decisions taken cannot be transformed into subjective issues. That being the position, recommendations finalised by the Chief Justice of India unless for any particular reason and unconnected with the mere change of the Chief

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Justice or the Chief Minister justifying the same should not be reopened and if in a given case the Union of India is of the view that the matter requires to be looked into again a reference should be made to the Chief Justice of India and there can be a fresh look at the matter only if the Chief Justice of India permits such a review of the case. [448E-F]

(8) Consistent with the constitutional purpose and process it becomes imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court and the High Courts of the States. This aspect dealt with in Gupta's case requires re-consideration by a larger bench. [450E]

(9) In India the judicial institutions, by tradition, have an avowed a political commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of "consultation" has to be understood and expounded consistent with and to promote this constitutional spirit. These implications are, indeed, vital. The constitutional

values cannot be whittled down by calling the appointment of Judges as an executive act. The appointment is rather the result of collective, constitutional process. It is a participatory constitutional function. It is, perhaps, inappropriate to refer to any 'power' or 'right' to appoint judge. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories. [457D-F]

(10) The executive, on whose advice the President acts, as a participant in the process has its own important and effective role. To say that the power to appoint solely vests with the executive and that the executive, after bestowing such consideration on the result of consultations with the judicial organ of the State, would be at liberty to take such decision as it may think fit in the matter of appointments, is an over-simplification of a sensitive and subtle constitutional sentence subversive of the doctrine of judicial independence. [457F-G]

(11) The word "consultation" is used in the constitutional provision in recognition of the status of the high constitutional dignitary who formally expresses the result of the institutional process leading to the appointment of judges. To limit that expression to its literal limitations, shorn of its constitutional background and purpose, is to borrow Justice Frankfurter's phrase, "to stick in the bark of words". [458B]

(12) Judicial Review is a part of the basic constitutional structure

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and one of the basic features of the essential Indian Constitutional policy. This essential constitutional doctrine does not by itself justify or necessitate any primacy to the executive wing on the ground of its political accountability to the electorate. [458C]

(13) It might under certain circumstances be said that Government is not bound to appoint a judge so recommended by the judicial wing. But to contemplate a power for the executive to appoint a person despite his being disapproved or not recommended by the Chief Justice of the State and the Chief Justice of India would be wholly inappropriate and would constitute an arbitrary exercise of power. [458D-E]

(14) The purpose of the 'consultation' is to safeguard the independence of the judiciary and to ensure selection of proper persons. The matter is not, therefore, to be considered that the final say is the exclusive prerogative of the executive government. The recommendations of the appropriate constitutional functionaries from the judicial organ of the State has an equally important role. "Consultation" should have sinews to achieve the constitutional purpose and should not be rendered sterile by a literal interpretation. [458F-G]

(15) There are preponerant and compelling cousideratious why the views of the Chief Justices of the States and that of the Chief Justice of India should be afforded a decisive import unless the executive has some material in its possession which may indicate that the appointment is otherwise undesirable. [458G-H]

(16) The correctness of the opinion of the majority in S.P. Gupta's case relating to the status and importance of consultation, the primacy of the position of the Chief Justice of India and the views that the fixation of Judge strength is not justiciable should be reconsidered by a larger bench. [459B]

(17) In view of the fact that the bulk of vacancies in the High Courts have been filled up, and in view of the

assurance held out by the learned Attorney General that prompt steps are being taken to fill up the remaining vacancies, further monitoring for the time being is not necessary. [459F]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition (Civil) Nos. 13003 of 1985, 1303 of 1987 and 302 of 1989.

(Under Article 32 of the Constitution of India)

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Subhash Sharma Petitioner in person.

M.S. Ganeshan, Ms. M. Karanjawala (N.P.), H.S. Anand, P.H. Parekh and Ms. Sunita Sharma for the Petitioners.

Ashok Desai, Solicitor General, Ms. A. Subhashini, P.S. Poti, K.R. Nambiar, (For Kerala), Probir Chowdhury (For Assam), A.K. Panda (For Orissa), Ms. G.S. Misra, H.K. Puri, T.V.S.N. Chari (For Bihar), S.K. Agnihotri (For Madhya Pradesh), Ms. Kamini Jaiswal (For Chandigarh), Ms. S. Dikshit (For U.P.), V. Krishnamurthy (For Tamil Nadu), B. Parthasarthi (For Andhra Pradesh), Ms. Urmila Kapoor & Ms. S. Janani (For Manipur), Aruneshwar Gupta, M.N. Shroff (For Gujarat). Mahabir Singh (For Haryana), A.S. Bhasme (For Maharashtra), I. Makwana (For Rajasthan), Ms. Urmila Kapur (For Manipur) and M. Veerappa (For Karnataka) the Respondents.

The Judgment of the Court was delivered by

RANGANATH MISRA, CJ. These are applications under Article 32 of the Constitution. The first petition is by an advocate practising in this Court; the second by the Supreme Court Advocates on Record Association and the last by the Honorary Secretary of the Bombay Bar Association. These applications are in the nature of public interest litigation. The relief asked for is one for mandamus to the Union of India to fill up the vacancies of Judges in the Supreme Court and the several High Courts of the country and ancillary orders of directions in regard to the same. The petition from Bombay is confined to the relief of filling up of vacancies in the Bombay High Court. Since common please were advanced and the relief sought was of similar nature, these applications have been clubbed together and heard from time to time.

In response to the rule, the Union of India took the stand through the Attorney General that the petitions were not maintainable and the filling up of the vacancies in the superior courts was not a justiciable matter. Reliance was placed on the decision of this Court in the case' of S.P. Gupta v. Union of India, [1982] 2 SCR 365. The objection raised by the learned Attorney General was overruled by the Court by drawing a distinction between fixing the Judge strength in the Courts or selection of judges on one side and the filling up of vacancies on the basis of sanctioned strength on the other. This Court as an interim measure took the view that while the ratio in S.P. Gupta's case left the matter of fixing up of the Judge strength to the President of India under the constitutional scheme, and the choice of Judges to the

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prescribed procedure, once the sanctioned strength was determined it was the obligation of the Union of India to maintain the sanctioned strength in the superior Courts and these cases were allowed to proceed.

Mr. Soli Sorabjee, the succeeding Attorney General, withdrew the objection regarding this Court's jurisdiction

and made a statement that he was of the view that it was the constitutional obligation of the Union of India to provide the sanctioned Judge strength in the superior courts and the default, if any, was a matter of public interest and the writ petitions requiring a direction to the Union of India to fill up the vacancies were maintainable.

I

The superior judiciary is divided into the Union Judiciary covered by Chapter 4 of Part V and the High Courts in the States are covered by Chapter 5 of Part VI of the Constitution. Article 124(1) of the Constitution provides:

"There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges."

From time to time the Judge strength in the Supreme Court has been expanded and by the Supreme Court (Number of Judges) Amendment . Act, 1986 (22 of 1986), the existing number has been fixed at 25 apart from the Chief Justice. Article 2 14 provides:

"There shall be a High Court for each State."

But there are 18 High Courts in all on account of the fact that the High Court at Guwahati exercises jurisdiction over six States including Assam; the High Court at Chandigarh is common for the States of Punjab and Haryana and the jurisdiction of the High Court of Bombay extends over Goa. There is High Court at Delhi though the mandate of Article 2 14 does not apply. Article 2 16 provides:

"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."

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From time to time administratively the Judge strength of the different High Courts has been retired. At the time these matters were first placed before us the total strength was 462 but later it has been enhanced to 470. The enhancement has been on account of the fact that in the Judge strength of the High Courts of Calcutta,. Himachal Pradesh, Karnataka, Madras and Rajasthan had ten additions in all and the sanctioned strength of the Kerala High Court was reduced by two. There was a time during the pendency of these writ petitions affidavit filed before this Court on behalf of the Ministry of Law & Justice the position as on 20th of February, 1990, showed that as against the sanctioned strength of 462,368 had been filled up and the vacancies were 94 in all. By 16.8.1980, the sanctioned strength had gone up to 470 and as against these, 440 appointments had been made. The total posts to be filled up were 30 in number--19 being permanent and 11 additional vacancies. We gather that by now some more appointments have been made and the number of unfilled posts has been reduced to around 22.

These cases were adjourned from time to time with interim directions calling upon Union of India to fill up the vacancies within specified dates. As a result of monitoring by the Court by interim directions in these petitions, the position has somewhat eased but 22 vacancies still remain to be filled up. With retirements and other cognate processes the number of vacancies keeps increasing from time to time.

We had made it clear to the learned Attorney General at the several interlocutory hearings that these petitions and the Court’s directions have nothing to do with the actual selection of particular Judges to be appointed in the vacancies and that was a matter exclusively within the domain of the constitutional scheme and concern of the concerned constitutional functionaries. These petitions are concerned

with the filling up of vacancies and discharge of the constitutional obligation of the Union of India to the nation in that behalf. We may point out that filing of these writ petitions and the proceedings of the Court have helped the Union of India to fill up the vacancies to a considerable extent by making the various constitutional authorities conscious of the urgency of problem and of their responses. We have noticed the fact that while the process of filling up of vacancies was considerably slow prior to the general election held in November, 1989, there has been an improvement in the process from January this year. We have, however, not been able to appreciate the stand taken
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in some of the affidavits of the Union of India that as the place and process of appointments has been expedited, the writ-petitions be taken to have served their purpose and do not survive. We recall several occasions when our interim directions were received not with any conspicuous enthusiasm and other occasions when inspite of assurance and undertakings no progress was noticed.

II

For more than six scores of years High Courts have been functioning in this country. Earlier appeals lay from the High Courts to the Privy Council in certain situations. Under the Government of India Act, 1935, a Federal Court was stipulated which started functioning from 1937. With Independence of India in 1947, the jurisdiction of the Privy Council got repealed. Our Constitution provided for a Supreme Court for the entire country and a High Court for every State. The superior judiciary in India now, therefore, consists of the Supreme Court and the High Courts. Article 50 in Part IV of the Constitution required the State to take steps to separate the Judiciary from the Executive in the public services of the States. By now that has been done. The constitutional scheme postulates Rule of Law and independence of the judiciary. With a view to providing the same as an indispensable factor for the sustenance of the democratic pattern of society, provisions have been made in the Constitution.

The Preamble of our Constitution stipulates justice--social, economic and political for all citizens of India. It is too late in the day to dispute the position that justice has to be administered through the courts and such administration would relate to social, economic and political aspects of justice. The Judiciary therefore becomes the most prominent and outstanding wing of the Constitutional System for fulfilling the mandate of the Constitution. For its sound functioning, it is, therefore, necessary that there must be an efficient judicial system and one of the factors for providing the requisite efficiency is ensuring adequate strength.

For Rule of Law to prevail, judicial independence is of prime necessity. Dr. Robert MacGregor Dawson, speaking about individual independence of Judges once said:

"The Judge must be made independent of most of the restraints, checks and punishments which are usually called into play against other public officers ..... He is
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thus protected against some of the most potent weapons which a democracy has at its command: he receives almost complete protection against criticism; he is given civil and criminal immunity for acts committed in the discharge of his duties; he cannot be removed from office for any ordinary offence, but only of misbehaviour of a flagrant kind, and he can

never be removed simply because his decisions happen to be disliked by the Cabinet, the Parliament, or the people. Such independence is unquestionably dangerous, and if this freedom and power were indiscriminately granted the results would certainly prove to be disastrous. The desired protection is found by picking with special care the men who are to be entrusted with these responsibilities, and then paradoxically heaping more privileges upon them to stimulate their sense of moral responsibility, which is called in as a substitute for the political responsibility which has been removed. The Judge is placed in the position where he has nothing to loss by doing what is right and little to gain by doing what is wrong; and there is therefore every reason to hope that his best efforts will be devoted to the conscientious performance of his duties."

In Bradley v. Fisher, 80 US 335 (1871) it was pointed out:

"Our judicial system is guided by the principle that a judicial officer, in exercising the authority vested in him must be free to act upon his own convictions, without apprehension of personal consequences to himself."

For the availability of an appropriate atmosphere where a Judge would be free to act according to his conscience it is necessary, therefore, that he should not be over burdened with pressure of work which he finds it physically impossible to undertake. This necessarily suggests that the Judge strength should be adequate to the current requirement and must remain under constant review in order that commensurate Judge strength may be provided.

Within a few years of functioning under the aegis of the Constitution our people started realising that there was backlog in courts and the same was on rapid and constant increase. The Law Commission in its 14th Report in September, 1958, dealt with the question adequacy of judicial strength as a matter of special importance. It pointed out:

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"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 decision have not only taken longer time but have led not infrequently to reference 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."

The Law Commission emphasised the position by further saying:

"Governments could not have been unaware, at any rate from 1950 onwards, that the files of the High Courts were being loaded with a large amount of additional work. The large number of writ applications and applications questioning the constitutionality of enactments and rules flamed thereunder must have come directly to the notice of the Governments.

Responsible persons cannot also have failed to notice that the disposal of these complicated and in a sense novel matters consumed a great deal of the time of the High Courts which had the natural consequence of clogging the normal and usual work."

Inspite of highlighting of the position by the Law Commission and the warning administered by it, the process of providing adequate judge strength commensurate with the volume of litigation has been usually slow. Subsequent reports of the Law Commission have referred to this aspect.
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The Commission took note of the position that due consideration was not being bestowed upon the administration of justice and the importance of the subject was not realised by the Executive authorities. Lack of adequate financial provision and absence of appropriate funding of schemes for improvement often led to abandonment of contemplated wholesome measures and made long term planning difficult. In fact, the plea from several relevant quarters that 'Administration of Justice' should be treated as a 'plan subject' has not been entertained all these years. It has been so more on account of lack of appropriate appreciation of the importance of the matter than anything also.

Lord Denning of the Preface to the Law in Crisis by Professor C.G. Weera Mantry has said:

"We are passing through a critical moment in the history of mankind. Civilised society appears to be disintegrating. Minorities openly defy the law for their own ends. Terrorists seize hostages and threaten to-kill them. Workmen set up picket hives outside power stations and threaten to bring the country to a standstill. Students occupy buildings and prevent the running of their universities. Only too often their threats succeed. The peaceful majority give in. They surrender.

Moral and spiritual values, too, appear to be at a low ebb. The sanctions of religion have lost their force. Schools and teachers take much interest in social sciences. They explain how people behave. They seek to help the misfits. But they do not set forth standards of conduct. They do not tell people how to behave. The only discipline to do this is the discipline of law. It is the law which teaches that men must not resort to violence to obtain their ends; that they must keep their promises; they must not injure their neighbours and they must act fairly. The law covers the whole range of human behaviour and says what men must do and must not do ..... Law which is the very foundation of the civilized society is in peril."

Sir Frederick Pollock in one of his lectures pointed out that long indifference to the legal system and to all that goes with it is the result of many generations of neglect in communicating to the layman some understanding of the very ground work of the legal system under which
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he spends his life. Religion, politics, art, literature--all these are taught as part of general education, but not the fundamentals concerning the administration of law, nor the history of liberty nor the need for public vigilance over its legal system. It is not surprise that faith and confidence in the law are steadily declining and legal systems, by and Large, are losing their base of popular support on which they must ultimately rely.

We are living in an age when all traditional institutions are under scrutiny, suspicion and challenges of reassessment. If the current mood of disillusionment infects the core of the law and its institutions, we may have lost our

last opportunity for the preservation of freedom under the Law. It is, therefore, a matter for immediate attention of all concerned--and of Government in particular--that the need is recognised and the Administration of Justice is made a plain subject and given appropriate attention.

It is true that the number of High Courts compared to 1950 has increased in later years. It is also true that the Judge strength has been increased. It is, however, equally true that the enhancement has not been commensurate. After a lot of exercise, per year disposal per Judge of main cases has been fixed at 650. If this be the basis, perhaps no High Court in India excepting that for Sikkim has adequate judge strength.

e gather that the Kerala High Court where the sanctioned strength has been reduced by 2, has a sanctioned strength 22 while its pendency as on 1.1. 1990 being 34,330 cases justifies a Judge strength of almost 50 on the basis of the measure of 650 cases per Judge per year. We intend to indicate that there was no justification for reduction of the sanctioned strength.

We are alive to the position that in S.P. Gupta's case this aspect has been held to be not justiciable. We do not agree with the opinion expressed by the majority on this aspect and are of the opinion that that aspect requires reconsideration. For the present we suggest to Government that the matter should be reviewed from time to time and steps should be taken for determining the sanctioned strength in a pragmatic way on the basis of the existing need. If there be no correlation between the need and the sanctioned strength and the provision of judge-manpower is totally inadequate, the necessary consequence has to be backlog and sluggish enforcement of the Rule of Law.

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III

Another reason directly contributing to backlog and its increase is the non-filling up of the sanctioned vacancies. Under the traditional process followed the matter, steps for filling up of vacancies have been initiated by the Chief Justice of the High Court six months in advance of the occurrence of the vacancy. The date of retirement of a Judge is known on the date he enters office unless vacancy is caused by resignation, removal by impeachment or death. Apart from these eventualities, the date of vacancy in the post being known for years before there can really be no justifiable excuse for inaction in the initiation of steps for filling up the vacancy well in advance of its actual occurrance. The existing scheme of appointment involves a process of consultation with the Chief Justice, the Governor of the State, the Chief Justice of India before the President of India makes the appointment. The involvement of the Governor brings in the Chief Minister and Presidential action involves the Central Government. If, however, every functionary associated with the process remains cognisant of the constitutional obligation involved in the matter we see no justification as to why for selection of the incumbent more than 3 to 4 months should be necessary. The system should be so perfect and smooth that with the retirement of one Judge his successor should be ready to step in and by this process not a day's judge strength should be lost to a High Court.

The question of appointment of Judge was the subject-matter of the 80th Report of the Law Commission. It referred to its earlier Report (1979) where it was said:

"As mentioned earlier, though the sanctioned judge strength of the High Courts in the country during the year 1977 was

352, only 287 judges on an average were in position. Likerise, in the year 1976, even though the sanctioned strength was 351, only 292 judges were in position. Leaving aside the judges who were entrusted with work outside their normal duties, the fact remains that the number of judges in position in both the years was less than the sanctioned strength. This disparity between the sanctioned strength, and the number of judges in position was apparently due to the fact that vacancies in the post were not filled in as soon as they occurred. It is our considered opinion that delay in filling in the vacancies is one of the major controlling factors reasonsible for the filling accu-
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mulation of arrears. In our opinion, when a vacancy is expected to arise out of the retirement of a judge, steps for filling in the vacancy should be initiated six months in advance. The date on which such a vacancy will normally arise is always known to the Chief Justice of the High Court and also to others concerned. It should be ensured that necessary formalities for the appointment of a Judge to fill the vacancy are completed by the date on which the vacancy occurs."

Several other reasons contributing to the non-filling up of vacancies were brought to the fore in the Report. Obviously, the reports furnished by the Law Commissions from time to time have not received adequate consideration in the hands of the appropriate authorities and administration of justice has not received its due attention. This has resulted in the_ obstinate problem of backlog.

Prolongation of litigation is perhaps a necessary evil of our type of adjudicatory system. Dacon (Law Tracts) listed the grievances of his times against the laws of England and the Justice system in the following way:

"Certain it is that our laws, as they now stand, are subject to great uncertainties, and variety of opinion, delays and evasions whereof ensueth: (i) that the multiplicity and length of suits in great; (ii) that the contentious person is armed and the honest subject wearied and oppressed; (iii) that the judge is more absolute, who, in doubtful cases, hath a greater scope and liberty; (iv) that the chancery courts are more filled, the remedy of law being often absent and doubtful; (v) that the ignorant lawyer shroudeth his ignorance of law, in that doubts are frequent and many; and (vi) that men's assurances of their lands and estates by patents, deeds, wills are often subject to question and hollow .... "

Bacon's description to a considerable extent represents even today's situation. The volume of litigation has increased while there has been no commensurate expansion of the adjudicatory machinery.

When interim directions made in these cases were not yielding results, the Attorney General mentioned to us on repeated occasions that the consultations were taking time. Very often, while the Chief
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Justice of the High Court had made his recommendation, the response from the Chief Minister through the Governor of the-State was not forthcoming, he used to say. Repeated reminders were being sent from the Union Government and they went unheaded. On one occasion to meet the stalemate we had indicated in an interlocutory order that a time frame must be set for the response of the constitutional authority in the State and if there was no response forthcoming within the time, the Union of India should be in a position to proceed with the recommendation of the Chief Justice of the

High Court. That even bore no fruit.

Backlog in Courts has become a national problem. The adjudicatory process is being blamed for the equalling itself to the challenge of the times. There is a general complaint that the judicial system is on the verge of collapse. It is, therefore, the obligation of the constitutional process to keep the system appropriately manned. We have found no justification for the sluggish move in such an important matter.

We may, at this stage, advert to the Constitution (Sixty-Seventh Amendment) Bill, 1990, which is pending before the Parliament. In the statement of objects and reasons of this Bill, it has been stated:

"The Government of India have in the recent past announced their intention to set up a high level judicial commission, to be called the National Judicial Commission for the appointment of Judges of the Supreme Court and of the High Courts and the transfer of Judges of the High Courts so as to obviate the criticisms of arbitrariness on the part of the Executive in such appointments and transfers and also to make such appointments without any delay. The Law Commission of India in their 121st Report also emphasised the need for a change in the system."

This part of the statement obviously accepts the position that Government are satisfied that there is basis for criticism of the arbitrariness on the part of the Executive and the modality adopted following S.P. Gupta's ratio has led to delay in the making of appointments which the Constitutional Amendment seeks to eliminate.

From the affidavits filed by the Union of India and the statements made by learned Attorney General on the different occasions when the matter was heard. We found that the Union Government had

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adopted the policy of reopening recommendations even though the same had been cleared by the Chief Justice of India on the basis that there had in the meantime been a change in the personnel of the Chief Justice of the High Court or the Chief Minister of the State. The selection of a person as a Judge has nothing personal either to the Chief Justice of the High Court or the Chief Minister, of the State. The High Court is an institution of national importance wherein the person appointed as a Judge functions in an impersonal manner. The process of selection is intended to be totally honest and upright with a view to finding out the most suitable person for the vacancy. If in a given case the Chief Justice of the High Court has recommended and the name has been considered by the Chief Minister and duly processed through the Governor so as to reach the hands of the Chief Justice of India through the Ministry of Justice and the Chief Justice of India as the highest judicial authority in the country, on due application of his mind, has given finality to the process at his level, there cannot ordinarily be any justification for reopening the matter merely because there has been a change in the personnel of the Chief Justice or the Chief Minister of the State concerned. We intend to make it clear that this has to be the rule and the policy adopted by the Union of India as has been indicated to us in Court by the learned Attorney General should immediately be given up. In the functioning of public offices there is and should be a continuity of process and action and all objective decisions taken cannot be transformed into subjective issues. That being the position, .recommendations finalised by the Chief Justice of India unless for any particular reason and unconnected with

the mere change of the Chief Justice or the Chief Minister justifying the same should not be reopened and if in a given case the Union of India is of the view that the matter requires to be looked into again a reference should be made to the Chief Justice of India and there can be a fresh look at the matter only if the Chief Justice of India permits such a review of the case. In fact, as an interim measure we had indicated that this should be the position but we find that steps contrary to the expression of this opinion have been taken. That is why we have found it necessary to re-state the opinion. Government shall take appropriate action in accordance with this principle.

IV

An independent non-political judiciary is crucial to the sustenance of our chosen political system. The vitality of the democratic process, the ideals of social and economic egalitarianism, the imperatives of a socio-economic transformation envisioned by the constitution as well as the Rule of law and great values of liberty and equality are all dependent on the tone of the judiciary. The quality of the

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judiciary cannot remain unaffected, inturn, in the process of selection of Judges.

Some of the important aspects of selection and appointment of Judges fell for debate before a seven-judge bench in S.P. Gupta's case [1982] 2 SCR 365. The controversy was triggered-off by a circular dated 13th March, 1981 issued by the Union Law Minister addressed to the Governor of Punjab and the Chief Ministers of the States referring to the desirability of one-third of the judges of the High Courts, as for as possible, being from outside the State in the interest of 'National Integration' and "to combat narrow parochial tendency bred by caste, kinship and other local links and affiliations." The circular requested the Governor and the Chief Ministers to obtain from all the additional judges working in the High Court in their respective States their consent to be appointed as permanent judges in the other High Courts of the country and also to obtain from persons who had already been, or may in the future be, proposed for initial appointment their consent to be appointed to any other High Court in the country. The additional judges as well as the proposed-appointees were also asked to name three High Court, in the order of preference, to which they would prefer to be so appointed as permanent judges. The main issues that fell for consideration in the case were whether the said circular interfered with judicial independence; whether at all, and if so under what circumstances, a judge of High Court could be transferred to another High Court without his consent; and as to the criteria on which an additional judge was entitled to be made permanent. Several inciental issues such as whether the lawyers who brought the petitions had the requisite 'standing to sue'; whether the records of the Government pertaining to the appointment or non-appointment of additional judges as permanent judges and to the transfer of judges were privileged from disclosure and, more importantly, the question as to the significance and status of the process of 'consultation' envisaged in the constitutional process of appointment of judges and the primacy of the position of the institution of the Chief Justice of India in the consultative process--whether the opinion and advice of the Chief Justice of India was on the same significance as those of the other constitutional 'functionaries viz., the Governor, the Chief Justice of the State who consulted in the matter--also came to be debated. In our opinion, the view

expressed by four learned Judges whose views constituted the majority on the point--the other three learned judges took a different view--vitally affects the concept and values of judicial independence.
That case, indeed, traversed a wide ground and range of ideas.
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Referring to that case a critical-review published in the International and Comparative Law Quarterly [vol. 33-1984] said.
"In reaching these conclusions, members of the Court passed over much fascinating ground, and it gives intriguing insight into the attitude of the Indian judiciary towards their own role and that of the Constitution in the context of India today. Some of the most interesting observations are obiter, but that does not necessarily detract from their importance in the decision of a final court of appeal."
The view taken by Bhagwati J., Fazal Ali J. Dasai J., and Venkataramiah J., to which we will presently advert, in our opinion, not only seriously detracts from denudes the primacy of the position, implicit in the constitutional scheme, of the Chief Justice of India in the consultative process but also whittles down the very significance of "consultation" as required to be understood in the constitutional scheme and context. This bears both on the substance and the process of the constitutional scheme. The constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished values of judicial independence. Consistent with the constitutional purpose and process it becomes imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court and the High Court of the States. We are of the view that this aspect dealt with in Gupta's case requires re-consideration by a larger bench.

The points which require to be re-considered relate to and arise from the views of the majority opinion touching the very status of "consultation" generally and in particular with reference to "consultation" with Chief Justice of India and, secondly, as to the primacy of the role of the Chief Justice of India. The content and quality of consultation may perhaps vary in different situations in the interaction between the executive and the judicial organs of the State and same aspects may require clarification.

There is yet another aspect as to the right to initiate the appointments of Judges. In regard to this aspect, in practice, there appears to have been a distortion of the scope of the observations of the majority, even to the extent these observations go. The statement that there should be no embargo on the State executive initiating the proposal for appointments goes with the qualification that the State executive can-
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not send its proposals directly to the Union Government but should first send it to the Chief Justice of the State. Desai J., clearly and unambiguously qualified this right of the executive thus:

> ". ..... Similarly, mere 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 view of both may be forwarded to the Chief Justice of India ..... "
(Emphasis Supplied)

But it has been mentioned that a practice is sought to be developed where the executive Government of the State sends up the proposals directly to the Centre without reference to the Chief Justice of the State. This is a distortion of the constitutional scheme and is wholly impermissible. So far as the executive is concerned, the 'right' to initiate an appointment should be limited to suggesting appropriate names to the Chief Justice of the High Courts or the Chief Justice of India. If the recommendation is to emanate directly from a source other than that of the Chief Justices of the High Courts in the case of the High Courts and the Chief Justice of India in the case of both the High Courts and the Supreme Court it would be difficult for an appropriate selection to be made. It has been increasingly felt over the decades that there has been an anxiety on the part of the Government of the day to assest its choice in the ultimate selection of Judges. If the power to recommend would vest in the State Government or even the Central Government, the picture is likely to be blurred and the process of selection ultimately may turn out to be difficult.

Returning to the views of the majority, we may set out the views of these learned Judges in the Judgment as to "consultation" and primacy of the position of the Chief Justice of India which would, in our opinion, require reconsideration. Referring to 'Consultation' in Article 124(2) and 217(1) Bhagwati, said:

" .... Iris 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
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Constitution to appoint Judges of the Supreme 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 Courts and of the Supreme Court as the Central Government may deem it necessary to consult, are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government .... "

" .... 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 Government and consultation cannot be equated with concurrence .....
It would therefore be open to the Central Government to over-ride 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 ..... Even if the opinion given by all the constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion .... "
(emphasis supplied)
[See: [1982] 2 SCR 540, 541,542]
As to the primacy of the position of Chief Justice of India, the learned Judge observed:

" .... 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 families of the judicial fraternity. We find ourselves unable to accept this contention ..... Article 217 places all the three constitutional functionaries on the same pedestal so far as the process of consultation is concerned.
(emphasis supplied)
"It is therefore, clear that where there is difference of
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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 10 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 ..... "
(emphasis supplied)
[See: [1982] 2 SCR 543 and 545]

Certain observations of Fazal Ali J., on judicial independence, indeed, reflect the state of acute poverty and ignorance of the large masses of Indian society and the consequent lack of awareness on their part of the niceties of the controversy and the general air of cynicism that degenerating standards in public-life has engendered in them..
Learned judge observed:
"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 interest .....

"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 the judiciary. I can fully understand that lawyers or other persons directly connected with the administration of justice may have a grievance however ill-rounded that improper 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
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administration of justice is concerned they merely want that their cases should be decided quickly by Judges who generate confidence..."
(emphasis supplied)
[See: [1982] 2 SCR 852]

But it is only through the great institutions of democracy, political statesmanship and the activist role of the judiciary that the much needed socio-economic transformation from a fuedal and exploitative society to an egalitarian social and economic order of a true welfare state that the Constitution dreams of, can emerge. Political observers ‘see that despite object poverty and squalor amongst large sections of Indian masses, they manifest such rare intuitive political acumen, insight and sagacity which has sustained the democratic spirit that there is no justification for any

cynical pessimism. Even if the assumption that large sections of the people are not be able to appreciate the constitutions niceties is true, that, by itself, does not detract from the necessity to maintain the highest standards of judicial independence. On the contrary the need becomes all the greater.

Desai J., contemplated "Value-packing" on the premise that a preponderant role for the judicial wing in the appointments raises a question of essential political doctrine that the very power of Judicial Review, with the concomitant jurisdiction to defeat the will of the people by striking down laws enacted by the people's representatives, would be essentially an undemocratic process, a-fortiori where there is no elective element in the appointment of judges. Certain observations of Prof. Schwartz were referred to in this behalf.

On the same topic Venkataramiah, J. said:

"In India we have adopted the procedure contained in Article 2 17(1) of the Constitution for the appointment of judges of the High Courts ..... This method appears to have been adopted so that the appointment 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 appointment of judges is to be made on the basis of the recommendation of judges only then they will be Judges' judges and such appointments may not fit into the scheme of popular democracy."

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[See: [1982] 2 SCR 1273]

"The position of the Chief Justice of India under Article 2 17(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 be Overlapping also, it cannot be said that the Chief Justice of India has been given any position 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....."

[See: [1982] 2 SCR 1262]

This, indeed, has the familiar ring of the controversy arising out of the judicial response of the Supreme Court of the United States to the "New-Deal" legislation. The striking down of the minimum wage law as unconstitutional triggered an impassioned debate as to the very doctrinal justifiability of Judicial Review and said to have led the American President to contemplate "Court-packing". That, subsequently the court gave a clean bill of health to the "New-Deal" legislation is part of judicial history of that country. Certain observations of Prof. Schwartz referred to by Desai J --as the learned author's own views to the contrary indicate--are not apposite in the context in which the learned judge sought to invoke them. The learned author, even in the American context, reiterated the imperative of Judicial Review to make "the provisions of a constitution more than mere maxims of political morality" and that "the universal sense of America has come to realise that there can be no constitution without law administered through the Supreme Court". Referring to Chief Justice Marshall's pronouncement in the Marbury case, the learned author said:

"That case is now rightly considered as the very

keystone of the American constitutional arch, for, in it, the U.S. Supreme Court first ruled that it possessed the authority to review the constitutionality of statutes. Yet, when the case came before the Supreme Court, it seemed to present any-
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thing but the question of judicial review."

"Marbury v. Madison is crucial in the history of American public law because it laid down the doctrine of judicial review which has since been the foundation of the constitutional structure. Marbury v. Madison was the first case to establish the Supreme Court's power to review the constitutionality of legislative acts and it did so in terms so firm and clear that the power has never since been legally doubted. Had Marshall not confirmed review power at the outset in his magisterial manner, it is entirely possible it would never have been insisted upon, for it was not until 1857 that the authority to invalidate a federal statute was next exercised by the U.S. Supreme Court. Had the Marshall Court not taken its stand, more than sixty years would have passed without any question arising as to the omnipotence of Congress. After so long a period of judicial acquiescence in Congressional supermacy, it is probable that opposition then would have been futile."

[See: "Some makers of American Law"; Tagore Law Lectures--pages 32 & 34]

Referring to the dilemma of political theorists whether assumption by the Marshall Court of review power was justified by the constitution or was an act of judicial usurpation the learned author says:

" .... Those who urge the latter position lose sight of the fact that Marbury v. Madison Merely confirmed a doctrine that was part of the American legal tradition of the time, derived from both the colonial and revolutionary experience. One may go further. Judicial review was the inarticulate major premise upon which the movement (discussed in my last lecture) to draft Constitutions and Bills of Rights was ultimately based. The doctrine of unconstitutionality had been asserted by Americans even before the first written Constitutions, notably by James Otis in his 1761 attack on general writs of assistance and by Patrick Henry in 1763 when he challenged the right of the Privy Council to disallow the Virginia Two-penny Act. The Otis-Henry doctrine was a necessary foundation, both for the legal theory underlying the American Revolution and the Constitutions and Bills of Rights it produced.
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"Addressing the court in the Five Knights' case (one of the great state trials of Stuart England), the AttorneyGeneral, arguing for the Crown, asked, "Shall any say, The King cannot do this? No, we may only say, He will not do this." It was precisely to insure that in the American system one would be able to say, "The State cannot do this," that the people enacted a written Constitution containing basic limitations upon the powers of government. Of what avail would such limitations be, however, if there were no legal machinery to enforce them? Even a Constitution is naught but empty words if it cannot be enforced by the courts. It is judicial review that makes constitutional provisions more than mere maxims of political morality."
(emphasis supplied)

[See: "Some makers of American Law"; Tagore Law Lectures--pages 35 & 37]

In India, however, the judicial institutions, by tradition, have an avowed a-political commitment and the assurance of a

non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of "consultation" has to be understood and expounded consistent with and to promote this constitutional spirit. These implications are, indeed, vital. The constitutional values can not be whittled down by calling the appointments of judges as an executive act. The appointment is rather the result of collective, constitutional process. It is a participatory constitutional function. It is, perhaps, inappropriate to refer to any 'power' or 'right' to appoint judges. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories. The executive, on whose advice the President acts, as a participant in the process has its own important and effective rule. To say that the power to appoint solely vests with the executive and that the executive after bestowing such consideration on the result of consultations with the judicial organ of the State, would be at liberty to take such decision as it may think fit in the matter of appointments, is an over-simplification of a sensitive and subtle constitutional sentence and, if allowed foul play, would be subversive of the doctrine .of judicial independence. What Endmond Burke said is to be recalled:

"All persons possessing a position of power ought to be strongly and awfully impressed with an idea that they act in trust and are to account for their conduct in that trust to
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the one great Master; Author and Founder of Society."

The word "consultation" is used in the constitutional provision in recognition of the status of the high constitutional dignitary who formally expresses the result of the institutional process leading to the appointment of judges. To limit that expression to its literal limitations, shorn of its constitutional background and purpose, is to borrow Justice Frankfurther's phrase, "to stick in the bark of words".

Judicial Review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional policy. This essential constitutional doctrine does not by itself justify or necessitate any primacy to the executive wing on the ground of its political accountability to the electorate. On the contrary what is necessary is an interpretation sustaining the strength and vitality of Judicial Review. It might under certain circumstances be said that Government is not bound to appoint a judge so recommended by the judicial wing. But to contemplate a power for the executive to appoint a person despite his being disapproved or not recommended by the Chief Justice of the State and the Chief Justice of India would be wholly inappropriate and would constitute an arbitrary exercise of power. Then-again, whatever there might be difference of opinion between the Chief Justice of a State and the Chief Justice of India some of the weighty reasons in this behalf are set out by the other three judges in their opinion the opinion of the Chief Justice of India should have the preponderant role. We are of the view that the primacy of the Chief Justice of India in the process of selection would improve the quality of selection. The purpose of the 'consultation' is to safeguard the independence of the judiciary and to ensure selection of proper persons. The matter is not, therefore, to be considered that the final say is the exclusive prorogative of the executive Government. The recommendations of the appropriate constitutional functionaries from the judicial organ of the State has an equally important rule. "Consultation" should have

sinews to achieve the constitutional purpose and should not be rendered sterile by a literal interpretation. Who is able to decide the qualities of lawyers proposed to be elevated to the Bench more than the Judges of the Superior Courts before whom they practice? There are preponderant and compelling considerations why the views of the Chief Justices of the States and that of the Chief Justice of India should be afforded a decisive import unless the executive has some material in its possession which may indicate that the appointment is otherwise undesirable.

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The view which the four learned Judges shared, in Gupta's case, in our opinion, does not recognise the special and pivotal position of the .institution of the Chief Justice of India.

The correctness of the opinion of the majority in S.P. Gupta's case relating to the status and importance of consultation, the primacy of the position the Chief Justice of India and the view that the fixation of Judge strength is not justiciable should be re-considered by a larger bench.

Indeed, the Union Government has quite often both before the Parliament and outside has stated that it has, as matter of policy, not made any appointments to the superior judiciary without the name being cleared by the Chief Justice of India. This, indeed, would be the application of a standard of selection higher than envisaged by the majority opinion in S.P. Gupta's case. But if the executive sets up a standard by which it professes its actions to be judged it must be held to those standards. This is to be done by a judicial recognition of the standard with a concomitant legal and constitutional obligation for the executive to adopt and apply the standard.

As we have already pointed out, the bulk of the vacancies in the High Courts have been filled up. Apart from two vacancies all other Judges in the Supreme Court are in position. Learned Attorney General has assured us that prompt steps are being taken to fill up the remaining vacancies and thereafter it will take steps to fill up the additional posts which have recently been created in the different High Courts. In view of what we have already stated and the assurance held out by the learned Attorney General we are of the view that further monitoring for the time being is not necessary.

As already pointed out the petition from Bombay was confined to filling up of vacancies in the Bombay High Court. Excepting two, the remaining vacancies have been filled up and we have been told that steps are afoot for getting two Judges to the Bombay High Court. We, therefore, dispose of the writ petition from Bombay with no further direction. Similarly, the writ application filed by Subhash Sharma for the reasons indicated above may also be disposed of without further directions. As and when necessary the matter can be brought before the Court. As in our opinion the correctness of the majority view in S.P. Gupta's case should be considered by a larger Bench we direct the papers of W.P. No. 1303 of 1987 to be placed before the learned Chief Justice for constituting a Bench of nine Judges to examine the two

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questions we have referred to above, namely, the position of the Chief Justice of India with reference to primacy and, secondly, justiciability of fixation of Judge strength.

We are aware of the position. that the setting up of the National Judicial Commission through a Constitutional Amendment is in contemplation. In the event of the Amendment

being carried and a National Judicial Commission being set up, the correctness of the ratio in S.P. Gupta's case of the status of the Chief Justice of India may not be necessary to be examined in the view of the fact that by the Amendment the Chief Justice of India would become the Chairman of the Commission. In case the Commission is not constituted, the two questions indicated above which are of vital importance to the efficient functioning of the judicial system in the country require consideration and there is an element of immediacy in the matter. We, therefore, suggest that the writ petition on the two issues indicated above maybe taken up for hearing at an early date and preferably before the end of this year. We hope and trust that the Supreme Court Advocate-on-Record Association would continue to evince interest in the matter but if our expectations are belied, this being in the nature of a public interest litigation, some on interested in the restitution of the issues would be brought on record to effectively continue the proceeding and assist the Court.

We clarify that apart from the two questions which we have indicated, all other aspects dealt with by us are intended to be final by our present order.

There shall be no order for costs.

R, S. S Petitions dis-posed of.

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