REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 887 OF 2009

University of Kerala ..Appellant

versus

Council, Principals', Colleges, Kerala & Others ..Respondents

WITH

S.L.P.(C) NOS.24296-24299 OF 2004
S.L.P.(C) NO.14356 OF 2005
WRIT PETITION(C) NO.429 OF 2009

O R D E R

Heard learned counsel for the parties as also the learned Solicitor General of India, Mr. Gopal Subramaniam, who has appeared as amicus curiae.

This Appeal has been filed against the impugned judgment of the Kerala High Court dated 24th June, 2004 in Writ Petition No. 30845 of 2003.

The Writ Petition was filed by the Council of Principals of Colleges in Kerala, which is an association of Principals of various private aided colleges in the State of

Kerala. The main challenge in the writ petition before the High Court was that the various universities in the State of Kerala had issued directions by way of letters/circulars to conduct election to the colleges' unions. The challenge in the writ petition was to those letters/circulars.

The Kerala High Court, by the impugned order, has allowed the writ petition and quashed those letters/circulars directing following the presidential system of election in the students' union election and left it free to the colleges to follow the system of their choice. The directions in the concluding part of the impugned judgment is as follows:

> "In such circumstances the direction given in the letters to conduct election following the presidential system of election cannot be sustained and the affiliated colleges are free to follow a system which is better for the administration and discipline in the colleges. The writ petitions are allowed accordingly. The direction to conduct election following the presidential system of election will stand set aside."

The High Court held that the impugned circulars/letters had no statutory basis, and hence were invalid.

Against the aforesaid judgment, the University of Kerala has filed this appeal by grant of special leave.

It appears that when this matter came up before this Court, the Court was concerned about the manner in which students' union activities were carried on, including the manner of election to the students' union, throughout the country. The Court was concerned about the politicization/criminalization in such activities. Hence, this Court by order dated 12th December, 2005 directed appointment of a Committee and accordingly a Committee was constituted by the Ministry of Human Resources and Development, Union of India. The members of the Committee were:

1. Mr. J.M.Lyngdoh, Retd. Chief Election Commissioner(Chairman).
2.Dr. Zoya Hassan
3.Professor Pratap Bhanu Mehta
4. Dr.Daya Nand Dongaonkar (Secretary General of the Association of Indian Universities).

Apart from the aforesaid members in the Committee, two other members were to be nominated by the Ministry of Human Resources and Development.

Consequent to the directions of this Court, the Committee headed by Mr. J.M.Lyngdoh, former Chief Election Commissioner, went into detail into all aspects of the matter and after having very wide consultations, including consultations with teachers, students' unions etc. submitted its Report dated 23rd May, 2006 to this Court.

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This Court by a detailed order dated 22nd September, 2006 directed implementation of the Report of the Committee as an interim measure. By the said order, this Court directed that the recommendations of the Committee shall be followed in all colleges/universities elections hereinafter, until further orders.

I am not going into the details about various recommendations made by the Committee and we have no doubt that many of them are wholesome. Mr. Lyngdoh is a man of very high integrity and the whole nation is proud of him. I have no manner of doubt that the Committee headed by him considered the entire matter, referred to it, in great detail. However, I have grave reservations about the manner of implementation of the recommendations of the Committee by passing the order dated 22.9.2006.

The question of great constitutional importance

which has arisen is "whether after getting the recommendations of some expert body by a court order, the Court itself can implement the said recommendations by passing a judicial order or whether the Court can only send it to the Legislature or its delegate to consider making a law for implementation of these recommendations".

The aforesaid question, therefore, raises a great constitutional question about judicial legislation, whether

it is permissible at all under our Constitution, and even if it is, what is the extent of judicial legislation?

In my opinion, the interim order of this Court dated 22nd September, 2006, prima facie, amounts to judicial legislation and the question before us is whether this is legally permissible. I am prima facie of the opinion that it is not. As held by this Court in *Divisional Manager, Aravali Golf Club & Another vs. Chander Hass & Another (2008) 1 SCC 683 (vide para 26):*

> ***"....If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce it."***

There is broad separation of powers under the Constitution, and hence one organ of the State should not encroach into the domain of another organ. The judiciary should not therefore seek to perform legislative or

executive functions vide *Common Cause vs. Union of India (2008) 5 SCC 511.*

In Ram Jawaya Kapur vs. State of Punjab AIR 1955 SC 549 (vide paragraph 12), a Constitution Bench of this Court observed:

> **"12. ...The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very**

> **well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."**
>
> **(emphasis supplied)**

Similarly, in Asif Hameed vs. State of Jammu and Kashmir, AIR 1989 SC 1899, a three Judge bench of this Court observed:

> **"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look at the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to**

function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of

social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint.

Frankfurter, J. of the U.S. Supreme Court dissenting in the controversial expatriation case of Trop v. Dulles (1958) 356 US 86 observed as under :

> **....All power is, in Madison's phrase, "of an encroaching nature". Judicial powers is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self restraint....."**

In my respectful opinion, once the Committee's

Report was received by the Court, the Court should have thereafter, instead of passing a judicial order directing implementation of the recommendations, sent it to the appropriate Legislature or its delegate (which in this case is the University which can make delegated legislation in the form of Statutes or Ordinances). It is for the Legislature or the concerned authorities to make a law accepting the Report in toto or accepting it in part, or not accepting it at all but it is not for the Court to pass judicial orders for implementations of the recommendations by the Committee, because that would really amount to legislation by the judiciary.

Learned Solicitor General submitted that when there is a pressing social need the Court can validly pass an order such as the one passed by this Court on 22.9.2006 in the public interest. I am afraid I have some reservations about this proposition, and that for two reasons. Firstly, there are hundreds of pressing social needs e.g. the need to control price rise, abolish unemployment and poverty etc. Should the Courts start dealing with all these social problems? Secondly, once the Court starts doing legislation, as the order dated 22.9.2006 has really done,

where does this end, and is this not encroaching into the domain of the legislature or executive? *In Divisional Manager, Aravali Golf Club (supra),* we have pointed at the grave dangers for the judiciary in this.

It has been repeatedly held by this Court that this Court cannot direct legislation vide Union of India vs. Prakash P. Hinduja (2003) 6 SCC 195:AIR 2003 SC 2612 and it cannot legislate vide Sanjay Kumar vs. State of U.P. 2004 All LJ 239, Verareddy Kumaraswamy Reddy vs. State of A.P. (2006) 2 SCC 670:JT(2006) 2 SC 361, Suresh Seth vs. Commr. Indore Municipal Corporation (2005) 13 SCC 287:AIR 2006 SC 767 and Union of India vs. Deoki Nandan Aggarwal 1992 Supp(1) SCC 323:AIR 1992 SC 96.

The Court should not encroach into the sphere of the other organs of the State vide N.K. Prasada vs. Govt. of India (2004)6 SCC 299 : JT 2004 Supp (1) SC 326.

Thus in Supreme Court Employees' Welfare Assn. vs. Union India (1989) 4 SCC 187:AIR 1990 SC 334, this Court observed:

> **"There can be no doubt that an authority exercising legislative function cannot be directed to do a particular act. Similarly the President of India cannot be directed by**

> the court to grant approval to the proposals made by the Registrar General of the Supreme Court, presumably on the direction of the Chief Justice of India".

In Union of India vs. Assn. for Democratic Reforms (2002) 5 SCC 294 : AIR 2002 SC 2112, this Court observed:

> "19. At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules."

Learned Solicitor General submitted that there are a large number of decisions where such orders have been passed by this Court, and there are a large number of pending cases where the issues mentioned above will arise,

and hence the matter should be referred to a Constitution Bench to be constituted by Hon'ble the Chief Justice of India. He invited our attention to Article 145(3) of the Constitution which states that a bench of at least 5 Judges should decide a case involving a substantial question of law as to the interpretation of the Constitution.

We agree with this submission. The points mentioned

above certainly raise grave questions of Constitutional importance e.g. about (1) the separation of powers of the different organs of the State under our Constitution, (2) the validity of judicial legislation and, if it is at all permissible, its limits, (3) the validity and limits of judicial activism and the need for judicial restraint, etc.

It is true that this Court has often being doing legislation in various decisions but the question remains whether this was constitutionally valid. For example, in Vishaka vs. State of Rajasthan (1997) 6 SCC 241 which was a case relating to sexual harassment of women in work places, a three Judge Bench of this Court has issued various directives and as stated therein these will be treated as law under Article 141 of the Constitution until Parliament makes a law on the subject. While we fully agree that working women should be protected against sexual harassment, the constitutional question remains whether

such directives by this Court are constitutionally valid? In substance the Court has said in Vishaka's case (supra) that it will become an interim Parliament and legislate on the subject until Parliament makes a law on the subject. Is this constitutionally valid? Can the Court convert

itself into an interim Parliament and make law until Parliament makes a law on the subject? I have grave doubts about this, and hence this point also needs to be decided by a Constitution Bench.

It is not necessary to refer to the other decisions of this Court where it has assumed legislative or executive powers, but the time has come when a thorough reconsideration by an authoritative Constitution Bench is required about the constitutional correctness of these decisions.

Hence, I refer the following questions of law, preferably to be decided by an authoritative Constitution Bench of this Court, to be nominated by Hon'ble the Chief Justice of India:

> **"1. Whether the Court by an interim order dated 22.09.2006 can validly direct implementation of the Lyngdoh Committee's Report;**
>
> **2. Whether the order dated 22nd September, 2006 really amounts to judicial legislation;**
>
> **-12-**
>
> **3. Whether under our Constitution the judiciary can legislate, and if so, what is the permissible limits of judicial legislation. Will judicial legislation not violate the principle of separation of**

powers broadly envisaged by our Constitution;

4. Whether the judiciary can legislate when in its opinion there is a pressing social problem of public interest or it can only make a recommendation to the legislature or concerned authority in this connection; and

5. Whether Article 19 (1)(c) and other fundamental rights are being violated when restrictions are being placed by the implementation of the Lyngdoh Committee report without authority of law.

6. What is the scope of Articles 141 and 142 of the Constitution? Do they permit the judiciary to legislate and/or perform functions of the executive wing of the State."

In our opinion, these are questions of great constitutional importance and hence, in our respectful opinion they require careful consideration by a Constitution Bench of this Court. The matters we are referring to a larger Bench are occurring in a large number of cases all over the country and indeed all over the world. Hence, the issues we have raised have to be decided after careful consideration preferably by a Constitution Bench and after hearing learned counsel for the parties, and also taking the help of some senior counsel as amicus

curiae.

Let the papers of this case be placed before Hon'ble the Chief Justice of India for constituting preferably a Constitution Bench at an early date for deciding the questions stated by us above.

.....J.
[MARKANDEY KATJU]

NEW DELHI;
NOVEMBER 11, 2009.

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S.L.P. (C) No. 14356 of 2005
Writ Petition (C) No. 429 of 2009

O R D E R

GANGULY, J.

1. I agree with my learned Hon'ble Brother Katju, J., that the questions formulated by His Lordship should be referred to a Constitution Bench for an authoritative pronouncement.

2. Since those questions concern the very core of

our Constitutional jurisprudence, I would like to add my perception on those questions which may be a shade at a variance with Brother Katju, J. The relevance of those questions is perennial and they are bound to figure in decisions of this Court in various situations. So while making an authoritative pronouncement on those questions the Constitution Bench may consider the views of both of us.

3. The rationale of the doctrine of Separation of Powers, to my mind, is to uphold individual liberty and rule of law. Vesting of all power in one authority obviously promotes tyranny. Therefore, the principle of Separation of Powers has to be viewed through the prism of constitutionalism and for upholding the goals of justice in its full magnitude.

4. The doctrine is normally associated with the French Philosopher Montesquieu, but the origin of this principle can be traced back to Aristotle who opined that government should be composed of three organs, namely, the "deliberative" (i.e legislative), the magisterial (i.e., executive) and the judicial. However the scope of this doctrine was not worked out

fully until Locke and Montesquieu elaborated this concept in 18th Century. Following the principles of John Locke, James Madison wrote in the Federalist Papers, (esp No.47) that:-

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

5. The value of this doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. This concept of separation of power or of divided authority is clearly woven in the fabric of American Constitutional Law.

6. Separation of powers may, therefore, be a plausible Constitutional doctrine but as a matter of practice a complete separation is never possible. In a modern governmental set up, the legislative, executive and judicial functions may overlap, and the power exercised by these three branches are potentially coextensive' as viewed by Chief Justice Marshall in Osborn V. Bank of U.S. 6 L.Ed.204 (at

page 222 of the report). Justice Frankfurter of the U.S. Supreme Court also observed that "enforcement of a rigid conception of separation of powers would make modern government impossible."(See: Schwartz American Constitution Law, page 310).

7. The Constitutional law of England recognizes this doctrine but this was never given a Constitutional status nor was it theoretically accepted. However in several judgments, the existence of this doctrine has been acknowledged. (See the speech of Lord Diplock in **Hinds and others** vs. **The Queen** – (1976) 1 A.E.R 353, at page 370 (Placitum 'g'), **Duport Steels Limited and Others** vs. **Sirs and others** reported in (1980) 1 A.E.R. 529, the opinion of Lord Diplock at 541 placitum, 'g', 'h' and 'i' and that of Lord Scarman at page 557, there the learned judge accepted that in the absence of statute, judges are virtually 'law makers', (placitum 'c') and the view of Lord Templeman in **M** vs. **Home Office and another**, reported in (1993) 3 A.E.R. 537, at page 540, placitum 'f'.

8. The doctrine has been most directly incorporated in the U.S. Constitution by its provisions like "all legislative powers shall be vested in a Congress (Article I, Section 1), "The executive powers shall be vested in a President" (Article II, Section 1) and "the judicial powers shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish" (Article III, Section 1).

9. In our Constitution there is no such defined and express incorporation of the doctrine of Separation of Power, save and except that the Executive power of the Union is vested in the President under Article 53(1) and similarly the Executive power of the State is vested on the Governor under Article 154(1). But so far as legislative and judicial powers are concerned they are not vested on any authority. Under Article 50, one of the directive principles of State policy, State is to take steps to separate the judiciary from the executive in the public services of the State. But this has nothing to do with the vesting of power.

10. Under our Constitution the executive is endowed with certain legislative powers, for instance the Ordinance making powers under Article 123 and Article 213. It also has certain judicial powers under Article 103 and Article 192. The legislature is also empowered to exercise certain judicial powers under Article 105 and Article 195. The judiciary also exercises certain legislative and executive powers under Articles 145, 146, 227 and 229.

11. In addition, the executive also exercises substantial quasi-judicial powers under several statutory provisions whereby Tribunals have been set up. These Tribunals, with almost the trappings of a Court, decide the lis between the parties. Of course, the same is subject to well known grounds of interference by writ court under judicial review. The Parliament, the highest legislative body in this Country also exercises quasi-judicial power in the case of impeachment of judges [Art. 124(5) and Art. 217] and also in respect of contempt of legislatures [Art. 194(3)].

12. Justice Pathak (as His Lordship then was)

explained these principles in **Bandhua Mukti Morcha** vs. **Union of India** reported in (1984) 3 SCC 161, and which is of some relevance in the context and which I quote:-

> "It is common place that while the Legislature enacts the law the Executive implements it and the Court interprets it and, in doing so, adjudicates on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself. And yet it is well recognized that in a certain sphere the Legislature is possessed of judicial power, the executive possesses a measure of both legislative and judicial functions, and the Court, in its duty of interpreting the law, accomplishes in its perfected action a marginal degree of legislative exercise. Nonetheless a fine and delicate balance is envisaged under our Constitution between these primary institutions of the State".

13. In so far as judicial power is concerned, no such limitation has been imposed under the Constitution. Rather the conferment of judicial power under Articles 141, 142, 32 and 226 has been plenary and very wide and enable the Supreme Court to declare the law which shall be binding on all the courts within the territories of India and Article 142 enables the Supreme Court to pass such order as

is required to do complete justice in the case. Those two Articles (Article 141 and 142) are set out:-

> "141. Law declared by Supreme Court to be binding on all courts:--The law declared by the Supreme Court shall be binding on all courts within the territory of India.
>
> 142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.- (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order 103 prescribe.
>
> (2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

14. Following the aforesaid dispensation, it may perhaps be said that the framers of our Constitution never wanted to introduce the doctrine of Separation of Powers rigidly to the extent of dividing the three

organs into water-tight compartments.

15. In this context the direction of Justice Bhagwati (as His Lordship then was) in the Constitution Bench decision in **Minerva Mills** vs. **Union of India** – [(1980) 3 SCC 625], is very apt and is quoted:-

> "...Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J., (as he then was) in *Indira Gandhi case [(1975) Supp SCC 1]*, "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged..."

16. Similar principle has been reiterated by Chief Justice A. N. Ray in **Indira Nehru Gandhi** vs. **Raj Narain**, [(1975) Supp SCC 1]. In para 46 at page 42 of the report the learned Chief Justice clearly stated:-

> "The doctrine of separation of powers is carried into effect in countries like America

> and Australia. In our Constitution there is separation of powers in a broad sense…… the doctrine of separation of powers as recognized in America is not applicable to our country."

17. The Learned Chief Justice made a categorical finding at para 47 (page 42) that the rigid separation of powers as under American Constitution or Australian Constitution does not apply to our country.

18. In **Indira Nehru Gandhi** [Supra] the view of Chief Justice Ray was affirmed by Justice Chandrachud in para 684 at pg. 259 and which are very pertinent in present context and I quote:-

> The American Constitution provides for a rigid separation of governmental powers into three basic divisions the executive, legislative and judicial. It is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian Constitution follows the same pattern of distribution of powers. Unlike these Constitutions, the Indian Constitution does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. As observed by Cardozo, J., in his dissenting opinion in Panama Refining Company v. Ryan (1934) 293 US 388, 440 the principle of separation of

> powers "is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of Govt. which cannot foresee today the developments of tomorrow in their nearly infinite variety". Thus, even in America, despite the theory that the legislature cannot delegate its power to the executive. a host of rules and regulations are passed by non-legislative bodies, which have been judicially recognised as valid.

19. In another Constitution Bench Judgment in A. K. Roy v. Union of India AIR 1982 SC 710 Chief Justice Chandrachud speaking for the majority held at para 23 pg. 723 that "our constitution does not follow the American pattern of strict separation of powers"

20. It may be noted that this Court has on several occasions issued directions, directives in respect of those situations which are not covered by any law. The decision in **Visaka** vs. **State of Rajasthan**, [(1997) 6 SCC 241], is one such instance wherein a three-Judge Bench of this Court gave several directions to prevent sexual harassment of women at the workplace. Taking into account the "absence of enacted law" to provide for effective enforcement of the right of gender equality and guarantee against

sexual harassment, Chief Justice Verma held that guidelines and norms given by the Court will hold the field until legislation was enacted for the purpose. It was clarified that this Court was acting under Article 32 of the Constitution and the directions "would be treated as the law declared by the Court under Article 141 of the Constitution." (para 16)

21. Similarly, the Supreme Court issued directions regarding the procedure and the necessary precautions to be followed in the adoption of Indian children by foreign adoptive parents. While there was no law to regulate inter-country adoptions, Bhagwati J., (as His Lordship then was) in **Laxmikant Pandey** vs. **Union of India,** [AIR 1987 SC 232], formulated an entire scheme for regulating inter-country and intra-country adoptions. This is an example of judiciary filling up the void by giving directions which are still holding the field.

22. Such judicial intervention when there are gaps in the legislation has served the cause of justice. It may be noted that the judges make law is also shared by several accomplished jurists. Judge Richard

A. Posner, in 'The Federal Courts: Crisis and Reform, 1985' argues that even though "judges are not supposed to and generally do not make law with the same freedom that legislatures can and do"; the "fact remains that judges make, and do not just find and apply law."

23. Lord Reid's observation in 'The Judge as Law Maker' is crucial in this regard. The learned judge points out how "there was a time when it was thought almost indecent to suggest that judges make law" and he underscores how that has changed and there is potential for creativity in the judicial role.

24. Benjamin Cardozo in his accomplished work – 'The Nature of Judicial Process' accepts that a judge is not a legislator in general but highlights how the judge does legislate new law in close cases to fill gaps between existing rules. He offers this theory as a departure from the traditional Blackstonian theory of "pre-existing rules of law which judges *found*, but did not *make*." (**Banjamin Cardozo, The Nature of Judicial Process, page 41, 1921.**)

25. Chief Justice Bhagwati's view in this regard is in tune with the jurists mentioned above. His Lordship held in His Lordship's address on the 'Domestic Application of Human Rights Norms' - "It is recognized on all hands that judges do not merely discover law, but they also make law… Even when a judge is concerned with interpretation of a Bill of Rights or a statute, there is ample scope for him to develop and mould the law. It is he who infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society and by thus making and moulding the law, he takes part in the work of creation and this is much more true in the case of interpretation of the Constitution… Greatness on the Bench lies in creativity and it is only through bold and imaginative interpretation that the law can be moulded and developed and human rights advanced… To meet the needs of the society, the judges do make law and it is now recognized everywhere that judges take part in this law making function and, therefore, judges make law."

26. The law-making role of this Court has also been

acknowledged in various other decisions as well. In this context, one must appreciate the scope and ambit of Articles 141 and 142.

27. In so far as Article 141 is concerned, Sabyasachi Mukharji's, C.J., view is of primary importance. In **Delhi Transport Corporation** vs. **D.T.C. Mazdoor Congress,** (AIR 1991 SC 101), the learned judge notes that 'we must do away with the childish fiction that law is not made by the judiciary' and cites Austin's description of the Blackstonian Principle in this regard. Mukharji J. also refers to the observations made by Chief Justice Subba Rao in ***Golak Nath*** vs. ***State of Punjab,*** (AIR 1967 SC 1643 at 1667**),** wherein it was pointed out that Article 141 and Article 142 "are designedly made comprehensive to enable the Supreme Court to declare law and to give such directions or pass such orders, as are necessary to do complete justice. Subba Rao C.J. had made the following observation - "the expression 'declared' is wider than the words 'found or made'. To declare is to announce opinion. Indeed, the latter involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts

of the process, while that interpreted, ascertained or evolved is declared as law. The law declared by this Court is the law of the land. To deny this power to this Court on the basis of some outmoded theory that the Court only finds law but does not make it, is to make ineffective the powerful instruments of justice placed in the hands of the highest judiciary of this Country."(para 50)

28. This particular view of Chief Justice Subba Rao, to my mind, has not been departed from. M.P. Jain in his article titled 'The Supreme Court and Fundamental Rights' comments on this observation in **Golak Nath** (supra) and points out that the declaratory theory which says that judges only declare the law but do not make it has been discarded even in Britain and the 'general consensus of opinion at the present days is that new law is created by the judiciary' (***in* Fifty Years of the Supreme Court: Its Grasp and Reach**). Mr. Jain refers to Lloyd's Introduction to Jurisprudence, wherein it is pointed out how there remains a consensus of opinion that, within certain narrow and clearly defined limits, new law is created by the judiciary. As is rightly

pointed out in this treatise, 'attention centers primarily not so much on the *fact* of judicial legislation but rather on the ways in which this occurs…thus it is realized that in a sense whenever a court applies an established rule or principle to a new situation or set of facts new law is being created.' It is further stated that there may be times when a 'court may take a bolder step, by laying down a new rule or principle which itself contains the potentiality of creative expansion and development.' (**Lloyd's Introduction to Jurisprudence, page 1403-1404**)

29. Article 142, which vests the Supreme Court with the repository of discretionary power that can be wielded in appropriate circumstances to deliver complete justice in a given case. Only Bangladesh (Art. 104) and Nepal [Art. 88(2)] include similar provisions in their Constitution. [**(2005) 3 SCC 281, para 32**] In the context of Article 142, it is worthwhile to appreciate the observations made by Hegde J. in **Kalyan Chandra Sarkar** vs. **Rajesh Ranjan,** [(2005) 3 SCC 284], wherein His Lordship pointed out

that Article 142 is an important constitutional power granted to the Court to protect its citizens. The learned judge observed – 'In a given situation when laws are found to be inadequate for the purposes of grant of relief, the Court can exercise its jurisdiction under Article 142 of the Constitution.' (**para 33**) In para 39, Hegde J. refers to the decisions in ***Visaka*** vs. ***State of Rajasthan***,[(1997) 6 SCC 241] and **Vineet Narain** vs. **Union of India**, ([1998) 1 SCC 226], to note that the directions issued by the Court under Article 142 form the law of the land in the absence of any substantive law covering that field. Such directions, according to His Lordship, 'fill the vacuum' until the legislature enacts substantive law.

30. We may note here that this attempted legislation by this Court has been applauded internationally. Reference in this connection may be made to an article on Separation of Powers by N. W. Barber in 2001 Cambridge Law Journal (Vol. 60 pg. 59). At page 82 of the article, the learned author has said:-

> "Thirdly, it is possible for a court deliberately to depart from the triadic structure in order to combat the resource deficiencies of litigants. As interesting example of this can be found in India were the Supreme Court has attempted to meet the institutional challenges posed by a combination of a weak legislation and a poor citizenry. The Supreme Court has relaxed the formal restrictions on applications to the court. An application can be made by a letter, or even a postcard, addressed to the court."

31. Further it is pointed at page 83 that:-

> "These measures must be commended as a significant attempt to adapt the court to the needs of the unempowered citizenship, but whilst this may be the best of all possible alternatives it remains a far from ideal solution. Though the court is able to mitigate the limitations of its structure, it cannot wholly escape them."

32. Again Lord Woolf in his treatise on "The Pursuit of Justice" {Oxford University Press 2008) appreciated the innovative steps taken by this court in the realm of environmental law by observing on this court's willingness to devise new remedies while discussing **Vellore Citizens' Forum** vs. **Union of India,** [(1996) 5 SCC 647]. The learned Law Lord recognized that the principle of (a) sustainable

development, (b) precautionary principle and (c) polluter pays- became part of the Indian law in view of the said judgment.

33. Commenting on Vellores Citizens' judgment and devising of remedies by this Court Lord Woolf has said and which I quote:-

> "… the proactive action taken by the Indian Supreme Court to protect the environment that I freely acknowledge could not be taken by English Courts. The Supreme Court of India has shown what can be done in the absence of 'black letter weapons' in the judicial armoury." [page 385]

34. For the reasons discussed above, I am humbly of the view that the questions formulated by Justice Katju may be considered by the Constitution Bench in the background of the inherent power of this Court under Article 141 and Article 142. Both these powers are unique and possibly in no other jurisprudence has the highest Court been empowered by such provisions. That is why it has been observed that the Supreme Court itself has been a source of law in as much as this Court held:-

> "Their Lordships decisions declare the

existing law but do not enact any fresh law, is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing but much beyond that. The Court as a wing of the State is by itself a source of law. The law is what the Court says it is. Patently the High Court fell into an error in its appreciation of the role of this Court." [***Nand Kishore* v. *State of Punjab*, (1995) 6 SCC 614, para 17**]

35. However, I agree with all the directions given by brother Katju, J., and the case may be placed before the Hon'ble Chief Justice for referring the questions before the Constitution Bench.

.....J.
(ASOK KUMAR GANGULY)

New Delhi
November 11, 2009