



GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta Vs UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association Vs UOI reported in 1993 (4) SCC 441 and Special Reference 1 of 1998 reported in 1998 (7) SCC 739

Report No. 214

November 2008



**THE LAW COMMISSION OF INDIA
(REPORT NO. 214)**

Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta Vs UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association Vs UOI reported in 1993 (4) SCC 441 and Special Reference 1 of 1998 reported in 1998 (7) SCC 739

Forwarded to the Union Minister for Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on 21st day of November, 2008.

The 18th Law Commission was constituted for a period of three years from 1st September, 2006 by Order No. A.45012/1/2006-Admn.III (LA) dated the 16th October, 2006, issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.

The Law Commission consists of the Chairman, the Member-Secretary, one full-time Member and seven part-time Members.

Chairman

Hon'ble Dr. Justice AR. Lakshmanan

Member-Secretary

Dr. Brahm A. Agrawal

Full-time Member

Prof. Dr. Tahir Mahmood

Part-time Members

Dr. (Mrs.) Devinder Kumari Raheja

Dr. K. N. Chandrasekharan Pillai

Prof. (Mrs.) Lakshmi Jambholkar

Smt. Kirti Singh

Shri Justice I. Venkatanarayana

Shri O.P. Sharma

Dr. (Mrs.) Shyamtha Pappu

**The Law Commission is located in ILI Building,
2nd Floor, Bhagwan Das Road,
New Delhi-110 001**

Law Commission Staff

Member-Secretary

Dr. Brahm A. Agrawal

Research Staff

Shri Sushil Kumar	:JointSecretary& Law Officer
Ms. Pawan Sharma	: Additional Law Officer
Shri J. T. Sulaxan Rao	: Additional Law Officer
Shri A. K. Upadhyay	: Deputy Law Officer
Dr. V. K. Singh	: Assistant Legal Adviser

Administrative Staff

Shri Sushil Kumar	:JointSecretary& Law Officer
Shri D. Choudhury	: Under Secretary
Shri S. K. Basu	: Section Officer
Smt. Rajni Sharma	: Assistant Library & Information Officer

The text of this Report is available on the Internet at:
<http://www.lawcommissionofindia.nic.in>

© **Government Copyright 2008**
Law Commission of India
Government of India
Ministry of Law and Justice
Department of Legal Affairs
New Delhi-110001
India

The text in this document (excluding the Government Logos) may be reproduced free of charge in any format or medium provided that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Government copyright and the title of the document specified.

Any enquiries relating to this Report should be addressed to the Member- Secretary, the Law Commission of India, 2nd Floor, ILI Building, Bhagwandas Road, New Delhi-110001, India. Fax: 91-11-23388870 or E-Mail to lci-dla@nic.in

Dr. Justice AR. Lakshmanan
(Former Judge, Supreme Court of India)
Chairman, Law Commission of India

ILI Building (IInd Floor),
Bhagwandas Road,
New Delhi-110 001
Tel.: 91-11-23384475
Fax: 91-23383564

21.11.208

Respected Shri Bhardwajji,

I am herewith enclosing our 214th Report on “Proposal for Reconsideration of Judges cases I, I and III – S.P. Gupta Vs UOI reported in AIR 1982 SC 149, Supreme Court Advocates on Record Association Vs UOI reported in 1993 (4) SCC 441 and Special Reference 1 of 1998 reported in 1998 (7) SC 739”. The proposal was placed before the Members of the Commission at 3.30 p.m. today. The Members of the Commission after due discussion and deliberations have unanimously approved the report of the Commission. The Commission, as already stated, examined the law on the subject. Various recommendations of Parliamentary Standing Committees and law of foreign jurisdiction like America, Australia, Canada and Kenya, where the executive is the sole authority to appoint Judges or the executive appoints in consultation with the Chief Justice of the Country have also been considered.

I request you to consider this report and do the needful at the earliest.

Since the matter is of great importance, I am submitting this report today itself.

Yours sincerely,

(AR. Lakshmanan)

Shri H.R. Bhardwaj,
Hon’ble Minister for Law & Justice,

Residence: No.1,Janpath, New Delhi-110011. Tel.:91-11-23019465.23793488.23792745
E-mail:ch.lc@sb.nic.in

PROPOSAL FOR RECONSIDERATION OF JUDGES CASES I, II & III - S.P..Gupta Vs UOI reported in AIR 1982 Supreme Court Advocates on Record Association Vs UOI reported in 1993(4) SCC 441 and Special Reference 1 of 1998 reported in 1998 (7) SCC 739

Preface : Part 1

1) Why reconsideration? The Supreme Court in Subhash Sharma Vs U.O.I. (reported in 1991(1) Supp. SCC 594) presided over by Ranganath Misra CJ, M.N. Venkatachaliah and M.M. Punchi JJ had expressed, doubts about the correctness of the interpretation of the word "consultation" in regard to the appointment of judges in S.P. Gupta Vs U.O.I. (reported in 1982 SC 149) in the following words (in paras 43 & 45 of the said judgment):-

"The word 'consultation' is used in a 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 limitation shorn of its constitutional background and purpose is to borrow Justice Frankfurter's phrase "to stick in the bark of words."

The judges in that case had opined that "Judicial Review is a part of the basic constitutional structure and one of the basic features of the essential Indian constitutional policy. The essential constitutional doctrine does not by itself justify or necessitate any primacy of 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, whenever 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

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. 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. (Para 44)

The View which the four learned judges shared in Gupta's case, in our opinion, does not recognize

the special and pivotal position of the institution of the Chief Justice of India. (Para 45) The correctness of the opinion of the majority in S.P. Gupta case relating to the status and importance of consultation, the primacy of the position of the Chief Justice of India and the view that the fixation of Judge strength is not justiciable should be reconsidered by a larger bench. (Para 45)

Emphasis Supplied__

The operative part of the order of reference is contained in para 49 "as in our opinion the correctness of the majority view in S.P. Gupta 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 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".

In para 51 the Hon'ble Bench has clarified:-

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. (Emphasis supplied)

Therefore, only two questions were referred to the bench of nine judges namely (1) The position of the Chief Justice of India with reference to primacy and (2) The justiciability of the fixation of the judge strength. It is important to note that no other question was referred to the larger bench.

2. The first judges case S.P. Gupta Vs Union of India and Ors. At this point it may be relevant to know as to what was decided by the majority judgment in the bench presided over by P.N. Bhagwati, A.C. Gupta, S.M. Fazal Ali, V.D. Tulzapurkar, D.A. Desai, R.S. Pathak and

E.S. Venkataramaiah JJ, in S.P. Gupta's case the correctness of which was doubted in Subhash Sharma's case.

The relevant portion of the majority judgment delivered by Justice P.N.Bhagwati speaking for himself in regard to the expression "consultation" occurring in 217 of the constitution is extracted herebelow:

"Each of the three constitutional functionaries occupies a high constitutional office and Cl. (1) of Art. 217 provides that the appointment of a High Court Judge shall be made after consultation with the functionaries without assigning superiority to the opinion of one over that of another. It is true that the Chief Justice of India is the head of the Indian judiciary and may be figuratively described as paterfamilias of the brotherhood of Judges but the Chief Justice of a High Court is also an equally important

constitutional functionary and it is not possible to say that so far as the consultative process is concerned, he is in any way less important than the Chief Justice of India. In fact, under the constitutional scheme, the Chief Justice of a High Court is not subject to the administrative superintendence of the Chief Justice of India nor is under the control of supervision of the Chief Justice of India.....

If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But it is only consultation and not concurrence of the

Chief Justice of India that is provided in Cl.

(1) of Art. 217.(Para 29). (emphasis supplied)

There must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be in consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential - it would go a long way towards securing the right kind of Judges, who would be truly independent and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity." (para 30)

Regarding fixation of judge strength the majority judgment was of the view that this was not justiciable and no Mandamus could

issue. This aspect however has lost its significance because in the case of Subhash Gupta the Attorney General made a statement that the government had no objection to the Hon'ble Court going into the question.

3. The second Judges case Supreme Court Advocates on Record Association and others vs U.O.I. (reported in 1993(4) SCC 441

It is in this backdrop that the nine judges bench was constituted and judgment was delivered on 06/10/1993. The judgment runs into 306 pages and travels far beyond the order of reference. Noted jurist Late H.M. Seervai in his Constitutional Law of India fourth edition Silver Jubilee Edition (Volume 1) has criticized this judgment and called it "null and void" for not following the mandatory provisions of article 145(4) and (5) - (which is clear from the dissenting judgment of Justice M.M. Punchi, the relevant portion

of which is reproduced in the succeeding para) - which are not a matter of form or technicality but a matter of substance as pointed out in Mohhammad Akill vs Azad-un-nisaa Bibi's case by Sir Barrnes Peacock C.J., speaking on this point for a bench of nine judges. "It is not a mere technical objection but is upon a fundamental principle essential to the due administration of justice that every judicial act which is done by the several judges ought to be completed in the presence of the whole of them... If after discussion, and after deliberately weighing the arguments of each other, the judges cannot agree, their several judgments ought to be delivered in open court in the presence of the others." (Wyman's Report Vol.5, p.69 quoted in Rohilkhand Kumaon Bank Ltd. vs Row (1884) 6 All. 468 at 474. (taken from Seervai's Constitutional Law of India fourth edition

vol.3).

The noted jurist calls the judgment "null and void" (please see page 2936 Constitutional Law of India by H M Seervai volume 3 fourth edition)

At this stage it is essential to note the lament contained in the opening paragraph of Justice M M Punchi's dissenting judgment at para 488 of 1993 (4) SCC 441 referred to in the preceding paras.

"Para 488 - M.M. Punchi J. (dissenting) - This opinion is in the nature of epilogue, though not in stricto sensu. Much has already been written on the two topics under reference to this Bench, and on others as well without reference. I on my part would have liked to avoid making any addition thereto but it seems the turn of events leave me no choice. I feel it would be dereliction to withhold

contributing and leave unsaid what needs to be said (emphasis supplied)

Para 490 - "This nine judge bench sat from April 7, 1993, to hear this momentous matter concluding its hearing on May 11, 1993 close to the onset of the summer vacation. I entertained the belief that we all, after July 12, 1993, on the reopening of the Court, if not earlier, would sit together and hold some meaningful meetings, having a free and frank discussion on each and every topic which had engaged our attention, striving for a unanimous decision in this historic matter concerning mainly the institution of the Chief Justice of India, relatable to this Court. I was indeed overtaken when I received the draft opinion dated June 14, 1993 authored by my learned brother J.S. Verma, J. for himself and on behalf of my learned Brethren Yogeshwar Dayal, G.N. Ray, Dr. A.S. Anand and S.P.

Bharucha, JJ. The fait accompli appeared a stark reality; the majority opinion an accomplishment. The hopes I entertained of a free and frank discussion vanished. But then came the opinion dated August 24, 1993 of my learned brother Ahmadi, J. like a pebble of hope hewn out of a mountain of despair, followed by the opinions of my learned Brethern Kuldip Singh and Pandian, JJ. dated September 7, 1993 and September 9, 1993 respectively. No meaningful meeting thereafter was possible as the views by that time seemed to have been polarized. So now the firm opinions of the eight Brethren, as communicated, are known to me. Loaded with these opinions, I set out to express my own, more as a duty to the venture embarked upon, for I owe it immeasurably, for being party to the referral."

Para 491 - "At the outset, I must remove a misgiving pertaining to the contents and thrust of the order of referral re correctness of S.P. Gupta vs Union of India, the opinion of which was authored by the then Chief Justice of India, Shri Ranganath Misra, and concurred to by the present Chief Justice of India Shri M.N. Venkatachaliah (then as a puisne judge) and by me. We had referred only two questions to a Bench of nine Judges, namely, to test the correctness of the opinion of the majority in S.P. Gupta case relating to the status and importance of consultation and the primacy of the position of the Chief Justice of India, and whether fixation of Judge strength was not justiciable, clarifying in the ultimate paragraph that apart from the two questions aforeindicated all other aspects dealt with were intended to be final by the said order. As I view it, due to the rigidity

of its terms, except for the two questions specifically referred, no other matter was open to canvass as has seemingly been done. (full text is not extracted for the sake of brevity. "Please see page 712 of the judgment).

In the penultimate para of his concurring judgment Kuldip Singh J. whose judgment came as late as September 7, 1993 (when the original majority judgment was signed on 14th June, 1995) makes the following observations "Before parting with the judgment it would be appropriate to say that the opinion circulated by Verma J. was based on elaborate discussion amongst the Brother Judges who were available and participated in the discussion. Although Verma, J. incorporated various suggestions in his original draft but a feeling left lurking in my mind that I have something more to say

in support of the conclusions reached by Verma, J. and that is how I ventured to embark upon writing a separate opinion".

It is therefore clear that there was no discussion, no meeting of minds and no consensus among the 9 judges on 14 of June 1993 when the final draft judgment was signed by Justice Verma who spoke for himself and on behalf of Yogeshwar Dayal, G.N. Ray, Dr. A.S. Anand and S.P. Bharucha, JJ. The judgment therefore plainly is Per Incuriam.

4. What was decided by the majority judgment headed by Justice Verma?

Following the suggestion made by Justice Bhagwati in the SP Gupta case that there should be a 'collegium' which should be consulted by the Chief Justice of India in every appointment the nine judge bench, speaking through Justice Verma laid down fourteen conclusions which are as follows:-

1. The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.
2. Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the

Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.

3. In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary symbolised by the view of the Chief Justice of India, and formed in the manner indicated, has primacy.
4. No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.
5. In exceptional cases alone for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, the appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other

Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention. (Emphases Supplied).

6. Appointment to the office of the Chief Justice of India should be of the seniormost Judge of the Supreme Court considered fit to hold the office.
7. The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices.
8. Consent of the transferred Judge/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.
9. Any transfer made on the recommendation of the Chief Justice of India is not to

be deemed to be punitive, and such transfer is not justiciable on any ground.

10. In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in anyone.

11. Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.

12. The initial appointment of a Judge can be made to a High Court other than that for which the proposal was initiated.

13. Fixation of Judge strength in the High Court is justiciable, but only to the extent and in the manner indicated.

14. The majority opinion in S.P. Gupta Vs Union of India in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of

appointments and transfers, and the justiciability of these matters as well as in relation of Judge strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution, including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us. (para 486).

Para 487 states that this summary has to be read alongwith the earlier part, where in the conclusions are elaborately stated with the reasons which in effect means that para 487 has to be read and incorporated in to the conclusions enumerated above. The said para provides as follows:-

"What is the meaning of the opinion of the judiciary 'symbolised by the view of the Chief Justice of India?"

"This opinion has to be formed in a pragmatic manner and past practice based on convention is a safe guide. In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two seniormost Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the senior-most judge of the Supreme Court whose opinion it likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124 (2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite. The object underlying Article 124(2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124 (2) is

the basis for the existing convention which required the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.

In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The opinion of the Chief Justice of High Court would be entitled to the greatest weight, and

the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of High court must be formed after ascertaining the views of at least the two seniormost Judges of the High Court.

The Chief Justice of India, for the formation of his opinion, has to adopt a course which would enable him to discharge his duty objectively to select the best available persons as judges of the Supreme Court and the High Courts. The ascertainment of the opinion of the other Judges by the Chief Justices of India and the Chief Justice of High Court, and the expression of their opinion, must be in writing to avoid any ambiguity.

For a full coverage of all details and reasons which are summarized in the conclusions aforementioned which are not being repeated for

the sake of brevity, Please see page 702 to 706 of the judgment (Supreme Court Advocates on Record Assn. Vs Union of India reported in 1993 (4) SCC 441).

Clearly the court has transgressed far beyond the order of reference and covered many aspects which were not in the contemplation of the referring order. Instead of clarifying matters the judgment of nine judges has created more ambiguity than before.

5. The third judges case : (special reference No.1 of 1998) reported in (1998) (7) SCC 739.

The President of India who required clarification and light on the second judges case made a reference to the Supreme Court under article 143 of the Constitution which is as follows:-

"Whereas the Supreme Court of India has laid down principles and prescribed procedural norms in regard to the appointment of Judges of the

Supreme Court [Article 124 (2) of the Constitution of India], Chief Justices and Judges of the High Court [Article 217(1)], and transfer of Judges from one High Court to another {Article 222 (1)}, in the case of Supreme Court Advocates-on-Record Assn. Vs. Union of India;

And whereas doubts have arisen about the interpretation of the law laid down by the Supreme Court and it is in public interest that the said doubts relating the appointment and transfer of Judges be resolved.

And whereas, in view of what is hereinbefore stated, it appears to me that the following questions of law have arisen and are of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

Now, therefore, in exercise of the powers conferred upon me by clause (1) of Article 143

of the Constitution of India, I, K.R. Narayanan, President of India, hereby refer the following questions to the Supreme Court of India for consideration and to report its opinion thereon, namely:-

1. Whether the expression 'consultation with the Chief Justice of India in Articles 217 (1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India constitute consultation within the meaning of the said articles;
2. Whether the transfer of Judges in judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that 'such transfer is not justiciable on any ground' and its further observation that limited judicial review is available in matters of transfer, and the extent and scope of judicial review;

3. Whether Article 124(2) as interpreted in the said judgment required the Chief Justice of India to consult only the two seniormost Judges or whether there should be wider consultation according to past practice;
4. Whether the Chief Justice of India is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of all materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment;
5. Whether the requirement of consultation by the Chief Justice of India with his colleagues, who are likely to be conversant with the affairs of the High Court concerned refers to only those Judges who have that High Court as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief

Justice of that Court on transfer from their parent or any other court;

6. Whether in the light of the legitimate expectations of senior Judges of the High Court in regard to their appointment to the Supreme Court referred to in the said judgment, the 'strong cogent reason' required to justify the departure from the order of the seniority has to be recorded in respect of each such senior Judge, who is overlooked, while making recommendation of a Judge junior to him or her;

7. Whether the Government is not entitled to require that the opinions of the other consulted Judges be in writing in accordance with the aforesaid Supreme Court judgment and that the same be transmitted to the Government of India by the Chief Justice of India along with his views;

8. Whether the Chief Justice of India is not obliged to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India;

9. Whether any recommendations made by the Chief Justice of India without complying with the norms and consultation process are binding upon the Government of India?

New Delhi

Dated: 23-7-1998

Narayanan, K.R.

President of India

A bench of nine Judges was constituted comprising of S.P. Barucha, M.K. Mukherjee, S.B. Majumdar, Sujata V. Manohar, G.T. Nanavati, S. Saghir Ahmad, K. Venkataswami, B.N. Kirpal and G.B. Pattanaik, JJ and the court answered the said reference unanimously in the following manner in para 44 of the reference:

"The questions posed by the reference are now answered but we should emphasize that the

answers should be read in conjunction with the body of this references

1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India required consultation with a plurality of judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles.
2. The transfer of puisne Judges is judicially reviewable only to this extent that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost Judges of the Supreme Court and/or that the views of the Chief Justice of High Court from which the transfer is to be effected and of the Chief Justice of High

Court to which the transfer is to be effected have not been obtained.

3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four seniormost puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two seniormost puisne Judges of the Supreme Court.
4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment.

5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the High Court concerned does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.
6. "Strong cogent reasons" do not have to be recorded as justification for a departure from the order of seniority in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.
7. The views of the other Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to

the extent set out in the body of his opinion.

8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforesaid, in making his recommendations to the Government of India.
9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforesaid, are not binding upon the Government of India (emphasis supplied)

Part-II

Analysis of the judges cases I, II & III - I, II & III - S.P. Gupta Vs. UOI reported in AIR 1982 Supreme Court 149, Supreme Court Advocates on Record Association Vs. UOI reported in 1993(4) SCC 441 and

Special Reference 1 of 1998 reported in 1998 (7) SCC
739

1. In the three judges cases, I, II & III - S.P. Gupta Vs UOI reported in AIR 1982 Supreme Court 149, Supreme Court Advocates on Record Association Vs UOI reported in 1993(4) SCC 441 and Special Reference 1 of 1998 reported in 1998(7) SCC 739, the Supreme Court has virtually re-written Articles 124(2) and Articles 217 which pertain to appointment of Supreme Court Judges respectively. The text of Article 124(2) is as follows:-

124(2) Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

217(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.

The word "collegium" is nowhere present in the constitution. It was first used by Bhagwati J in the majority judgement of S.P. Gutpa vs. UOI (4:3) In Para 29 "There must be a collegium to make recommendations etc." (already extracted in Para 2 of Part-1) Again in the Presidential reference the expression "collegium" and

"collegium of judges" has been freely used (Paras 15 and 22 to cite a few instances)

It is submitted that any addition of words in the constitution would not be permissible under the interpretive jurisdiction of the Supreme Court. The Supreme Court has to interpret the constitution as it is.

2. The advisory opinion in the guise of clarifying doubts raised regarding the norms laid down in the Judges II case has virtually reviewed its earlier decision.

It is respectfully submitted that the opinion expressed in an advisory opinion is contrary to the plain language of article 124(2). What the article says is that the President shall consult the Chief Justice of India and such of the judges of the Supreme Court or the high court as he deems necessary. The article does not place any ceiling or limitation on the number of judges other than the Chief Justice of India to

- be consulted. The President should always act on the aid and advice of the Council of Ministers (article 74). However, contrary to what was said in the Constitution, both the Judges II and Judges III cases have laid down that consultation with the Chief Justice of India means a collegium consisting of the Chief Justice of India and two or four judges as the case may be. Further, in both the cases it was stated that it is the Chief Justice of India who should consult with collegium of judges, whereas Constitution says that the President should consult the Chief Justice of India and such judges as he deems necessary.
3. The three judges cases, i.e. the two judgements of the Supreme Court and one opinion on a Special Reference have all dealt with the scope of "consultation" and it was in the Second Judges Case that the Supreme Court evolved the concept of 'primacy' for the opinion of the

Chief Justice of India, which itself was to be based on a consultative process amongst the senior colleagues of the Chief Justice of India. At the hearing of the Special Reference for the opinion of the Court about the extent of the 'consultative' process, it was conceded on behalf of the Executive (and recorded in the Court's opinion) that the Government was not seeking a review or reconsideration of the judgement in the Second Judges case and that it would accept as binding (although an opinion and not a decision) the answers of the Court to the questions incorporated in the Special Reference.

4. The Supreme Court's opinion in the Special Reference not only strongly reinforced the concept of "primacy" of the Chief Justice of India's opinion but also increased the number of judges the Chief Justice of India must consult before providing his opinion and laid down a detailed set of guidelines on the procedure to

be followed in arriving at the Chief Justice of India's opinion to which "primacy" was attached. The procedure in effect transferred the "primacy" from the Chief Justice of India to the group of Judges to be consulted.

5. The collegium is now to consist of the Chief Justice of India and four (instead of two) senior-most judges of the court in the appointment of a high court judge, the Supreme Court judge acquainted with that particular high court should also be consulted raising the number to six. The increased size of the group that has to be a part of the consultation process with several interests being involved has made the consultation process cumbersome and delays in filling up of vacancies is bound to arise. The Presidential Reference also provides that every communication with the consultee has to be in writing and the views should be communicated to the Government. There is no

indication as to what happens if there is no consensus among the consultees or if the majority dis-agrees with the Chief Justice of India. S.P. Gupta has laid down that the entire correspondence and communication between various authorities are open to public scrutiny (since the entire record was summoned, perused and made public in that case).

Part-III

Recommendations

1. From what has been stated above it is clear that an entire reconsideration I, II & III judges cases - S.P. Gupta Vs UOI reported in AIR 1982 Supreme Court 149, Supreme Court Advocates on Record Association Vs UOI reported in 1993(4) SCC 441 and Special Reference 1 of 1998 reported in 1998(7) SCC

739, is urgently and immediately called for in order to bring about clarity and consistency in the process of Appointment of Supreme Court and High Court Judges.

2. The Eighty Fifth Report on Law's Delays: Arrears in Courts has expressed the same view. The same is extracted here below:

"The Committee is aware that for this state of affairs the Union Law Ministry is not blameworthy, as the entire process of initiation of proposal for appointment of new judges is no longer the responsibility of the Executive as a result of a decision of the Supreme Court. Though it was not contemplated in the Constitution, responsibility for judicial appointments now rests in the domain of the judiciary. The Union Law Minister is accountable to Parliament for the delay in filling up of the vacancies of judges but he has functionally no contribution to make. The

Supreme Court read into the Constitution a power to appoint judges that was not conferred upon it by the text or the context. The underlying purpose of securing judicial independence was salutary but the method of acquiring for the Court the exclusive power to appoint judges by the process of judicial interpretation is open to question. Against this backdrop the Committee recalls a recent discussion in the Rajya Sabha in which the Government was asked regarding alternate arrangements to fill up the vacancies and whether there was any scope for having a fresh review of the Supreme Court's judgment.

The position as it exists in different countries may be noticed at this stage. On a scrutiny of several constitutions of other countries it may be seen that in all other Constitutions either the executive is the sole authority to appoint judges or the executive appoints in consultation with the

Chief Justice of the country. The Indian Constitution has followed the latter method. However, the 2nd judges case *Advocates on Record Association vs. U.O.I.* (1993(4) SCC 441), as we have seen in the discussion above, has completely eliminated and excluded the executive and the opinion of the Hon'ble Supreme Court in the Presidential reference (Special Reference 1 of 1998) has reaffirmed this view with slight modifications.

In America the State judges are elected. When they are not elected their appointment is subject to legislative concurrence. In the Supreme Court it is the President who nominates the Judges but the nomination has to be confirmed by the Senate. In Australia it is the executive that appoints judges. In Canada the Governor General makes the appointment of judges.

In New Zealand the Chief Justice is appointed on the recommendations of the Prime Minister by the President. The Prime Minister in turn consults the

Attorney General; the A.G. informally consults the President of Court of Appeal and other judges.

As for High Court Judges, Chief Justice recommends after consulting other Judges and gives the list to the AG for scrutiny. AG scrutinizes the list, consults New Zealand Law Society and then candidate's consent is sought. Thereafter the Cabinet finally recommends the names to the Governor General who issues the appointment letter.

Recently, the judges from the Apex Court and the High Court of Kenya came to the Supreme Court and they addressed the Supreme Court Bar. They confirmed that they have a National Judicial Commission which undertakes the selection process. In this National Judicial Commission there is the Attorney General and the Chief Justice, two senior most judges of the Apex Court and an expert.

Thus it may be seen that in all the Constitutions, the executive has a role to play and in some countries a major and exclusive role. The

Indian Constitution provides a beautiful system of checks and balances under Articles 124(2) and 217(1) for the appointment of Judges of the Supreme Court and High Courts where both the executive and judiciary have been given a balanced role. As already stated this delicate balance has been upset by the 2nd Judges case (Advocate on Record Association Vs Union of India 1993(4) SCC 4412 and the opinion of the Supreme Court in the Presidential Reference (Special Reference No.1 of 1998). It is time the original balance of power is restored.

The above recommendation for the need for an urgent and immediate review of the present procedure for appointment of judges is further fortified by the views expressed by Justice J.S. Verma, who wrote the lead judgment in Advocates on Record vs. Union of India 1993(4) SCC 441, by his forthright views expressed in an interview in the Front Line Magazine dated 10.10.1998. The relevant portion is reproduced below:

When asked "you said in one of your speeches that judicial appointments have become judicial disappointments. Do you now regret your 1993 judgement? Justice Verma stated "My 1993 judgement, which holds the field, was very much misunderstood and misused. It was in that context I said the working of the judgment now for some time is raising serious questions, which cannot be called unreasonable. Therefore, some kind of rethink is required. My judgement says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise between the executive and the judiciary, both taking part in it.

Broadly, there are two distinct areas. One is the area of legal acumen of the candidates to adjudge their suitability and the other is their antecedents. It is the judiciary, that is, the Chief Justice of India and his colleagues or, in the case of the High Courts, the Chief Justice of the High Court and his colleagues (who) are the best persons

to adjudge the legal acumen. Their voice should be predominant. So far as the antecedents are concerned, the executive is better placed than the judiciary to know the antecedents of candidates. Therefore, my judgement said that in the area of legal acumen the judiciary's opinion should be dominant and in the area of antecedents the executive's opinion should be dominant. Together, the two should function to find out the most suitable (candidates) available for appointment."

The views of the Parliamentary Standing Committee on Law & Justice recommended the scrapping of the present procedure for appointments and transfers by Supreme Court and High Court Judges are of great relevance in this context. As reported in the Hindustan Times of 20.10.2008 "the Law Ministry has agreed to review the 15-year-old system after the Parliamentary Standing Committee on Law & Justice recommended doing away with the committee of

judges (collegium). Presently, the collegium decides the appointments and transfer of judges. Interestingly, the recommendations come close on the heels of recent cases of corruption against judges of the top courts in the country. Law Minister H.R. Bhardwaj told Hindustan Times that the House Committee's recommendation had been accepted, and an action-taken report prepared by the Ministry would now be placed before Parliament. "Collegium system has failed. Its decisions on appointments and transfers lack transparency and we feel courts are not getting judges on merit.(.....) The government cannot be a silent spectator on such a serious issue", Bhardwaj said. The House Committee had said: "Through a Supreme Court judgement in 1993, the judiciary wrested the control of judges appointments and transfers. The collegium system has been a disaster and needs to be done away with". H.R. Bhardwaj, Minister for Law & Justice, said "It is the right time to review this important matter".

"There was no problem till 1993 when the judiciary tried to re-write the Article of the Constitution dealing with appointments. They created a new law of collegium which was wrong. In a democracy, the primacy of Parliament cannot be challenged", he said.

The Chairman of the Departmental Related Parliament Standing Committee of Personnel, Public Grievances Law and Justice in its 28th Report presented to the Hon'ble Chairman of Rajya Sabha on August 2008 has stated thus:-

"I would like to conclude by saying that the Government should expeditiously see to it that appointment of Judges in High Courts and Supreme Court are done in a transparent way. We have recommended in two ways: One is, we have to see to it that the collegium system has to be done away with, since appointments will be delayed, we have

said that from the very beginning of identifying the eligible persons, the various places of recommendations, be it at the level of the High Courts, or, at the Governor's level or at the level of the Departments, and finally be the Supreme Court, should be transparent, and this should be put up in the web site then and there so that the person, who is going to occupy the Constitutional place, is known to the public, and their background should be allowed to be discussed by the public and, finally, it has to go through the process of issuing warrant by the President of India. But, what is happening presently is that from the day one of identifying the person till the issuance of the warrant, nothing is known to anybody except to the persons who are involved in it. Even the persons, who are identified and who are going to be made as judges of the High Court or of the Supreme Court, may not know about it. This type of secrecy is not good for democracy".

It may be noted in this context that in every High Court the Chief Justice is from outside the State as per the policy of the Government. The senior most Judges who form the collegium are also from outside the State. The resultant position is that the judges constituting the collegium are not conversant with the names and antecedents of the candidates and more often than not, appointments suffer from lack of adequate information.

Two alternatives are available to the Government of the day. One is to seek a reconsideration of the three judgments aforesaid before the Hon'ble Supreme Court. Otherwise a law may be passed restoring the primacy of the Chief Justice of India and the power of the executive to make the appointments.

(Dr. Justice AR. Lakshmanan)

Chairman

(Prof. Dr. Tahir Mahmood) (Dr. Brahm A. Agrawal)

Member

Member-Secretary

Dated: 21.11.2008