JUDICIAL APPOINTMENT AND ACCOUNTABILITY:
JUDICIAL RESPONSE

The conflict between the Judiciary on the one side, and the Executive and the Legislative wings of the government on the other, commenced almost immediately after the adoption of the Constitution. Friction developed over a series of judgments which had to deal with the constitutional validity of land reform legislations. Several of these legislations were struck down by the courts for violating the fundamental right to property guaranteed under Art. 19(1) (f)\(^1\) of the Constitution of India. Pandit Nehru, India’s first Prime Minister, had more or less visualized the imminent conflict and had opposed the idea of listing the right to property as a fundamental right in the Constitution. One of the objects of the independence movement was the abolition of Zamindari and other exploitative land tenure systems. Nehru and many in the Constituent Assembly felt that the corollary of the right to property as a fundamental right would lead to extensive litigation which could hold up economic reforms especially land reforms.\(^2\)

(A) Bela Banerjee Case

In *Bela Banerjee*\(^3\) where the government had taken land for rehabilitation of refugees and in *Dwarkadas Shrinivas v. Sholapur*

\(^{1}\) The sub-clause (f) omitted by the Constitution (Forty Fourth Amendment) Act, 1978 (w.e.f 20.06.1979).
\(^{2}\) Jawaharlal Nehru, *A Biography* by Sarvepali Gopal, Oxford University Press, page 215, “…The Constituent Assembly was alive to the fears of its members and therefore included the provision 31(4) to protect Zamindari abolition legislations from being called in question by any court on the ground it contravenes Art. 31 (3)…”
Spinning and Weaving Co.\textsuperscript{4} the Supreme Court struck down actions as violating the right to property. Pandit Nehru pushed for the Constitution (4\textsuperscript{th} Amendment) Act, 1955 which sought to amend Art. 31(2) by adding the words, “no such laws shall be called in question in any court on the ground that the compensation provided by that law is not adequate.”\textsuperscript{5}

The parliament ultimately passed the 4\textsuperscript{th} Amendment to the Constitution to curtail the impact of the Court verdicts insisting on market value compensation and to the make the legislature the formal arbiter of quantum of compensation.\textsuperscript{6}

The conflict did not end with the 4\textsuperscript{th} amendment. The Kerala Agrarian Relation Act, 1961 was enacted to acquire ryotwari land for redistribution among the landless. The Act was struck down as discriminatory and it also held that ryotwari land not being an ‘estate’ was not protected by Art.31-A(2) (a).\textsuperscript{7} The Constitution (Seventeenth Amendment) Act, 1964 was enacted which added Forty Four Acts to the IX schedule making them immune from any challenge for violation of the fundamental rights. It was perceived that the stumbling blocks for the land reforms stood removed. This 17\textsuperscript{th} constitutional amendment Act was challenged in Golak Nath Case.

(B) Golak Nath Case

The decision of the Supreme Court in 1967 in Golakh Nath v. State

\textsuperscript{4} AIR 1954 SC 119 : [1954] 1 SCR 674.
\textsuperscript{5} The Constitution (Fourth Amendment Act, 1955.
of Punjab\(^8\) stirred the hornet’s nest and was to impact the course of history of India in more ways than one. The Supreme Court struck down the Punjab Surety of Land Reforms Act, 1972 as violating fundamental rights. The razor thin majority of 6 to 5 Judges held that the Parliament could not amend the Constitution to abridge the fundamental rights. It was held that the power to amend conferred by Art. 368 did not include the power to take away fundamental rights guaranteed by Part III.\(^9\) According to Subba Rao J., fundamental rights were “given a transcendental position under our Constitution and kept beyond the reach of Parliament”.\(^10\)

(C) Bank Nationalisation and the Privy Purse Case

On February 10, 1970, the Supreme Court struck down the Bank Nationalization Act, 1969 as being violative of Art. 14 (the right to equality) and Art. 19(1) (f) (the right to acquire, hold and dispose of property).\(^11\) The compensation provided for the takeover of the banks was found to be illusory and violative of Art. 31 of the Constitution. With an overwhelming majority of 10 is to 11, it was held that the principles of compensation laid out by the Legislature for appropriation of property could be subjected to judicial scrutiny. The lone dissent came from Justice A.N. Ray, who took the view that the principles of compensation could not be made subject of judicial scrutiny.\(^12\)

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\(^9\) Ibid.
\(^10\) Ibid.
\(^12\) Ibid.
Ten months after its verdict in the *Bank Nationalization case*,\(^{13}\) the Supreme Court struck down a government order seeking to withdraw the recognition granted to rulers of Princely States and deprive them of Privy Purses.\(^{14}\) Prime Minister Indira Gandhi declared that the government would abide by the verdict, but assured that Privy Purses would be abolished by ‘appropriate constitutional means’\(^{15}\) twelve days after the judgment in the *Privy Purse case*\(^{16}\) on December 27, 1970, Minister Mrs. Indira Gandhi dissolved the Parliament, one year ahead of the completion of its five-year term. The setbacks faced by the government in the courts became the burning election issue. Mrs. Gandhi won a two-thirds majority with her party securing 350 out of the 518 seats in the Lok Sabha. The results the March 1971 general elections were a turning point for Mrs. Gandhi and were to impact the balance of power between the judiciary and the executive and the legislature.

After the elections, the Parliament passed Constitutional amendments to reverse the decisions of the Supreme Court in *Golakh Nath, Bank Nationalization* and *Privy Purse Cases*. The Constitution (Twenty Fourth Amendment) Act, 1971 empowered the Parliament to amend any provision of the Constitution. It also removed judicial review of any amendment which abridged or took away fundamental rights. The Constitution (Twenty Fifth Amendment) Act, 1971 substituted the word “amount” for the word “compensation” in Art. 31(2) thereby diluting the rigors of the court’s mandate of providing ‘adequate’. Further, a new Art.

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\(^{13}\) Ibid.


31(C) was inserted by virtue of which no law giving effect to the Directive Principles of State Policy contained in Art. 39 (b) or 39(c) could be questioned on the ground that it abridged the fundamental rights in Art. 14, 19 and 31 of the Constitution.

(D) Kesavananda Bharati Case

The 24th and 25th amendments to the Constitution came to be challenged in the Supreme Court and was heard by 13 judges in what became the iconic judgment of Kesavananda Bharati v. State of Kerala. On April 24, 1973 the Supreme Court pronounced its verdict in Kesavananda Bharati. The majority upheld the validity of the 24th Amendment affirming the Parliament’s right to amend any provision of the Constitution including the fundamental rights. The ratio of Golak Nath stood reserved. The Court also held that the first part of the 25th Amendment, substituting the word “amount” for “compensation” in cases of compulsory acquisition of property by the governments as valid. And that any challenge based on the inadequacy of the amount could not be agitated in the court. The majority of 7 to 6 also upheld that any law giving effect to the directive principles specified in article 39 (b) and (c) could be deemed to be void on the grounds that it abridged or took away the fundamental rights conferred by articles 14, 19 and 31 of the Constitution. The provision relating to absence of judicial review was struck down. The Court, in a strikingly innovative, ruled with a majority of seven judges (with 6 judges dissenting) that, “the power to amend does not include the power to alter the basic structure or framework of the

The Court held that the power to amend the Constitution under Art. 368 did not permit the destruction or damage to the ‘basic structure of the Constitution’.

The very next day, on April 25, 1973, the President of India acting on the advice of the Cabinet, superseded 3 judges of the Supreme Court, viz. J.M. Shelat J., K.S. Hegde J. and A.N. Grover J. and appointed A.N. Ray J. as the Chief Justice. This decision was taken on the advice of H.R. Gokhale, the Law Minister, S.S. Ray, the Chief Minister of West Bengal and Mohan Kumaramangalam, the Minister of Steel and Mines. Kumaramangalam justified the decision. He emphatically asserted that the Government had a

“Duty in the Government honestly and fairly to come to the conclusion whether a particular person is fit to be appointed the Chief Justice of the Court because of his outlook, because of his philosophy as expressed in his expressed opinions, whether he is a more suitable or a more competent Judge.”

This view was condemned as a serious encroachment of the independence of the judiciary by all the political parties except the CPI.

(E) Minerva Mills and the 42nd Amendment

In July 1980, the Supreme Court decided Minerva Mills Ltd. Challenge was made to the constitutional validity of certain provisions of the Sick Textile Undertakings (Nationalization) Act, 1974 which was

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18 Ibid.
Judicial Appointment and Accountability: Judicial Response

used by the Central Government to take over the management of the Petitioner mill. The clauses 4 and 5 of Art. 368 which was inserted by the 42\textsuperscript{nd} Amendment was held to be unconstitutional and void because clause 4 deprived the courts of their power to call in question any amendment of the Constitution and clause 5 had removed all limitation on the amending power of the Parliament. The question as to what should be given precedence; the Directive Principles or the Fundamental Rights was settled. Thus the attempt by the 42\textsuperscript{nd} Amendment Act, 1976 to overrule \textit{Kesavananda’s case} was set at naught. The Janata government which subsequently came to power had not repealed section 4 of the 42\textsuperscript{nd} amendment which rendered constitutional amendments immune from judicial review.

\textbf{(F) S.P. Gupta Case}

In March 1981, the then Law Minister P. Shiv Shankar, a powerful Cabinet Minister, sought consents from additional judges to their serving in the other High Courts. Besides, the President was granting short term extensions to the additional judges. In addition, there was transfer of several judges of the High Courts. All these acts of the Executive came to be challenged in the Supreme Court. The substantive question before the court was who had primacy in matters of appointment of judges of the higher judiciary. Four cases were heard and the Supreme Court delivered its judgment in \textit{S.P. Gupta v. Union of India}.\textsuperscript{21}

The majority of the judges held that in appointments of Judges to the higher Judiciary, the primacy lay with the Executive. Justice Bhagwati writing the majority opinion held that:

\footnote{\textit{AIR 1982 SC 149}; [1982 2 SCR 365].}
“The opinion of each of the three constitutional functionaries is entitled to equal weight and that it could not be said that the opinion of Chief Justice of India must have primacy over the opinion of the other two constitutional functionaries. He was emphatic that it is only “consultation” and not “concurrence” of Chief Justice of India that is provided in clause (1) of Art. 217. So also where a judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted and his concurrence was not required. The majority’s determinative opinion, ‘The ultimate power of appointment rests with the Central Government and that is in accord with the constitutional practice prevailing in all democratic countries’, was to govern judicial appointment for over two decades.”

Justice Bhagwati expounded the rational for the interpretation recognizing the Executive’s primacy as follows:

“The power of appointment of judges is not entrusted to the Chief Justice of India or the Chief Justice of the High Court because they do not have any accountability to the people and if any wrong or improper appointment is made, they are not liable to account to anyone for such appointment.”

Several of the appointments made after the decision in S.P. Gupta came under severe criticism. There was general dissatisfaction with the appointments being made. With the Executive having a decisive role in the appointments process, the bad appointments were attributed to this imbalance in the system. The charge against the prevailing appointment system was that the functional independence of the judges were sought to be subverted by the Executive. The Executive’s personal favorites were
hand-picked. The recruitment process was perceived to require a secret loyalty which undermined independence. The post retirement positions also were a cause for concern. There were serious problems with the judicial appointments of the period. Many felt the appointments had a political bias and the entrants did not possess the caliber required of judges. There was disaffection with some of the appointments made in a system with an overbearing Executive.

(G) Supreme Court Advocates on Record Association Case

The appointments in the post S.P. Gupta phase which created a crisis in confidence had a bearing on the final decision in SCAORA on the judgment. There is a history which does not find mention in the SCAORA judgment. The reason is all constitutional debates in a court of law eliminate history, economics, and sociology. Yet these factors have an unconscious bearing on the outcome.

The post S.P. Gupta was not a happy situation. It is interesting to note that the seeds of the collegiums system originated in the judgment in S.P. Gupta which was incidentally mooted by Justice P.N. Bhagwati:

“We would rather suggest that there must be a collegiums to make recommendation to the President in regard to appointment of a Supreme Court or High Court judge. The recommending authority should be more broad-based and there should be consultation with wider interests. If the Collegiums is composed of persons who are expected to have knowledge of the persons who may be fit for appointment and this last requirement is absolutely essential as it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with
significance and meaning for the deprived and exploited sections of humanity. We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for appointment of high judiciary.”

The dissatisfaction with the appointments process post S.P. Gupta resulted in some serious thinking in order to secure an appointments process which would secure independence and the best of talent. Justice H.R. Khanna as chairman of the Law Commission in a letter dated January 24, 1978 suggested for a panel which would consist of the Chief Justice of India, the Minister of Law and Justice and Company affairs and three persons who has been a Chief Justice or a Judge of the Supreme Court. He suggested, the present constitutional scheme, “the method of appointment of judges is basically sound; it has, on the whole, worked satisfactorily and does not call for any radical change. But there are certain aspects of its working about which recommendations are necessary in order to bring about an improvement.”

In July 1987 the Law Commission headed by Justice D.A. Desai submitted the Law Commission’s 121st Report and suggested the making of the National Judicial Service Commission. It was to be composed of a “body of experts drawn from various interest groups in close touch with the Administration of Justice such as judges, lawyers, law academics and litigants” it is interesting to note that the body was to comprise of the 11 persons out of who whom seven were judges or ex-judges, one Law
Minister and the Attorney General. The predominance was obviously judges in which the Chief Justice of India would have a pre-eminent position along with three senior most judges, three senior most Chief Justices of the High Courts, the Minister of Law and Justice, the Attorney General and an outstanding law academic were to be part of the selection body.

The recommendations of the report of Justice D.A. Desai Commission found express in the Constitution (67th Amendment) Act, 1990. This was perhaps the most progressive and well-meaning of amendments to bring accountability and independence of the judiciary. This bill was prepared after extensive consultations with the Executive, the Chief Justice of India, the Chief Justice of High Courts, the Attorney General, the Chairman of the Bar Council and State Bar Councils and Bar Associations. The credit must in full measure go to the then law Minister Dinesh Goswami, a man who had the good and well being of the judiciary. He was candid enough to state in his objects and reasons that the government intended to set up a high-level judicial commission “so as to obviate the criticism of arbitrariness on the part of the executive in such appointments and transfers and also to make such appointments without any delay.”

The recommendations of Justice D.A. Desai were introduced as a bill in the Lok Sabha which if passed would have been known as the Constitution (67th Amendment) Act, 1990. The bill did not pass because the Lok Sabha stood dissolved in May 1991.

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25 Statement of Objects and Reasons dated 11th of May 1990 by Mr. Dinesh Goswami, Minister of Law and Justice introducing Bill 93 of 1990.
In a petition filed by Subhash Sharma, Advocate of the Supreme Court whose knowledge and inputs rings through in every major decision of the Supreme Court, filed the petition before the Supreme Court. The Bench consisting of Chief Justice Ranganath Mishra, Justice M.N. Venkatchaliah and Justice M.M. Punchi held as follows:

“It has been increasingly felt over the decades that there has been an anxiety on the part of the government of the day to assert its choice in the ultimate selection of judges. If the power to recommend was to vest in the State government or even the Central government, the picture is likely to be black and the process of selection ultimately may turn out to be difficult.”

“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 oversimplification of a sensitive and subtle constitutional sentence and, if allowed full play, would-be suburbs of the doctrine of judicial independence.”

The opinion in Subhash Sharma was unanimous. That was the genesis of the Constitution of the nine judges bench in the Second Judges case where the question as to the meaning and purport of the word ‘consultation’ in article 124(2) and 217(1) of the Constitution came to be considered. Integral to the question before the court was whether S.P.

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Gupta was correctly decided and who had the primacy with regard to appointment of judges.

In 1990 something singularly grave to the Judiciary emanated from Bar of the High Court of Bombay. The Original Side and the Appellate Side Bar Associations of the High Court of Bombay resolved expressing their lack of confidence in four named Judges. The Chief Justice of the Bombay High court refused to assign any judicial work to the four named judges. Earlier, one other judge in whom the Bar had lost confidence on receiving an order of transfer from the Bombay High Court to another High Court, resigned from his office. It was the biggest challenge the Judiciary faced because there were attempts to clone what happened in Mumbai in other High Courts.  

(H) Justice V. Ramaswami Case

At the heels of this controversy, another issue erupted which further dented the credibility of the appointments made by the executive. Audit reports implicated Mr. Justice V. Ramaswami, a sitting judge of Supreme Court for having used public funds for personal gains when he presided as Chief Justice of Punjab and Haryana High Court. This was followed by a resolution passed by the Bar Association of the Supreme Court calling for his impeachment. On a petition made by 108 members of the Lok Sabha, the Speaker appointed a committee of three judges under the Judges Enquiry Act, 1968. The Committee found him guilty on 11 out of 14 charges. The enquiry finally resulted in an impeachment motion. The impeachment motion failed. In a House of 401 members,

there were only 196 votes for the impeachment and 205 abstentions; it fell short of two-thirds majority of those present and voting required for carrying the motion through. This aggravated the perception that the Executive was not serious about taking on proved misdemeanors. The Executive’s role in the impeachment process created a trust deficit.

The events of the Bombay Bar and the subsequent failed impeachment of Justice V. Ramaswami led to discontentment of Executive driven appointments. The failure to impeach was perceived as the Executive trying to help the judge in question. At the heart of the problem was the intense desire to secure the independence of the Judiciary and induct the best of talent.

The controversy regarding judicial appointments revolves around the debate as to who has ‘primacy’ and who is ‘best equipped’ to exercise the power to appoint members of the higher judiciary: Is it the Chief Justice of India or is it the Executive being the government of the day? The wording of Art. 124 of the Constitution of India has been sufficiently vague to have triggered a debate which sustained for over six decades and continues to this day. The Constitution prescribes that it is the President of India who appoints judges of the Supreme Court of India, “after consultation with such of the Judges of the Supreme Court and of the High Courts as he may deem necessary.”

It is this word ‘consultation’ used in Art. 124 and 217 of the Constitution which has been the bone of contention from the time of the debates in the Constituent Assembly. The true import and meaning of the word ‘consultation’ and consequently the question as to whose opinion

28 Art. 124 of the Constitution of India.
has *primacy*, received intense scrutiny of the Supreme Court. The balance of power of appointment titled on the interpretation of the word ‘consultation’. The Supreme Court, during a period of twelve years decided three cases which in popular parlance are called, *S.P. Gupta case* (the First Judges case),29 *SC Advocates on Record* (the Second Judges case)30 and *Special Reference No. 1 of 1998* (the Third Judges case).31 The first two decisions gave widely divergent views to the meaning of the word ‘consultation’ and accordingly the pendulum of the power of appointment, swung from the Executive in *S.P. Gupta* case (1981) to the exclusive power of the Judiciary itself in the *SCAORA* (1993).32 Subsequently, the 1993 decision was endorsed in *Special Reference No. 1 of 1998* with a prescription for a wider collegium. This debate on primacy, as aptly put by Justice J.S. Verma, “is intended who amongst the constitutional functionaries involved in the integrated process of appointments, is best equipped to discharge the greater burden attached to the role of primacy, of making the proper choice.”33

The treats undermining the independence of the judiciary and the Executive’s complete stranglehold on judicial appointments was the backdrop of the decision of the Supreme Court on October 6, 199334 when it delivered its verdict in *SCAORA*.35 In one stroke, the Supreme Court of India, became the most powerful Supreme Court in the world. Its

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33 Ibid.
power emanated from the decisive say it had in the appointment of judges of the higher judiciary. The decision in SCAORA is perhaps one of the most misunderstood decisions the Supreme Court has delivered. It has been perceived by the critics as an usurpation of power of appointments by the judiciary a power not exercised in any other jurisdiction.

The context has to be borne in mind while appreciating the decision which overruled S.P. Gupta. Justice Kuldip Singh, in his opinion, rationalized the new paradigm being erected by the majority:

“The case before us must be considered in the light of our entire experience and not merely in that of what was said by the Framers of the Constitution. While deciding the questions posed before us, we must consider what Judiciary is today and not what it was fifty years back. The Constitution has not only to be read in the light of contemporary circumstances and values; it has to read in such a way that the circumstances and values of the present generation are given expression in its provisions.”

The decision in SCAORA was seen as a welcome step in securing the independence of the Judiciary. Two decades later, the decision came under fire from the very same quarter which applauded the decision.

The entire controversy and the legitimacy of the anti-Collegium argument has been that the literal interpretation of the word ‘consultation’ has been abandoned in favour of a more contrived meaning, the of ‘concurrence’. This according to the critics amounted to a usurpation of power not contemplated by the founding fathers.

36 Ibid.
The debate on judicial appointments always bings by trying by assessing what exactly was in the mind of framers of the Constitution when this extremely delicate issue was being considered? Throughout the Constituent Assembly Debates, the necessity of having an independent judiciary animated the discussion surrounding the Constitution of the Supreme Court, the High Court and the appointment of judges. Dr. B.R. Ambedkar, the Chairman of the Constituent Drafting Committee in 1949, very much anticipated the controversy which would surround the mechanism and the exercise of the power to make appointments to the higher judiciary. Dr. Ambedkar’s view was to balance the power of appointment amongst the various constitutional authorities, in making the judicial appointments. It is this following passage of Dr. Ambedkar which provides the ammunition to those against a judge centric appointments system elucidated in SCAORA:

“The draft article, therefore, steers a middle course. It does not make the President, the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesis, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment”. 37

“with regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very

37 Constituent Assembly Debates, Constituent Assembly of India, Volume VIII (24 May 1949).
eminent, person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that is also a dangerous proposition.”

The criticism that ‘consultation’ has been interpreted to mean ‘concurrence’ in articles 124 and 217 of the Constitution and that ‘Collegium’ does not find mention in the Constituent Assembly debates nor in the Constitution itself is based on the view that only a literal interpretation of the Constitution is possible. The study of Constitutions will show this perception is not correct. The judgment in SCAORA is not a departure from settled constitutional principles of interpretation. Constitutional courts have read into the Constitution, concepts and texts, which were not there in the original text.

The earliest example of reading into a Constitution is the decision of the U.S. Supreme Court in McCulloch v. Maryland. The United States Congress had incorporated the Bank of United States. The State of Maryland tried to impose a targeted tax on the bank. The Supreme Court came to a conclusion that the Congress had acted within its constitutional powers in creating and renewing the National bank. There was no provision which gave an express power to empower the Congress to create a national bank. Yet Chief Justice Marshall upheld the power of

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38 Ibid.
39 17 U.S. 316 1819.
the Congress to create the bank while conceding that there were no provisions in the Constitution for incorporation of bank, he wrote:

‘Although, among the enumerating powers of government, we do not find the word “bank” or “incorporation” we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct of war; to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsideration of the industry of the nation, are entrusted to its government…. A government, entrusted with such ample powers, o the due executive of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.’

Chief Justice Marshall found the power of the Congress not by locating decisive and determinative words, but by the deeper principles animating Constitution as a whole, by reading between the lines to decipher the document’s spirit, rather than focusing solely on its letter:

‘There is no express for the case, but the bank’s claim has been sustained on principle which so entirely pervades the Constitution, is so intermixed with materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them’.

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40 Ibid.
41 Ibid.
Akhil Reed Amar, a Sterling Prof. of Law and Political Science at Yale University, visiting professor Harvard and Columbia in his seminal work shows how courts have with the written text created a parallel ‘unwritten constitution’. He has established how the unwritten Constitution of America was created and involved along with its written Constitution over the period of almost 200 years. For a sound constitutional interpretation, the author opines, that there is a constant dialogue between America’s written Constitution and its unwritten Constitution.

“The take-home lesson of our story thus far is that sound constitutional interpretation involves a dialogue between America’s written Constitution and America’s unwritten Constitution. The latter, at a minimum, encompasses various principles implicit in the written document as a whole and/or present in the historical background, forming part of the context against which we must construe the entire text. The constitutional analysis in the preceding pages has not flowed from a literalistic and clause-bound reading of the written Constitution… But neither has our arguments strayed far from the written Constitution. Rather, we have been exploring a variety of unwritten sources that intervene with text – sources such as Blackstone’s Canonical Commentaries Summarizing late 18th-century rules of interpretation; Founding-era speeches and essays; pre-constitutional and post-constitutional practices and precedents; principles and purposes implicit in various patches of constitutional text; and, above all, structural deductions from constitutional system viewed holistically.”

42 Akhil Reed Amar, America’s Unwritten Constitution at pages 19 and 20.
Standing alone, an unwritten Constitution would appear to be inadequate. Were it read in a literal and flatfooted way, some of its clauses would seem indeterminate or even perverse when measured against the larger purposes of the document itself.

Standing alone, an unwritten Constitution would appear to be illegitimate. Were it to degenerate into an assortment of “constitutional rules” conjured up out of thin air, it would do violence to the fundamental choice of the American people over the centuries to ordain and amend a single written text that sets forth the nation’s supreme law.

Neither America’s written Constitution nor America’s unwritten Constitution stands alone. Rather, the two stand together and support each other. The unwritten Constitution, properly understood, helps make sense of the written text. In turn, the written text presupposes and invites certain forms of interpretation that go beyond clause-bound literalism”. 

Another American constitutional scholar Kent Greenawalt spelt out the debate between the ‘originalist’ and the ‘evolutionist’. He elaborated the concept of evolutionism in Constitutional law: 44

‘Common-Law Aspects of Constitutional Interpretation ‘For judges, as well as citizens, constitutional adjudication is incremental. Constitutional rights in practice have more to do with what courts have decided over the years than with what the original document says and what members of the founding generation believed. As so started, this point is perfectly consistent with originalist interpretation. If clause of

\[\text{Ibid. } 43\]

44 Kent Greenawalt ‘Constitutional and Statutory Interpretation’ from the Oxford Handbook of Jurisprudence and Philosophy of Law edited by Jules Coleman and Scott Shapiro at pp. 275, 309 and 310.
Constitutions (and Statutes) are highly general, courts attempting to carry out the original understanding may need to develop sets of ancillary doctrines and distinctions not found in the text. After many cases have been decided, new decisions may apply and refine these doctrines without any reference back to the original understanding.…

The evolutionist, who thinks judges should recognize a ‘Living Constitution’, believed it is much better simply to admit that in many areas the law has drifted from what can be justified by any genuinely constraining originalism, and to recognise that constraint lies in judges preserving reasonable continuity with what their predecessors have done. On this vision, Constitutional law develops out of an original Constitution, but over time develops in some respects that are not easy to connect to the words of that Constitution or the understandings of the founding generation. Such a pattern is not to be regretted as a series of errors that, for reasons of continuity, judges should not now correct, but as what amounts to help the development of law for a Constitution that endures for centuries.\(^{45}\)

(I) In Re Presidential Reference Decision Case

Four years later, on a reference made by the Union Government, the Supreme Court in *Special Reference Number 1 of 1998*\(^{46}\) broadened the Collegium appointing the Judges. The Court emphasized that merit would be the predominant consideration for the appointment to the higher Judiciary. It was held that the Chief Justice of India would from an opinion taking into account the views of four senior most judges. Justice

\(^{45}\) *Ibid.*

S.P. Bharucha wrote the unanimous opinion of the nine judges holding as follows:

“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 senior most puisne Judges of the Supreme Court. In so far as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two senior most puisne Judges of the Supreme Court….”

“…The views of the other Judges consulted should be in writing and 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 this opinion.”

(J) Supreme Court Advocates-on-Record Association and Another V. Union of India Case

The petitions (writ petition no. 13 of 2015) were filed on by senior advocate Fali S. Nariman, the Supreme Court Advocate-on-Record Association, NGO change India, Centre for Public Interest Litigation (CPIL), Bar Association of India and others. A Clutch of these petitions were heard before a five-judge bench led by Justice J.S. Khehar and other

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48 Ibid.
judges *viz.*, J. Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh K. Goel.

At last this five judges Supreme Court Bench headed by Justice J.S. Khehar on 16th Oct. 2015 by a majority of 4:1 struck down the Constitution 99th Amendment Act and National Judicial Appointments Commission (NJAC) Act, 2014 as unconstitutional. Hon’ble Mr. Justice Jagdish Singh Khehar, Hon’ble J. Chelameswar, Hon’ble Madan B. Lokur, Hon’ble Kurian Joseph and Hon’ble Adarsh Kumar Goel, J.J. Pronounced the separate judgments, the prayer for reference to a larger Bench, and for reconsideration of the Second and Third Judges cases [(1993) 4 SCC 441 and (1998) 7 SCC 739, respectively] is rejected; the Constitution (Ninety-ninth Amendment) Act, 2014 is declared unconstitutional and void; the National Judicial Appointments Commission Act, 2014, is declared unconstitutional and void; the system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Courts; and transfer of Chief Justices and Judges of High Courts from one High Court, to another, as existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014 (called the “collegium system”), is declared to be operative; and to consider introduction of appropriate measures, if any, for an improved working of the “collegium system”, list on 3.11.2015.

The adjudication on the merits of the controversy, raised in this batch of cases, was rendered on 16th October, 2015, wherein a separate “Order of the Court” was also recorded. In paragraph 5 of the Order of the Court, it was decided to consider the incorporation of additional appropriate measures, if any, for an improved working of the “collegium
system”. For the above purpose, hearing was fixed for (and commenced on) 3rd November, 2015. Mr. Mukul Rohatgi, learned Attorney General for India, preferred written suggestions and supplemented them with oral submissions. Likewise, other learned senior counsel were also heard and they too presented their views. Submissions were advanced freely, solely with the objective of introducing measures in the prevailing “collegium system” of appointment of Judges to the higher judiciary, which in the perception of the concerned learned counsel, would improve the working of the system. From the first hearing itself, it emerged that the suggestions were on diverse issues. A few suggestions, though honestly and meaningfully expressed, contained diametrically opposite recommendations. It was therefore felt that the suggestions received should be compiled in an orderly manner so as to enable all concerned stakeholders to have a bird’s eye view of the same, thereby possibly making the debate thereon more judicious. Accordingly, on the nomination by the learned Attorney General, of Mrs. Pinki Anand, Additional Solicitor General, and on the unanimous endorsement of all the learned counsel representing the petitioners, of Mr. Arvind P. Datar, Senior Advocate, a two-member committee was constituted. The committee was requested to make a compilation of the suggestions received upto 4th November, 2015. The above committee presented the compilation on 5th November, 2015. After hearing the Chairman of the Bar Council of India and learned counsel some of whom had travelled from distant States, it was felt that a further opportunity should be afforded to the stakeholders to furnish their valuable contributions on the matter. It is therefore, that the following order came to be passed on 5th November, 2015:
“Mrs. Pinky Anand, learned Additional Solicitor General, and Mr. Arvind Datar, learned Senior Advocate have made a compilation of suggestions received up to 23.45 hours on 4.11.2015, in furtherance of our motion Bench order dated 3.11.2015. A large number of learned counsel have even today prayed for further time to make suggestions. They have also requested for time on behalf of private individuals for the same purpose.

The Chairman of the Bar Council of India has also made a prayer, that the Bar Council of India which is the apex body of all the State Bar Councils, be permitted to gather suggestions from all stake holders, and submit such of the suggestions as it approves, for consideration by this Court.

The learned Attorney General for India has volunteered to facilitate the prayer made by the learned counsel, by web-hosting the compilation made by the Additional Solicitor General and the learned Senior Counsel referred to above, on the web site of the Department of Justice, Ministry of Law and Justice, New Delhi, and also, to issue a public notice in the media seeking suggestions from all those who may desire to make contribution by 17.00 hours on 13.11.2015 (up to 14.11.2015 by the Bar Council of India). Suggestions may be made in the four categories, i.e., Transparency, Collegium Secretariat, Eligibility Criteria and Complaints.

The Supreme Court said that we appreciate the efforts made by the learned Attorney General for India. He may web-host the compilation and issue a WP(C) No.13/15 etc.etc. public notice. Likewise, all those who desire to make suggestions may do so directly, on the website of the
Department of Justice, Ministry of Law & Justice, New Delhi. Suggestions received by 17.00 hours on 13.11.2015 shall be entertained. No further suggestions will be entertained. All such suggestions will be forwarded by the Department of Justice to the learned counsel who had assisted this Court in the previous compilation, for incorporating additional suggestions in the earlier compilation, for consideration.”

Further S.C. said that even though the task seemed to be daunting, we felt obliged to take up the responsibility, as it was after all, for an improvement of the judicial system and such an opportunity must not be lost. It was at this stage of our reflection, that the learned Attorney General made an impassioned submission, not in any obstructive manner, but as a matter of faithful assistance, suggesting that we should desist from pursuing the contemplated course of action. In this behalf it was pointed out, that the formulation of the Memorandum of Procedure was an administrative responsibility which fell in the executive domain. It was submitted that this Court neither had the expertise nor the wherewithal for proposing amendments in the existing Memorandum of Procedure (drawn on 30th June, 1999 by the Government of India), for improving the collegium system. The learned Attorney General in his submission candidly invited our attention to the following observations recorded in paragraph 478 of the Second Judges case:\footnote{Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441.}

“478. …. (13) On initiation of the proposal by the Chief Justice of India or the Chief Justice of the High Court, as the case may be, copies thereof should be sent simultaneously to all the other constitutional
functionaries involved. Within the period of six weeks from receipt of the same, the other functionaries must convey their opinion to the Chief Justice of India. In case any such functionary disagrees, it should convey its disagreement within that period to the others. The others, if they change their earlier opinion, must, within a further period of six weeks, so convey it to the Chief Justice of India. The Chief Justice of India would then form his final opinion and convey it to the President within four weeks, for final action to be taken. It is appropriate that a memorandum of procedure be issued by the Government of India to this effect, after consulting the Chief Justice of India, and with the modifications, if any, suggested by the Chief Justice of India to effectuate the purpose. „„”

(emphasis supplied)

It was submitted that even the nine-Judge Bench had left the task of drawing up the Memorandum of Procedure to the Government of India. We may also record, that the introduction of the above changes referred to in the preceding paragraph, are broadly in tune with the majority of the suggestions. These were also referred to by us by the committee under the category of “transparency”, “secretariat”, “eligibility criteria” and “complaints”, in our order dated 5th November, 2015. This practice, we were informed, had been consistently adopted, in consonance with the directions contained in paragraph 478 of the Second Judges case. In order to allay any fear that may be entertained by any of the stakeholders, it was submitted that the same procedure would be adopted now, if the task was entrusted to the executive. We are in complete agreement with the suggestion of the learned Attorney General.
In view of the above, the Government of India may finalize the existing Memorandum of Procedure by supplementing it in consultation with the Chief Justice of India. The Chief Justice of India will take a decision based on the unanimous view of the collegium comprising the four seniormost puisne Judges of the Supreme Court. They shall take the following factors into consideration:

1. **Eligibility criteria**

The Memorandum of Procedure may indicate the eligibility criteria, such as the minimum age, for the guidance of the collegium (both at the level of the High Court and the Supreme Court) for appointment of Judges, after inviting and taking into consideration the views of the State Government and the Government of India (as the case may be) from time to time.

2. **Transparency in the appointment process**

The eligibility criteria and the procedure as detailed in the Memorandum of Procedure for the appointment of Judges ought to be made available on the website of the Court concerned and on the website of the Department of Justice of the Government of India. The Memorandum of Procedure may provide for an appropriate procedure for minuting the discussions including recording the dissenting opinion of the Judges in the collegiums while making provision for the confidentiality of the minutes consistent with the requirement of transparency in the system of appointment of Judges.

3. **Secretariat**

In the interest of better management of the system of appointment of Judges, the Memorandum of Procedure may provide for the
establishment of a Secretariat for each High Court and the Supreme Court and prescribe its functions, duties and responsibilities.

4. Complaints

The Memorandum of Procedure may provide for an appropriate mechanism and procedure for dealing with complaints against anyone who is being considered for appointment as a Judge.

5. Miscellaneous

The Memorandum of Procedure may provide for any other matter considered appropriate for ensuring transparency and accountability including interaction with the recommendee(s) by the collegium of the Supreme Court, without sacrificing the confidentiality of the appointment process.

It is made clear that the guidelines mentioned above are only broad suggestions for consideration and supplementing the Memorandum of Procedure for the faithful implementation of the principles laid down in the Second Judges case and the Third Judges case.

(K) Appraisal

Judges are human beings, no doubt. But, they are human beings encased in dominant ideologies generating consent, and organizations of force producing compliance. The plain fact is that only certain kind of human beings can become justices- those with the “right” socialization, “right” professional standing, “right” kind of reputation. The criteria transforming human beings into justices cannot transcend dominant ideologies and the need to maintain, and expand organization of force. As J. D.P. Madon has observed recently: “judges are not appointed
haphazardly... more thought and care have gone into their selection than in the diction of legislatures from whose ranks executive come. This must be so because the very first, and most crucial, attribute of a judicial role is, always and everywhere, in conformity with the ruling ideology.”

Judicial independence is the fountain-head of Justice and justice is the source of civilization and rule of law. Those that tamper with judicial independence, tamper with justice and shake the portals of a common man’s faith that right will be rewarded, wrong will be punished and justice will be done.

Three distinguished Judges of the Supreme Court (Khanna, Krishna Iyer and Gupta JJ.) who shared a platform to discuss the topic of judicial independence described internal threats as more ominous than the external threats and one of them (Krishna Iyer, J.) went so far as to call it “the death wish among the judiciary” and warned his brother judges against the tendency “to commit suicide”.

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52 Ibid, at 98.
53 Ibid at 100.