

बना दिया गया, आपको ताज्जुब होगा कि इनका साल का बजट 3.65 करोड़ है। पूरे देश के आदिवासियों और दलितों की सेवा करने के लिए बनाए गए कमीशन को यह बजट दे रहे हैं, जबकि साढ़े तीन करोड़ तो आप कम्युनिटी सिंगिंग के लिए दे रहे हैं। यह जो इस कमीशन को 3.65 करोड़ दे रहे हैं, इसको बढ़ाकर आप 50 करोड़ करिए ताकि कम से कम लगे तो कुछ पैसा अप इनको दे रहे हैं, जिससे कुछ यह कर पाएं।

महोदय, मैंने इनसे पूछा आप दौरा क्यों नहीं करते? मैं इनको अपने आदिवासी क्षेत्र में उस हीरे वाले इलाके में ले जाना चाहता था। मैंने कहा कि पूरा कमीशन चलिए। हमारे साथी कहते हैं कि पैसा ही नहीं है। केवल 3.65 करोड़ का बजट है, उसमें कैसे जाएंगे। यह हवाई जहाज से यात्रा करके नहीं जा सकते, यदि अपने सब अधिकारियों को ले जाना चाहे तो ऐसा कमीशन आपने बनाया क्यों है? कहा गया था कि इनको इन्वेस्टीगेशन की पावर देंगे। कहा गया था कि इनको डी.आय.जी. देंगे, एस.पी. देंगे, लेकिन न ही कोई डी.आय.जी. दीया गया और न ही एस.पी. दिया गया है। अकेले हनुमनतप्पा साहब को बैठा दिया कि इनका नाम जपते रहो, यह कमीशन के अध्यक्ष हैं, यह आपके बारे में सब कुछ करेंगे। इनके पास चले जाओ, तो ज्यादा से ज्यादा बेचारे अपने हाथ से चिट्ठी लिखकर दे देते हैं कि ले जाओ इसको इससे ज्यादा क्या कर सकते हैं? यह इस तरह का कमीशन आपने बनाया है। यह तो आपने इस वर्ग के सात मखौल कर दिया, मजाक उड़ाया है उसका। इस वर्ग को अगर आप गंभीरता से लेते हैं तो कमीशन को अख्तियार दीजिए, इसको लीगल सेंक्शन दीजिए, इसको स्टेचुरी स्टेटस दीजिए और इसको मजबूत बनाइए।

उपध्यक्ष जी, इतना कहकर, चूंकि आपने कहा कि मैं कम समय में बोलू इसलिए अपनी बहुत सी महत्वपूर्ण बातें छोड़ दी हैं, अगली बार जरूर कहूंगा, इस अनुरोध के साथ अपनी बात समाप्त करता हूं कि जितनी बातें मैंने कही हैं वह इसलिए कही हैं क्योंकि मैं हृदय की अन्तरतम गहराइयों से इनको अनुभव करता हूं। महसूस करता हूं, इस वर्ग के साथ आप न्याय कीजिए। धन्यवाद।

#### **HALF-AN-HOUR DISCUSSION ON POINTS ARISING OUT OF ANSWER TO STARRED QUESTION NO. 423 GIVEN ON 6TH MAY, 1997 REGARDING POLICY OF APPOINTMENT OF JUDGES IN SUPREME COURT AND HIGH COURTS**

THE VICE-CHAIRMAN (SHRI MD. SALIM): Now we will take up the Half-an-Hour discussion regarding the policy of appointment of Judges in the Supreme Court and the High Courts. Mr. Satish Agrawal will raise the discussion.

SHRI SATISH AGRAWAL (Rajasthan): Thank you very much, Mr. Vice-Chairman, for permitting me to raise the Half-an-Hour Discussion on a matter of vital national importance.

This Half-an-Hour Discussion arises out of the most unsatisfactory answers given by the hon. Law Minister to Starred Question No. 423 on the 6th of May, 1997. Unfortunately, what happened on that day was that when Mrs. Jayanthi Natarajan put a supplementary, the Question Hour was declared to be over, and the hon. Members could not elicit much information on this subject from the Government.

Mr. Vice-Chairman, Sir, on that very day, there was another Starred Question No. 428 which could not come up for answer in the House. If one looks at the answer given to this question, one finds that in reply to part (c) of the question, the hon. Law Minister says:

"The Government proposes to reintroduce a Constitutional Amendment Bill in Parliament to make changes in the existing system of appointment of Judges of the Supreme Court, Chief Justices of the High Courts, Judges of the High Courts and transfer of Judges of the High Courts." Chief Justices of the High Court, judges of the High Courts and transfer of judges of the High Courts. Even on that day, while replying to various supplemen-

tarics, the hon. Law Minister was frank enough to assert that the Government intends to revert to the 1993 position so far as the appointment of the Judges is concerned.

Mr. Vice-Chairman, Sir, you are well aware that prior to the judgment of the nine judges' bench delivered on 6.10.1993, the primacy in appointment of the judges rested with the Executive i.e. with the Council of Ministers. But after the nine-judges' Bench Judgment dated 6.10.1993, the primacy and supremacy has gone over to the Chief Justice or to the Judiciary itself. I do not know why after practically three and a half years, and more particularly after various special cases relating to corruption pending in the Supreme Court or in the High Court since 1993, it has now occurred to the Government of the day that the Government should have the primacy and supremacy in the appointment of the judges. I am not holding any brief for the Judiciary at the moment, but I would say that as on date the public is very much receptive and appreciative of the judicial role that is being played by the Judiciary more particularly in cases relating to corruption. Whether it be the housing scam, whether it be the L.P.G. gas dealership case, whether it be the petrol pump dealership case, whether it be out-of-turn allotment cases or the tele-com scandal or Hawala or Fodder scandal, all such cases have rocked this Parliament for weeks together, but the Parliament did not rise to the occasion to redress all those grievances and take cognisance of those grievances and set the things right in a better way, as was done earlier in 1951, when on a simple complaint of accepting Rs. 2,000/- by way of bribe by one Member of Parliament, Mr. Mudgal, the Prime Minister of the country, Pandit Jawaharlal Nehru rose high to the occasion, moved a resolution in this House, set up a committee of inquiry to enquire into the malpractices and the misdemeanour of Mr. Mudgal and ultimately

on the receipt of the investigation report, Mr. Mudgal, a sitting Member of Parliament, was expelled from the Membership of the House. This was the stature, this was the method, this was the ethics, this was the standard of morality of the then Prime Minister of India, Pandit Jawahar-lal Nehru in 1951. Just imagine how much deterioration has taken place now, how much degeneration has taken place in this institution. We are responsible for it.

I raise a question. When this Hawala scandal came to the notice of the then Prime Minister in 1993 itself or from 1991 onwards, why was no action taken, why was no motion brought forward, why was no committee set up, why did the Parliament not rise high to take *suo motu* action so far as the conduct of the Members of the Parliament was concerned? Now, we are going to set up some ethics committee and all that. But I am sorry to say that I feel very much disgusted and frustrated seeing all this degeneration in the present time. Right from 1991 onwards we are witnessing scandals and scams. As a result of the securities scam Rs. 10,000 crores have been lost. Where has the money gone? Nobody knows even now. Nobody has been convicted and nobody has been sent to jail. So is the case with the Hawala scandal; so is the case with other matters.

Half of the Ministers of 1991 to 1996 have either been in jail or on bail that is the position that we have come to. After that we feel ashamed describing ourselves as Members of Parliament when we go out in the public. Despite all failings in the judicial system, despite all deficiencies in the judicial administration which they are not free from, people have some faith in the judiciary. But at the moment I am not on that point. Now, the position has come to such a pass that judiciary is monitoring the investigations itself, investigation of crime is a job of the executive. ! But now whether it is the High Court of

Patna or whether it is the High Court of Delhi or whether it is the Supreme Court, they are monitoring the progress of investigations which is not their job. But we have reached a stage where the inaction on the part of the executive to take appropriate action at the appropriate time against the guilty and the culprits has led to this situation. That is why judicial activism has come into play. The perception of the public about judiciary is very high as on date because people are feeling very happy that we are getting rid of corrupt elements.

Prior to 1993, it was the supremacy of the executive in the appointment or transfer of Judges. There was the famous *S.P. Gupta's* case which was reported in 1982, Supreme Court, pages 4 and 7. In 1993, the nine Judge Bench overruled the judgement by a majority decision. Now, the supremacy is not of the executive, but of the judiciary or of the Chief Justice. This has gone on for 2<sup>1/2</sup> years, but nothing has happened. There was no problem. Nothing of that sort happened. Why has it happened suddenly? It has happened because after exposure of scandals and investigations, the Supreme Court directed the CBI not to take any instructions from the Chief Executive of India, that is, the Prime Minister. Now, they are themselves monitoring these cases due to lack of faith in the executive. We should ponder over ourselves as to why this situation has arisen. We failed to rise to the occasion when these scandals rocked the Parliament. That is why a judgement has been given. I am not saying that we have to balance the whole situation. Mr. Law Minister, I would like to say that four things are involved. The question of appointment of Judges, the question of transfer of Judges, the question of removal of Judges and the question of promotion of Judges. Where is the question of appointment of Judges? The appointment of Judges includes their transfers. When Judges are promoted from High Court to the Supreme Court,

the question of their transfers comes up. There is a question of impeachment also. I don't say that there are no guilty Judges in the whole country, in High Courts or in the Supreme Court. May be, they are infallible. If there is another superior Supreme Court in our country, I say about SO judgements of the Supreme Court might have been set aside by it. Now, there is no superior Supreme Court. Now, we have only the Supreme Court. Therefore, its judgement is final. Under article 141 of the Constitution, the law laid down by the Supreme Court is binding on everybody. Of course, parliament is competent to amend the Constitution and to make a law to nullify the judgement. Ultimately, it is again the Supreme Court which has to interpret the law passed by Parliament, whether it is valid or not, whether it is Constitutional or not. So, interpretation of the Constitution, interpretation of laws made by Parliament exclusively rests with the Supreme Court. You may do anything, do whatever you like. But under the present circumstances to think of such a law, to nullify the judgement of 6.10.1993 and to restore it on the technical ground that consultation doesn't mean concurrence. Mr. Law Minister, words appearing in the same section may have different connotations. You were a practising lawyer. Now, you are the Law Minister. I had practised at the Bar for the last 45 years. I may show you words which have different meanings in the same section itself. It is the whole context that has to be interpreted. Who would interpret it? The Law Minister or the Parliament or the court? It is the Supreme Court which has the exclusive jurisdiction to interpret laws. It is within the exclusive domain of the Supreme Court or the High Court to interpret words, phrases, sentences and laws. That is the position.

THE VICE-CHAIRMAN (SHRI MD. SALIM): Mr. Agarwal, in this context I want to remind you, we are discussing an important issue under Half-An-Hour Dis-

cussion. Unless you conclude, the Minister would not be able to reply. After that, there are seven or eight Members who want to put questions. Again the Minister has to reply to their queries. You can calculate accordingly. Normally we allot ten minutes to the Member who raises the discussion...(*Interruption*).

SHRI SATISH AGARWAL: All right. I would not elaborate on these points. The subject is of vital importance to the whole nation. However, I will try to be as precise and as brief as possible, as directed by you, Mr. Vice-Chairman.

There was one Dinesh Goswami, the then Law Minister of India. He had introduced the Bill in Parliament on 18.5.1990, regarding the setting up of a National Judicial Commission for appointment of Judges, transfer promotion, etc. That Bill was introduced by the then Government of Shri V.P. Singh. That Bill lapsed because Parliament was dissolved later on. But that has not seen the light of the day. I say now, lawyers all over the country are very much worried about this move of the Government. I am aware that my leftist friends are opposed to this move. I am one with them on this issue. They are one with us on this issue. We are one with them and they are one with us on many issues, excepting one. Mr. Vice-Chairman, Sir, there is a report of the Law commission also. I do not want to refer to all that. It was as back as in 1958. It said how things happened then. I would quote only one paragraph at page 34. It was presided by Mr. M.C. Setalvad. It said,

"It is widely felt that communal and regional considerations had prevailed in making the selection of the Judges. The idea seems to have gained ground that the component States of India should have adequate representation in the Court. So, we call ourselves a secular State. But the ideas of communal representation which were viciously

granted in our body politic by the British have not entirely lost their influence. What, perhaps, is still more to be regretted is the general impression that now and again, the executive influence exerted from the highest quarter has been responsible for some appointments to the Bench. It undoubtedly true that the best talent among the Judges of the High Court has not always found its way to the Supreme court. This has prevented the Court from being looked upon by the subordinate courts and the public generally with that respect and reverence which it is, by its status, entitled to."

I do not want to refer to the supersession of the Chief Justice of the Supreme Court during the Emergency period and how three Judges were superseded and transfers were effected during those days. That will take much time which I do not have and the Vice-Chairman is reluctant to grant me that time. I abide your observations, Mr. Vice-Chairman.

Now, many lawyers of the Supreme Court including retired Chief Justices of High Courts and many of the Supreme Court Judges, including retired Chief Justice Krishna Iyer, have set up a committee of which Mr. Shanti Bhushan, Mr. Ram Jethmalani, Ms. Indira Jaisingh, Mr. V.M. Tarkunde, Mr. Hardeep Singh, Ms. Kamini Jaiswal and Mr. Prashant Bhushan and so many others are members. There was a committee on judicial accountability. They set up a Sub-Committee. They drafted a Bill and sent it to the Law Minister by their letter dated 12th March, 1997. It was sent to Shri R. Khalap, the Minister of Law, justice and Company Affairs. You must have received a copy of it. If you have not received it, I am prepared to hand over my copy. They have practically drafted the Bill.

SHRI HANSRAJ BHARDWAJ: How can they?

SHRI SATISH AGARWAL: The Sub-committee has drafted the Bill for the consideration of the Government. All these eminent persons were present

there. The draft of the proposed Bill by the Sub-Committee was considered in a meeting on March 2 in which the former Supreme Court Judges Messrs. Krishna Iyer, P.B. Sawant, Jaichandra Reddy and Kuldeep Singh could not be present but conveyed their concurrence in principle. Former High Court Judges, Messrs. V.M. Tarkunde, Devi Singh Tevatia, P.S. Pot:, and Rajendra Sachar also participated. A former Chief Justice of the Allahabad High Court, Mr. S.S. Soni, conveyed his concurrence. This draft was conveyed to them as back as in March, 1997. Have you taken any view? Have you considered it?

You are giving some interview on the t.v. on this issue. So, I beg of you, as on date, have a full debate, a national debate, a public debate, on this issue. Consult all the eminent jurists in the country, the retired Chief Justices of the Supreme Court, the retired Judges of the Supreme Court, you consult everyone. Consult the Bar Council, Bar Associations. A lot of reforms are needed in the judicial system; I agree. I am not one of those who are prepared to give the judicial functioning in this country hundred marks out of hundred. But during the last four-five years they have done a commendable job; I applaud it. There are so many failings in our judicial system. They have to be corrected. Backlogs of cases are there, litigants are suffering. There are cases under the Contempt of Courts Act whereby people are being sent to jail without any hearings; such cases have come to light, but they need rectification. So, my humble submission before this august body is that you should not try to nullify the Judgement dated 6.10.1993; you must

try to evolve a consensus on this issue; bring forward a Bill, either as suggested by them or as drafted by the Government; refer that to a Committee of Parliament; have a public debate, have a national debate and then nullify the Judgment; otherwise, this should stand till we arrive at some sort of a consensus. Don't play with the judicial system. The judicial system needs reforms in other areas where you will be addressed later on; if you like, I can discuss the issue with you. With all these words, Sir, I seek these clarifications from the Government.

THE MINISTER OF STATE OF THE MINISTRY OF LAW AND JUSTICE. (SHRI RAMAKANT D. KHALAP): Sir, I am grateful to the hon. Member for his very spirited speech on this issue, but after listening to him, I still wonder whether the learned Member has formed his own opinion about what should be done in this particular aspect. He was good enough to take us through the entire views of different people, including the view of the Committee on Judicial Accountability wherein so many learned people have functioned and have given this Report to us. I would have really been happy if the hon. Member had told me to either accept this Bill according to him or accept it in some other form. The learned Member has left his questions so open and wide that I am unable to understand what exactly he wants me or this Government or the people of this country to do.

SHRI SATISH AGARWAL: I want a national judicial commission either on these lines or on the lines which you may suggest for our consideration. I want an independent national judicial commission for transfers, appointments, promotions, for everything.

SHRI RAMAKANT D. KHALAP:

I This one aspect is now clear, that you want a national judicial commission.

Therefore, Sir, I have to go to the very

purpose of either having a national judicial commission or going back to the pre-1993 position. The learned Member has spoken so widely over this issue, trying to impute motives to the Government. When the Government said that they wanted to go to the pre-1993 position, in fact, there was no need to argue by saying that the Government is afraid of some scams; some case is going on; the Ministers are being tried; somebody is going on bail; somebody is being inside the jail; this was not necessary at all. If, at all, it is your view—and I hope and I consider that this is the very view which you have formed after due deliberations—it is your considered view that you want to make some changes in the methodology of appointment of judges. That very fact shows that you want to steer a different path from what has been laid down in the 1993-Judgment of the supreme Court. This is what the Government feels. The Government did not have any fixed opinion on this. What the Government said was that we had for the last 45 years followed a particular route and that route was laid down in the Constitution; that route spelt out the power of the people of this country. The people of this country said that the President shall appoint the judges. What does it mean finally? When the President appoints judges, the President appoints them on the aid and advice of the Council of Ministers, and the Council of Ministers is accountable to the Parliament, which means they are accountable to the people. So, what was done in the last 45 years was, the right of the people was being exercised by the President. This judgment which came in 1993 sought to take away that prerogative of the people when it said that the judiciary shall have primacy and when it further said that the process of appointment of Judges shall be initiated by the judiciary. The effect of the word 'consultation' is there in the Constitution; this word appearing in

various Statutes, may have different meanings. I quite agree with my learned friend. Depending upon the context, this word may have different connotations. But the jurists themselves have said that the word 'consultation' as it appears here can never mean concurrence. That was the purpose. Sir, I would come back again after hearing the comments of other hon. Members on this very issue. I would only say this much that the whole question of appointment of judges is being criticised not only by the Members of this House but it is also being criticised by the Judges themselves. We have the latest interview of the former Chief Justice of our country where he has clearly stated what he means by the word 'consultation'. What exactly does he mean? Of course, his views have been laid down in the same judgment.

SHRI SATISH AGARWAL: Are you referring to the former Chief Justice, Shri Ahmadi?

SRHI RAMAKANT D. KHALAP: I am referring to him.

SHRI SATISH AGARWAL: It was a minority view.

SHRI RAMAKANT D. KHALAP: Exactly, that was a minority view. I can refer to the views of Shri Seervai where he stated that the meaning of the word 'consultation' given there is not a correct meaning and that amounts to rewriting of the Constitution. So the purpose of this whole exercise was to initiate a debate. Though last time we prepared a Bill and came here, the overall purpose was to initiate a debate. By giving powers to the people to appoint a judge, it does not in any way mean that we are going to reduce or we are going to interfere with the independence of the judiciary. Once a person is appointed as a judge, he is independent. Once a person is elected a Speaker of the Lok Sabha or a Chairman of the Rajya Sabha, he is independent. Whatever exercise is done, that is done prior to the appointment. Once he

occupies the rosy chair the august Chair, his independence comes in and nobody can interfere with him. When you say that we want to have a Judicial Commission, the fact is even in a Judicial Commission there will be members. These members shall be discussing it among themselves. Do you say that the members would be appointing them and the independence of those people who become judges later on would be affected? This argument does not hold good in my opinion. The Half-an-hour Discussion initiated by the hon. Member would touch upon important aspects of the issue. I will come to this aspect at a later stage because I would like to hear the eminent jurists like Shri Ram Jethmalani and others. Our former Law Minister has his own views on this issue. Once I hear them, I will once again reply to the debate. Meanwhile I conclude my speech here.

THE VICE-CHAIRMAN (SHRI MD. SALIM): There is a list of seven Members. I would request them to put their supplementary questions and be brief. I know they are eminent Members. **Shri** John F. Fernandes.

SHRI JOHN F. FERNANDES (Goa): Have I been included in the list of eminent Members?

Mr. Vice-Chairman, Sir, our democracy is strange and strange things happen in our country because this is the first country where the judiciary sits in judgment and usurps the power of the executive and authorises itself. I do not know where the natural justice lies. The Government is sitting quiet for the last four years. I am not blaming this Government or that Government. We had a similar crisis with the judiciary and the executive in 1971 when the Supreme Court removed the constituent powers of Parliament and ruled that Part 20 of article 368 only lays down the procedure to amend the Constitution, but it does not give powers to Parliament to amend

the Constitution. Immediately, the then Government amended the relevant portion of article 368 of the Constitution.

It was first amended in 1971 and then again in 1976 the same article was amended by the 42nd Amendment. I do not know why the Government is sleeping for the last four years.

It is an inherent right of the executive, as the hon. Law Minister has rightly mentioned. Finally the power vests with the people and by with the people" I mean, it vests with the executive. It vests with the Parliament. It vests with the President. Sir, the judgement was given in 1993 and I think there should be circumstantial evidence as to why this judgement was given. Why were the powers of the executive usurped by the judiciary? Parliament has the power to impeach a judge and for the first time in free India that option was sought to be exercised by Parliament. We know what we have done in the case of Justice Ramaswamy. I think, Parliament failed. We failed in our duty and now in the same year, the Law Commission has given a code of conduct for the judiciary. Everybody speaks outside. Even the former Chief Election Commissioner, Mr. Seshan, who wants to be the President of India, had talked of a code of conduct for the politicians. We have no grudge against him. But every institution of State should have a code of conduct and that list of code of conduct, the Government has rightly referred to the judiciary. For four years, they are sitting on it. There is no reaction from the judiciary. In the same year they remove the powers of the executive and confer the power for appointment- on themselves. It was relevant and appropriate for the Government. I am not blaming my colleague, the ex-Law Minister. But the Government of the day should have taken a decision to amend article 124. I do not know why the Government sat over it for four months. Is this not enough to get public opinion? It is a mere technicality. Finally, it is Parliament

which is supreme. The people are supreme. I hope the hon. Minister will inform me as to what he has done about it. Has he taken this up with the judiciary? The judiciary has to have it. I shall give a small example. We have seen the aspersions cast by Magistrate Dhingra on Parliament and the Members of Parliament.

THE VICE-CHAIRMAN (SHRI MD. SALIM): It would be better if you only put questions.

SHRI JOHN. F. FERNADES: I am coming to the code of conduct. Of course, that judgement was expunged by the higher court. But nothing was done to the Magistrate. But the very same Magistrate abused advocates and the Advocates' Association resented it and then the judiciary reacted and transferred him. This is what I am saying that they are biased. They cannot be biased. Mr. Vice-Chairman, Sir, I do not think have any more points. I hope the hon. Minister will react to my point as to what the Government has done to see that this kind of code is enforced on the judiciary. Thank you,

SHRI NARENDRA MOHAN (UTTAR PRADESH): Sir, it is a very important matter which I raised first in the Zero Hour during the last session. I fail to understand why the judiciary of this country does not feel the need to become accountable to the public. There is a need for it. Nothing has been done either by the judiciary itself or by this Government to make the judiciary accountable to the public. That is why we are discussing the new methodology that we need to adopt regarding the appointment of judges. In the earlier methodology which we had adopted, the pre-1993 methodology, the executive had all the powers. Later on, it was changed by the Supreme Court judgement. I would say, it was changed by Justice Verma. It was he who was behind that judgement. It was he who was preaching for judicial activism.

But when the appointment of a High Court judge at Madras came and when there was an application, a petition by the Committee on Judicial Accountability opposing Mr. Marimuthu's appointment, that petition was not even admitted by the Supreme Court. It was summarily disposed of, dismissed. If that is the way the judiciary is going to function, if that is the way the Supreme Court is going to behave, perhaps this Parliament will have to think. You know, Sir, the Committee opposed this appointment of a judge of Madras High Court because the person was of a dubious reputation. He was indicated by the Madras High Court twice and even then the Supreme Court appointed that person as a judge of that High Court. So we are now in a position when we can say...

SHRI TRILOKI NATH CHATUR-VEDI (UTTAR PRADESH): Reference to individual judges should be avoided.

SHRI NARENDRA MOHAN: Sir, I correct myself. I named it because it was publicly discussed, it was in the newspapers. Anyway, if it is the wish of the House, I am avoiding that name.

THE VICE-CHAIRMAN (SHRI MD. SALIM): It is better if you restrict yourself putting questions.

SHRI NARENDRA MOHAN: My request is that a situation should be created. It is the duty of the Government to create a situation so that the appointment of a higher judiciary is made in such a way that the persons who are appointed become accountable to the public, become accountable to the Constitution, to this nation. Now this can only be done, as my colleague has suggested, by a National Commission because that is the only alternative now. We have seen how the executives behaved we have seen how the executive tried to tamper the judicial system. We have seen how the concept of committed judiciary was brought in. They tried to



bring in the concept of committed judiciary. That was the role of the executive at one point of time. We cannot go back to that position when the executive will have all the authority, all the powers and try to do what they want to do. Now we have seen how, when the total powers were taken away by the Supreme Court, that position is also not accepted. The only alternative that remains is a National Judiciary Commission. But now the question is, who should be the Members of the Judicial Commission. That is more important. I would request the hon. Minister to inform us their the views on this particular issue. We will like to whether they are for a National Judicial Commission or whether they want to go back to 1993 position or whether they want to continue with the present judgement which was delivered in 1994, and on how they want to manage or how they want to see that the judiciary of this great country becomes accountable to the people of the country. The situation today is, in the name of judicial activism, some such things are being done which, perhaps, are very difficult to understand. And I personally feel that there is an increasing immunity of the entire judicial system. They want to get immunity. That sort of a system is, perhaps, not good. So we have to bring some changes. I would request the hon. Minister to first tell us, and then we will react to it. Thank you.

SHRI HANSRAJ BHARDWAJ (MADHYA PRADESH): Mr. Vice-Chairman, Sir, I had the privilege of hearing so sea S.P. Gupta's case in the Supreme Court. There the Bench and the Bar were equally divided. I will not mention the names. There was virtually a fight between the first and the second judge, and the Bar was equally divided. Nobody talked about principles, even at the hearing of that case. The result was disastrous. The Chief Justice of India, who is essentially the Leader of the judiciary was denied primacy, even against the Chief Justice of the High

Court. I personally feel that the Chief Justice of India is the Leader and he must be the determining factor in judicial appointments. Luckily, I got an opportunity in 1985; and I ensured that the Chief Justice of India should be the determining factor, not the appointing authority, Because on whom do you rely? You don't rely on the executive. All the senior Members used to attack saying that there was executive interference, this and that. Then we said that the safest course was to give it to the judiciary. When Subash Sharma's case came up we knew that the reference was limited, then, what is the position of the Chief Justice of India in the matter of appointment of Judges? The Supreme Court rightly overruled that S.P. Gupta's case was bad law because you could not dene-grate the position of the Chief Justice of India, Once you appoint a proper person, you cannot throw insults on him. Therefore, an unwritten rule was started in the Justice Department. This Department is a fully independent and devoted one. It does not care what the Minister wants or anybody else wants. It will put the record straight and then the Minister has to take his own decision in the best interests of the country and keeping the public opinion in mind. We are Members of Parliament. We are Ministers. We are exposed to that kind of criticism, that type of talk. We are normally guided by the feelings of the House. We filed an affidavit before a 9-Judge Bench. Yes, we followed the advice of the Chief Justice of India in the matter of appointment of Judges. In a few cases, we even got the Prime Minister's views reviewed because we feel that judicial independence and rule of law are the basis on which our democracy thrives. Everybody should try to strengthen it-For small matters such as who should be appointed, who should not be appointed, let us not sacrifice this judicial independence because this privilege of judicial independence is not meant for Ministers or Judge. It is meant for the people. If

the Judges are not independent, who will suffer? It is the consumer of justice-the people of India. Therefore, I ensured and I did file one of my Joint Secretaries affidavit saying that yes, we would give better weightage to the Chief Justice. We have gone by his advice. That does not mean that we had surrendered any part of the Executive's right or the power of the President in the matter of appointment of Judges. The President of India is the appointing authority today. For appointing the Members of the Judicial Commission, you will have to amend the Constitution. It is right to say that a national debate should take place on whether we need to have a correction in the word 'consultation' or 'concurrence'. But ultimately the power of judicial review is in the Supreme Court. I thought, in my own judgement, that rather than amending the Constitution, we should frame a memorandum, of procedure in consultation with the Chief Justice of India. The Judiciary cannot issue a writ of *mandamus* against the President of India saying that he should appoint such and such person. I think no Constitutional expert in this country will say that the Chief Justice of India, or any Judge for that matter will issue a *mandamus* against the President of India. Suppose the President withholds an appointment in spite of the Prime Minister's recommendation, in spite of the Law Minister's recommendation, what would happen? There were such cases, When I was the Law Minister, I did not allow this confrontation to come up. It was resolved. Now there is another surprising thing. People are forming small societies. I have never seen senior counsels forming associations for these purposes. Mr. Seervai argued S.P. Gupta's case and created hell for the Law Minister. It was because of one Judge who overnight changed

his views the Law Minister escaped. Otherwise, either the Law Minister would have to go or the Chief Justice of India would have to go. It was hotly contested.

It is time we realise it. We must realise that what is necessary for judicial independence is the unity of the Judges and the unity of the Bar. But where is this unity? Are there any more brother-Judges? Are there any more brother-lawyers? You want to enforce your views on me. You don't consider me as one of your brother-lawyers. Five or ten people frame a rule and then say this is what we want. What about some of the retired judges? Each one of them had his own innings without any contribution. Of course, Justice Krishna Iyer out of them did contribute something in Senta Singh's case. When he started judicial activism, he did contribute for re-hearing on questions of sentences, etc. The question is: Are you going to invite them again and snatch the power of the Minister or the President of India or the Chief Justice of India and place it in them? Certainly not. How can the practising lawyers say that they must have a say in the appointment of Judges when they go before the court to plead their cases? Do you want that power should be given to those people who argue their cases before the courts? It is the prerogative of the bar to convey their feeling to the Chief Justice when it is a High Court appointment or a Supreme Court appointment. I know in full measure that these views are being conveyed by the proper elected representatives. Those Members who signed this Bill some of them were Ministers. Agarwalji, you will remember that in 1979 when Morarji Bhai was the Prime Minister, the then Chairman Law Commission Justice Shri H.R. Khanna was asked to go into it. He said only two lines that the present system, constitutional scheme of the appointment of judges, is basically sound. It has on the whole worked satisfactorily. It does not call for any radical change. Now, if you are committed to judicial independence, how can you ask the members of the Executive to rub shoulders with the Chief Justice of India

and argue that so and so is good and so and so is bad? England has rejected it. Chief Justice Taylor in his broadcast over the BBC—five years ago I was in England when I heard him—said, "Nothing doing. We will not have this type of horrendous system of appointments. Lord Chancellor will recommend judges to Her Majesty the queen"

SHRI SATISH AGARWAL: I have also suggested that similar committee unwittingly—I do not think he meant it—when he said, "What role has the bar to play?" But later on you said that the bar has a greater role to play.

SHRI HANSRAJ BHARDWAJ (Madhya Pradesh): Sir, my name has been taken... (*Interruptions*)...

SHRI RAM JETHMALANI: Trust me, there is no misunderstanding.

SHRI HANSRAJ BHARDWAJ: Bar means, not a fragmented bar where a few Johnnies get together... (*Interruptions*)...

SHRI RAM JETHMALANI: Sir, a judge has no other constituency except the bar. If a judge who is acceptable to the bar, and the bar has nothing to say against him, you can 99 per cent assume that he must be a good judge. The Lord Chancellor of England makes appointments of judges in England, as you said. The Lord Chancellor was once asked, "How is it that you habitually make only good appointments and nobody can say a word against the appointments which you make?" Do you know what his answer was? He said, "If I make a bad appointment, whett-I go to have my lunch with the bar/ during the lunch hour, can I raise my eyes and meet their eyes squarely, if I make one bad appointment?" So, it is the influence of the bar which is preventing the Lord Chancellor from making bad appointments in England.

There is a judiciary sub-committee of the American Bar Association. Several

candidates for appointment as Supreme Court judges have been put forth by the President of America.

The American bar Association's Judiciary Committee has sat in judgement, criticised, analysed their roles in the past and whenever they have criticised these judges, the presidents, the mighty presidents of this mighty democracy have been compelled to withdraw their candidates because of the effect of the bar. We have proposed a Judicial Commission in which the bar of the country will also be represented. So, Sir, all that I am suggesting today is, please do not revert to that ridiculous model which prevailed, a model which worked because there were great people to work it. Even a bad model can work when there are great people around to work it. Pt. Jawaharlal Nehru, in 15 years of Prime Ministership, did not turn down even a single recommendation made by the Chief Justice of India. When you have a great man at the top, it works however bad the model is. It is only when lesser mortals had succeeded that great personality of the country that these disturbances had taken place, these conflicts have arisen and these conflicts are now sought to be

resolved. I would today trust the judiciary. If you would try to attempt to revert' to the Gupta Model, the bar of this country, the intellectuals of this country and, be sure, that the common man in this country will resist and you will be sounding the death-knell of your own Government, if not your own personal death-knell as the Law Minister. Please refrain from doing it. The country is faced with much more serious problems. Why has it become necessary just now to embark upon the process of a wide constitutional amendment to overturn

a nine-judge judgement of the Supreme Court? Why has it become necessary? The people of this country will draw only one inference that you are irked by what the judiciary is doing at the moment and surely you are not irked by a couple of vacancies here or a couple of vacancies there; you are irked by what judges are doing to the corrupt politicians. I hope the judges will continue to do their job of dealing with corrupt politicians and they will do it and successfully accomplish it before the Government of the day has a chance to tinker with the current process of appointment, namely, the 1993 model. So, Sir, I want a Judicial Commission. I want a debate. I do not want a reversion to the 1993 model. I hope I have made my position clear, Mr. Khalap. should be set up. There is a committee in the U.K. There is a committee in the U.S.A.

SHRI HANSRAJ BHARDWAJ: We should also set up a committee. We are committed to this cause. Ram is here, I would like him to hear me. You see, you cannot be a partisan bar. Can you divide the bar on this issue? Can you divide the Judiciary on this issue? Or search your soul that you are not divided.

SHRI NARENDRA MOHAN: ...partisan bar here.

SHRI HANSRAJ BHARDWAJ: It is a question of partisan approach that you don't consult anybody, and you form a judicial committee of accountability. What is that? You should include all shades of lawyers in it. We are prepared to sit and talk to the Minister. But, that is never done. You force your decision in the throat of everybody and say, "Sir, Only we stand for judicial independence." We have demonstrated that yes, judicial independence is essential, more particularly in the present day context when the judiciary is asked to

perform very delicate duty, when other institutions like Parliament and the Executive are not performing their functions honestly and dedicatedly. I agree that this is a very delicate time, but Satishji, you tell me can there be any possibility of a solution if the country as a whole does not suggest that this is the proper method? I think, if a debate is started by the Government...

SHRI SATISH AGARWAL: I have pleaded for that. Don't be unfair to me. I have not said that you adopt this draft as a model draft.

SHRI HANSRAJ BHARDWAJ: I myself sought this clarification yesterday. I will just take two-three minutes more. I am worried about other issues. Now, seven High Courts today are without proper Chief Justices. When we are having this debate, we have no Chief Justice in Delhi; we have no Chief Justice in Tamil Nadu; we have no Chief Justice in Patna; we have no Chief Justice in Gujarat and we have no Chief Justice in Guwahati.

SHRI ANANTRAY DEVSHANKER DAVE (Gujrat): There is an acting Chief Justice in Gujarat.

SHRI HANSRAJ BHARDWAJ: No, no. Acting Chief Justice... Please don't interrupt me. I am speaking on the floor of the House with full knowledge. I want full fledged Chief Justices. My worry is that sooner some more vacancies will come. Rather than diverting the attention of the Government on these issues, we should request that immediately that old system of keeping acting Chief Justices should not again be reverted to. Let us do some work. We should give full cooperation to the present Chief Justice

who is trying to do his best. All chief Justices have done their best. Let us not criticise them.

Chief Justice Ahmadi did an excellent work. He brought the arrears down from 67,000 to 20,000. Chief Justice

Venkatchelliah did take some steps and appointed transferred about 150 judges. In my whole tenure of 10 years, one transfer was made and there was a hue and cry. But, since he was known as a dedicated judge, he appointed and transferred about 150 judges. No cry! So, if you rely on the Judiciary — it is safer to rely on the Judiciary rather than relying on other institutions. But, the main thing is this. What happened to Supreme Court appointments after the nine-judge bench? Are you able to appoint judges? They are again divided. Who is going to set them right? Three of them don't see eye to eye on appointments. What is the solution? The solution is the bar. The senior members of the bar should talk, and help in filling the vacancies. From 18, judges we brought it to 26.

The Law Minister is waiting and no recommendations have come. We, as Members of Parliament, are only concerned that courts should dispose of cases quickly, and for that they should fill up vacancies quickly. Now the ball is in their court. Today if we say that public confidence in the judiciary is more as against the executive, it is because of our respect for the judiciary and that is a commitment of our founding fathers. May I remind you that when an *ad-hoc* committee was constituted in the Constituent Assembly over the Supreme Court, the founding fathers had rejected its recommendation. They said, no. Dr. Ambedkar had particularly said, "This is a middle path where neither the President nor the Chief Justice has a primacy." If you give primacy to the Chief Justice only, that means he would direct the President and virtually he would rule him over. So, something has to be done, and the proper method is that these things have to be discussed. In the matter of appointments, if the Chief Justice of India consults the senior judges, there is no harm in it. But what if they do not support the Chief Justice?

My purpose of participating in this debate is to draw the kind attention of the hon. Law Minister to this fact: Let us not get bogged down into these controversies because your Government does not have a two-thirds majority. The better course would be to have a committee constituted, consisting of Members of Parliament who are lawyers, and circulate their views and our views. After that let a public debate go on. In the meantime, please, for God's sake, have the appointments made to the various High Courts and the Supreme Court quickly so that the consumer of justice does not suffer. This is what I wanted to say. Otherwise, you will bring this institution into a controversy. You can say anything but that does not serve any purpose. You can have judicial independence only when we all unite, irrespective of our affiliations to various parties, and see reason rather than personal gains. I would again appeal to all. Some persons are desirous and say that after retirement they would come and contribute something. They should do something in the field of law, in the courts, in Lok Adalats and elsewhere. When I was the Minister, some of the retired judges used to hover around in Delhi for appointment. This is not a proper thing. We should ban their appointment in such activities such as commissions, this and that.

THE VICE-CHAIRMAN (SHRI MD. SALIM): Shri H. Hanumanthappa, not here. Shri Sundaram.

SHRI N. THALAVAI SUNDARAM (Tamil Nadu): Sir, I am very happy to note that both the Law Minister and the Welfare Minister are here. As far as the appointment of judges for the High Courts is concerned, there is no provision of reservation in the Constitution. Everyday, in India, we are fighting for reservation for SCs and STs. Mr. Minister, you must, at least, bring some amendment with regard to reservation for

SCs and STs in the High Courts. I now want some clarification as far as the Chennai Court is concerned. Last month seven judges were appointed there. Out of seven, four were from the Bar and three were from the judiciary. Out of three, only one was from the Scheduled Tribes. Our hon. friend said that there was a writ petition filed by a lawyer against the particular judge because he belonged to the Scheduled Tribe.

SHRI NARENDRA MOHAN: No. The allegation was not at all that. The question was that he was of some dubious... *(Interruptions)*..

THE VICE-CHAIRMAN (SHRI MD. SALIM): I have already told, we are not going to discuss the conduct.

SHRI N. THALAVAI SUNDARAM: Some advocate had filed a writ petition against a particular district judge. That is the reason. He is transferred to Kerala now. This is the position of judicial system in India. This is because appointment of judges and also the transfer of judges is vested in the Chief Justice of India and the concerned High Court. My question is: Do you have any reservation with regard to appointment of judges for the High Courts and the Supreme Court? As far as constituencies are concerned, we have reservations in the country. With regard to reservations in the departments, we have. But as far as appointment of the High Court judges and the Supreme Court judges is concerned, there is no reservation. If there is an amendment by the Minister, it would be better. I request him to bring forward in this house an amendment. There must be a chance for the SC and ST people in the appointment of High Court and Supreme Court judges. There is another instance of the Madras High 6.00 P.M.

Court. One advocate filed a writ petition that the cars of the Judges of the High Courts should be provided with flags and red lights. The concerned judge passed an

I order that the cars of judges should be provided flags and red lights within two J days by the Government, they have many S powers, they are not concerned about the Government. Sir, after this judgment the Government gave its sanction for red lights and flags. Another instance that I would like to quote is about the Andhra High Court. When Chief Justice of the High court went to Tirupati, there was some problem. Immediately a gentleman filed a writ petition before the Andhra High Court which immediately passed an order that whenever the judges visit the Tirupati temple, they should be provided with a DSP along with some other officials from the local area. Now, these are the things which are taking place in our judicial system. Sir, we are provided with certain discretionary quotas with regard to LPG connections and telephones, etc. Sir, in the same way judges have also a discretionary quota because the Supreme Court has passed an order. I am not against any order from any High Court or the Supreme Court. This is the system in India. Sir, we are the executive; we are Members of Parliament. Our learned friend, Shri Satish Agarwal, has just now said that there should be a Judicial Commission for our country. For example, if somebody says that he appoints me a Member of Parliament, will the Chair accept it? ...*(Interruptions)*.. We have to protect the interests of our country. I request the hon. Minister that he should bring an amendment for the appointment of a Judicial Commission, There should also be reservation of posts for SC/ST people.

SHRI RAM JETHMALANI  
(Maharashtra) Mr. Vice-Chairman,  
thank you very much for giving me somewhat generous time and not being technical about this half-an-hour business. One may not agree with me, but, at least, I leave no doubt as to what I have to say. The practice which prevailed from the coming into force of the Constitution

up to the time that Gupta's case propounded the existing system. Now, that system, according to me, was an evil. When Gupta's case was reversed in 1993, that produced a better system, but, certainly, not a perfect system. Probably a perfect system with human beings is not a possibility. That system too has its faults. We do not want to revert back to the worst system. We also want a change from the present 1993 system. We want a third system altogether in which the power is vested neither in the Executive nor in the judiciary. The question of primacy does not arise. But the power is vested in a Judicial Commission, in which certain interests which have got to be consulted if you are appointing good judges, must be properly represented. Mr. Vice-Chairman, a joke—my friend Bhardwaj will pardon me which was produced by the system which was sanctified by Gupta's case is that it produced two kinds of judges—judges who know the law and the judges who know the Law Minister...*(Interruptions)*..

SHRI HANSRAJ BHARDWAJ: All the 23 judges appointed in my time were excellent and competent...*(In terruptions)*...

SHRI RAM JETHMALANI: I am talking of a joke. ...*(Interruptions)*... You were fairly a good Law Minister.

Now, Sir, it is being said that we want to revert back to the pre-1993 position because they say that pre-1993 position had existed from the commencement of the Constitution and it has the wonderful authority of the great Dr. Ambedkar. These are some misgivings which required to be dispelled and I will take only three minutes of your time to be able to dispel all. The Constitution of India had to be enacted in a hurry. We had selected a date by which it had to be brought into force, and certain matters were deliberately left undisposed of. One of the matters which was left undisposed of was the formulation of the privileges

of the Members of Parliament and the J Members of Legislatures and we just said 1 that the privileges should be such as were } enjoyed by the House of Commons in England. Now, similarly, the power of appointment was left, really, unregulated. There is no doubt, it is vested in the president and there is no difficulty if the formal power of appointment is always continued to vest in the President of India who represents the unity and the sovereignty of the nation. That formal, ceremonial power of appointment is not sought to be tinkered with. What is sought to be tinkered with is, the substance of the power. Should the substance of the power lie with the Executive of the day or should the substance of the power lie with judges who decide disputes or should it lie with a third body altogether? This is the primary question which has to be considered. So far as the executive is concerned, it is one of the most copious litigants today. When a citizen asks for enforcement of his Fundamental Rights, he is complaining against the misuse of power by the Executive. When you are talking of corruption, you are talking of some corrupt bureaucrat or his corrupt political. So, the Executive is a party in most of the disputes which affect the liberty of citizens, the property of citizens and more than anything else, the Fundamental Rights of citizens. The question of principle is, should a litigant have a voice in the appointment of judges who are going to sit in judgement over the disputes in which the Executive itself is involved? Sir, Dr. Ambedkar's speech In the Constituent Assembly needs to be studied again and again. Dr. Ambedkar, clearly said in his speech that the power ought not to be vested in the Executive, the power must be vested in a larger body. But, obviously, there was no time to formulate the nature and characteristics of that larger body. In Gupta's case, the formal position was recognised as it existed on the literal

interpretation of the Constitutional word 'consultation.' What did Mr. Bhagwati say? Mr. Bhagwati said: "we would rather suggest that there must be a collegium to make recommendations to the president in regard to the appointment of a Supreme Court or a High Court Judge. The recommending authority should be, more broad-based and there should be consultations with wider interests." Then, he ended up by saying: "we may point out that even the countries like Australia and new Zealand have veered round the view that there should be a judicial commission for appointment of the higher judiciary." Sir, here, I want to correct my friend, Mr. Khalap, for whom I have great affection and regard. He is living in a world of dreams when he says that when the Executive makes an appointment, the people of India are making an appointment. Today, ask yourself, do a little introspection and ask yourself one question. Do not answer it openly, but answer it to yourself. Today, the people of India have more confidence in our judges than in our politicians. Today, a politician has to go around the country with his head hanging down in shame, his credibility is at low watermark. And today, please, therefore, do not tell us that when a law Minister makes an appointment, it is the people of India who are making an appointment and when Australia, New Zealand and other countries have vested this power in a judicial commission they have abrogated the rights of the people, taken away the powers of the people and put them in some alien hands. That is *i*\*A correct. The commission which we proposed—the judicial commission—was propounded by this Committee. I have some slight differences with them because I believe that a judge who decides political disputes—all political disputes have the habit of turning into a Constitutional dispute—between the ruling power and the victim of the ruling power or between

the ruling power and the opposition groups must be a judge who should command universal respect. And a judge ! who commands universal respect must necessarily be a judge in whose appointment the sole voice is certainly not of one party but of all parties. We therefore, propose a judicial commission in which the Judiciary itself should be represented, in which the Government of the day should be represented, in which the Leader of the Opposition should be represented and wider academic and social interest should be represented and this collegium which Dr. Ambedkar had in his mind, which Mr. Bhagwati had in his mind and which other people have in their mind should be the collegium whose appointments will certainly carry much more respect than an appointment which emanates either from a Law Minister or only from the Chief Justice of India. Sir, my friend, Shri Bhardwaj, I do not know,

**श्री जलालुद्दीन अंसारी (बिहार):** उपसभाध्यक्ष महोदय, सारी बातें आ गयी हैं। मैं एक दो सवाल रखना चाहता हूँ। अभी अपने देश में न्यायपालिका की सक्रियता की बहुत चर्चा होती है। साथ ही साथ सुप्रीम कोर्ट और हाई कोर्ट के जजों की बहाली के संबंध में भी चर्चा चल रही है। ऐसी स्थिति में हम ला मिनिस्टर साहब से चाहेंगे कि कोई ऐसा एपाइंटमेंट का क्राइटेरिया तब होना चाहिए जैसे सुझाव आ रहे हैं जुडीशियल कमीशन के बारे में एक बार इसको विचार करने की आवश्यकता है। यह सही है कि हाई कोर्ट और सुप्रीम कोर्ट के जजेज की बहाली कर जो तरीका है, जो बाहर से आते हैं, उसमें है कि दस साल तक जिनका प्रैक्टिस है वे चुने जायेंगे। तो कौन उनका नाम रेकमेंड करता है? सरकार करती है? गवर्नर और राष्ट्रपति जी इसको एप्रूव करते हैं? यह स्पष्ट है कि जिनकी लीडिंग प्रैक्टिस है, आम तौर पर लीडिंग प्रैक्टीशनर्ज जज नहीं बनना चाहते हैं। जज बन जाने के बाद, उनको हाई प्रैक्टिस से जो पहले इन्कम होती थी वह नहीं हो पाती और जजेज की जो सेलरी आदी है वह लिमिटेड है। यह ठीक है कि यह एक प्रेस्टीजियम पोस्ट है, लेकिन इन्कम के ख्याल से वह नहीं है। इसलिए एक हिस्सा जो अच्छे एडवोकेट्स



का है वे जजशिप में जाना भी नहीं चाहते हैं। यह तो अभी चली आ रही है कि जिसकी सरकार होती है वह उसी हिसाब से चयन करती है। इसमें कहीं कोई विवाद नहीं है।...**(व्यवधान)** वही कह रहे हैं कि इसलिए यह गड़बड़ी हो जाती है। अभी अभी माननीय आडवाणी जी और शुक्ला जी की अपील पर दिल्ली हाई कोर्ट के जज ने जो रेमार्क दिया अपने के नीचे के जज पर कि उनको लॉ कि जानकारी ही नहीं है तो कैसे समझा जाए कि जो नीचे वाले जज हैं उनको कानून की जानकारी नहीं है। मैं सहमत हूँ कि कोड़ ऑफ़ कंडक्ट तो सब के लिए होना चाहिए।...**(व्यवधान)**

श्री त्रिलोकी नाथ चुतर्वेदी उस मुकदमे में नहीं कहा दुसरे मामले में कहा है

श्री जलालुद्दीन असारी वह किसी भी मुकदमे में हो तो इस तरह से वह चला आ रहा है समझने का विषय यह है कि ऊपर का जज नीचे के जज को कहे किसी भी मामले में किसी भी निर्णय में कि उसको कानून की जानकारी नहीं है,

तो इस तरह से वह चला आ रहा है समझने का विषय यह है कि ऊपर का जज नीचे के जज को कहे किसी भी मामले में, किसी भी निर्णय में कि उसको कानून की जानकारी नहीं है, तो यही प्रश्न उठता है कि क्या सही मायने में एप्पायंटमेंट में सक्षम लोगों की नियुक्ति होती है या नहीं? मैं कहना यह चाहता हूँ तो इसीलिए आज प्रश्न उठ गया है। ये सारे जो सवाल हैं इनको एक सही तरीके से और जुडीशियरी की इंडीपेंडेंस होनी चाहिए ताकि वह सही ढंग से मामले का निष्पादन कर सके। वह किसी का पक्ष, विपक्ष नहीं ले और एकाडिंग टू लॉ वह अपना काम करे। लेकिन इसके लिए जरूरी है कि जुडीशियल कमीशन बने और उसको किस तरह से बनाया जाए। जजेज़ की नियुक्ति में, उनकी ट्रांसफर में, इस संबंध में हमारा और गया सिंह जी का प्रश्न था। उसमें यह भी सवाल था कि सुप्रीम कोर्ट और हाई कोर्ट के जजेज़ एक दूसरे कि रिश्तेदार हैं। माननीय लॉ मंत्री जी ने कहा कि अभी यह बताना संभव नहीं है। तो इधर से हाउस से आवाज आई थी, आप सभी लोग थे कि क्या इसके लिए कोई कमीशन आप बैठाना चाहते हैं और उसकी इन्क्वायरी हो जाए कि वे जो आरोप हैं वे किस हद तक सही हैं। यह देश की जनता के सामने और सदन के सामने भी आ कि क्या वे रिश्तेदारी में हैं। कहीं पर जो शंका पैदा होती है उसका निराकरण तो हीना है पब्लिक लाइफ में भी, पोलिटीकल पाइफ में भी, जुडीशियरी की लाइफ में भी और हर जगह।

इसीलिए हम माननीय लॉ मंत्री जी से कहना चाहेंगे कि यह जो सवाल उठ गए हैं, इन पर गंभीरतापूर्वक विचार करके इसमें सारे तरह के लोगों से, जुरिस्ट है, हमारे देश में रिटायर्ड जज है और पोलिटीकल पार्टी के लोग हैं, सारे लोगों से राय विचार करके इसको कैसे बेहतर बनाया जाए इस दिशा में आप कोई कारगर कदम उठाने की बात करें। यही मेरा निवेदन है।

इन्हीं शब्दों के साथ, मैं अपनी बात समाप्त करता हूँ।

شری جلال الدین انصاری "ہمار": اپ سہا پتی ادھیکش

مہودے۔ ساری باتیں اگئی ہیں۔ میں ایک دو سوال رکھنا

چاہتا ہوں۔ ابھی اپنے دیش میں "نیا پالیسی" کی سکریٹا کی

ہمت چرچہ ہوتی ہے۔ ساتھ ہی ساتھ سپریم کورٹ اور ہائی

کورٹ کے ججوں کی بحالی کے سمبندھ میں بھی چرچہ

چل رہی ہے۔ ایسی استہی میں ہم لا منسٹر صاحب سے

چاہیں گے کہ کوہ ایسا اپائینٹمنٹ کاکرائٹیریا طے ہونا چاہیے۔

جیسے سجھاؤ آرہے ہیں جوڈیشیل کمیشن کے بارے میں

ایک بار اسکو وچار کرنے کی ضرورت ہے۔ یہ صحیح ہے کہ

ہائی کورٹ اور سپریم کورٹ کے جج کی بحالی کا جو طریقہ

ہے جو باہر سے آئے ہیں اسمیں یہ ہے کہ دس سال تک جنکا

†[]Transliteration in Arabic Script.

پریکس ہے وہ جنے جائینگے تو کون انکا نام ریکمنڈ کرتا ہے۔ سرکار کرتی ہے۔ گورنر اور راشنریٹی جی اسکو ایپروو کرتے ہیں۔ یہ سیشٹ ہے کہ جنک لیڈنک پریکس ہے عام طور پر لیڈنک پریکٹیشنرز جج نہیں بننا چاہتے ہیں۔ جج بن جانے کے بعد انکو ہائی پریکس سے پہلے جو انکم ہونی تھی وہ نہیں ہو پاتی اور ججز کی جو سیلری وغیرہ ہے وہ لمیٹڈ ہے یہ ٹھیک ہے کہ یہ ایک "پریسٹیجیس" پوسٹ ہے۔ لیکن انکے خیال سے وہ نہیں ہے۔ اسلئے ایک حصہ وہ اچھے ایڈووکیٹس کا ہے وہ "جج شپ" میں جانا بھی نہیں چاہتے ہیں یہ تو ابھی چلی آرہی ہے کہ جسکی سرکار ہوتی ہے وہ اسی حساب سے چین کرتی ہے۔ اسمیں کہیں کوئی اختلاف نہیں ہے۔ مداخلت..... وہی کہہ رہے ہیں کہ اسلئے یہ گزبڑی ہو جاتی ہے۔ ابھی ابھی مانہ ایڈوانی جی اور شکلا جی کی اپیل پردلی ہائی کورٹ کے جج نے جو ریمارک دیا اپنے کے نیچے کے جج پر کہ انکو لاکی جانکاری ہی نہیں ہے تو کیسے سمجھا جائے کہ جو نیچے والے جج ہیں انکو قانون کی جانکاری

نہیں ہے میں متفق ہوں کہ "کوڈ آف کنڈکٹ" تو سب کے لئے ہونا چاہئے..... مداخلت..... شری ترلوکی ناتھ چٹرویدی: اس مقدمے میں نہیں کہا دوسرے معاملہ میں کہاں ہے۔ شری جلال الدین انصاری: وہ کسی بھی مقدمے میں ہو..... مداخلت..... تو اس طرح سے وہ چلا آ رہا ہے۔ سمجھنے کا و شے یہ ہے کہ اوپر کا جج نیچے کے جج کو یہ کہے کسی بھی معاملے میں۔ کسی بھی فیصلے میں کہ اسکو قانون کی جانکاری نہیں ہے تو یہی سوال اٹھتا ہے کہ کی صحیح معنوں میں اپائنٹمنٹ میں اہل لوگوں کا انتخاب ہوتا ہے یا نہیں۔ میں کہنا یہ چاہتا ہوں۔ تو اسلئے آج پرسن اٹھ گیا ہے۔ یہ سارے جو سوال ہیں انکو ایک صحیح طریقہ سے جوڈیشری کی انڈپینڈینس ہونی چاہئے تاکہ وہ صحیح ڈھنک سے معاملہ کا نشپادرن کر سکیں۔ وہ کسی کا پکش وپیکش نہیں لیں اور "ایکارڈنگ ٹولاء" وہ اپنا کام کرے۔ لیکن اسکے لئے

ضروری ہے کہ جوڈیشیل کمیشن بنے اور کسی طرح سے اسکو بنایا جائے۔ ججز کے تقرر میں۔ انکی ٹرانسفر میں اس سمبندھ میں ہمارا اور گیا سنگھ جی کا پرسن تھا۔ اسمیں یہ بھی سوال تھا کہ سپریم کورٹ اور ہائی کورٹ کے جج ایک دوسرے کے رشتہ دار ہیں۔ ماننیہ لامنتری جی نے کہا کہ ابھی یہ بتانا صلیں نہیں ہے۔ تو ادھر سے ہاؤس سے آواز آئی تھی۔ آپ سبھی لوگ تھے کہ کیا اسکے لئے کوئی کمیشن آپ بٹھانا چاہتے ہیں اور اسکی انکوٹری ہو جائے کہ یہ جو آروپ ہیں وہ کس حد تک صحیح ہیں۔ یہ دیش کی جنتا کے سامنے آجائے کہ کیا وہ رشتہ داری میں ہیں۔ تو کہیں پر جو شنکا پیدا ہوتی ہے اسکا "نرا کرن" تو ہونا ہے۔ پبلک لائف میں بھی۔ پولیٹیکل لائف میں بھی۔ جوڈیشری کی لائف میں بھی اور ہر جگہ۔ اسی لئے ہم ماننیہ لا منتری جی سے کہنا چاہینگے کہ یہ جو سوال اٹھ گئے ہیں ان پر سنجیدگی سے غور کر کے اسمیں ساری طرح کے لوگوں سے جو رسٹ ہیں ہمارے دیش میں۔

ریٹائرڈ جج ہیں اور پولیٹیکل پارٹیز کے لوگ ہیں سارے لوگوں سے رائے وچار کر کے اسکو کیسے بہتر بنایا جائے۔ اس طرف آپ کوئی کارگر قدم اٹھانے کی بات کریں۔ یہی میرا نویدن ہے۔ انہی شبدوں کے ساتھ میں اپنی بات ختم کرتا ہوں۔

DR. BIPLAB DASGUPTA (West Bengal): Mr. Vice-Chairman, Sir, I feel somewhat hesitant to speak on a legal subject, following some of the legal luminaries of the country like Shri Ram Jethmalani ... (Interruptions)

THE VICE-CHAIRMAN (SHRI MD. SALIM): Mr. Malkani is asking why do you speak?

DR. BIPLAB DASGUPTA: Still I should speak. I too have some legal pretensions like everybody else. Now, as far as I understand, the objective of the Government is...

SHRI TRILOKI NATH CHATUR-VEDI: Legal pretension is one of the pretensions.

DR. BIPLAB DASGUPTA: You may not know. I am a non-practising advocate of the Calcutta High Court. Does it entitle me to speak now?

SHRI SATISH AGARWAL: Why do you disclose the secret? A non-practising lawyer is a briefless lawyer!

DR. BIPLAB DASGUPTA: I never sought a brief.

Sir, as far as I understand, the objective of the Government was to go back to the pre-1993 status, and it wants to amend the law to ensure that the word "consultation" is not taken as cotermin-

ous with concurrence. So they wanted to spell it out that consultation doesn't mean concurrence and to give the power of appointment of Judges to the President of India. Now, President is a fiction. When the power of appointment of Judges is given to the President, it means that the power is given to the Government of the country. So, this is the question.

SHRI NARENDRA MOHAN: Not the Government but the ruling party of the country.

DR. BIPLAB DASGUPTA: All right. This, is the question. I would ask my friend, Mr. Ramakant Khalap, to consider the current political context in which we are having the debate. It is not taking place in a vacuum but in a particular political context. I agree that like in all walks of life, whether it is professors or doctors or civil servants, Judges come in all shapes and sizes, in all colours. There are good Judges, bad Judges, honest Judges, corrupt Judges. Like Mr. Bhardwaj, I can also give you a hundred stories of bad Judges. And I can also tell you a hundred stories of very good Judges. But that is not the point. The issue now is, just at this moment in our country the credibility of the Government is at its lowest, the credibility of Parliament is at its lowest. The man in the street would rather trust a Judge than a Member of Parliament or a Minister. We know what had happened over the last five years. All these scams! What has Parliament done to ensure that the scams are investigated? What has the Government done? Twenty Ministers of the previous Government are being charge-sheeted. All these things are at the background. In this situation, we will have to see how to assess the role of the Court.

Now, obviously, from a long-term point of view many other issues might have to be taken into account. Obviously, there is the question of division of power among the three organs of the State—the legislature, the executive and the judi-

ary. Obviously, their balance has to be restored, but this is not the time.

Judicial activism has been prompted by the current political situation. It is a political reality that without judicial activism, most of these hawalas and scams would not have been unearthed. This is the context. In this situation, I hope that the Minister would not try to give an impression to the people that he is trying to get the power for the executive for the appointment of Judges. There should not be any doubt in the minds of the people that we are compromising the independence of the Judges.

There is no point in comparing India with England, America or Australia. I am not saying about America, but both in the United Kingdom and Australia, the level of public morality is much higher. There is corruption, but the level of integrity is much higher. They are guided by some conventions which have been going on for many, many years now. There are certain conventions which guide the functions of the Lord Chancellor, as Mr. Jethmalani was saying. We don't have such conventions. So, it is not that we simply, mechanically, borrow whatever is being done in America, Australia or England. The question is, in which political context? It is in a political context where, even after 50 years of Independence, we don't have a party system. Any one can go from anywhere to anywhere. So, in this situation where we don't have the minimum of political integrity, the minimum of loyalty to the party to which we belong, in this situation where there is no convention and even written things are violated, the Government should not give an impression to the people at large that we are trying to give more powers to the executive to appoint Judges, which might also mean to influence the Judges. In this situation I would say that the Judges should be treated like the Lok Pal or even the Election Commission.

We have been having a lot of debate, over the last few years, as to how to make the nomination of the Lok Pal or even of the Election Commission, completely independent of the various political forces.

We had a good debate on this for the last two or three years. "What I am saying is that, taking this into account, there should be an attempt to ensure that the independence of the judiciary is not compromised. In this situation, I would request my friend, comrade Khalap, not to create another controversy.... (Time bell rings).... I am concluding now.

Please don't create another controversy. What you can do is you can produce a position paper. There should be a further discussion, debate on this in the country. Encourage a debate. Mr. Jethmalani has suggested creation of an independent, extra judicial commission, a collegium, for appointing Judges. That can also be done. But the last thing you should do how is to create a controversy which is not going to help at all, particularly when the credibility of Parliament and the Government is at its worst. I am not talking about this Government or even about the previous Government; I am talking about the role of the Government in the last five or six years. What I am saying is that in this situation it will be wrong for the Government to create such a situation where we all get discredited as if we are trying to concentrate power in our hands in order to compromise the independence of the judiciary.

Thank you very much.

SHRI RAMAKNAT D. KHALAP: Sir, this debate has thrown up two opinions. One opinion is that the system which prevailed prior to the 1993 Judgement of the Supreme Court was not a good system. Number two, we should make any changes now in the Constitution so as to go back to the pre-1993 position because, in the opinion of the

learned Members of this House, the image of the Government, that is, the executive is very low in the eyes of the people. Dr. Biplab Dasgupta has said that the image of parliamentarians also has gone down to such a low extent that people refuse to believe that there can be any honesty or that there can be any integrity either in the executive or in Members of Parliament.

Sir, very humbly I say that this self-condemnation may give us some sort of a feeling that we are trying to assuage the feelings of the public at large. I feel, at the same time, that this self-condemnation may also further strengthen the people's thinking that there is no future for politicians in this country and that there is no future for the executive in this country, therefore, the public perception of independence, integrity and honesty of Members of Parliament or the executive would be further eroded.

I would say that the time has come for all of us to sit back and evolve measures by which we can regain this confidence. This can be done in many ways. One would be to be so good and excellent in our behaviour and in our dealings with each other and in our dealings with people that people start "believing in us. If we go on doing this line of thinking that we are all incorrigible and that people will- never believe that the executive will do any good in this country, I think that the very concept of democracy will be in danger.

SHRI TRILOKI NATH CHATUR-VEDI: Nobody says that it is incorrigible. The point is that it has fallen on bad days. That is the point. This is the time for self-correction and introspection.

DR. BIPLAB DASGUPTA: We will restore the belief later.

SHRI RAMAKANT D. KHALAP: I am on this very point. In fact, we should now think about this very seriously. You go anywhere today. People point fingers

at politicians. People point fingers at Ministers. Of course, there are causes for this. Many of us have contributed to this thinking of theirs.

put should we allow the deterioration in principles in this manner? Can we not stand up and say, "Yes, I am a representative of the people. I believe in my own integrity and in my honesty."? Can we not behave in such a manner that once again this confidence can be re-won, that we can win back this confidence?

Therefore so far as the question of judicial appointments is concerned, the time has come where we choose this system or that system.

I would now go back to the history. A reference has been made by the hon Member, Shri Ram Jethmalani, to Am\* bedkar. When our Constitution was being enacted this very point was discussed in the Constituent Assembly. At that stage, he has rightly pointed out, it was said that we shall not go to a method by which the appointment is done either by the Executive directly with full powers in its hands or with total power to be given to the judiciary to see what should be done. The middle path was accepted. The middle path was that of consultation. If you read Article 124 or Article 217, the consultation was not limited to the Chief Justice and his two senior-most companion judges. Of course, it is my opinion. A different interpretation has now come up. But if you read, the plain reading of the Article will show that the consultation would be not only with one Supreme Court chief Justice or two or three judges but such judges of the Supreme Court. That means the process of consultation could be with two, with three, with five, with ten judges of the Supreme Court or with similarly with the judges of the High Court. That was the scope of the consultation. That scope of consultation has got reduced now. And what is the procedure now? My learned predecessor referred to the Memorandum of Procedure for ap-

pointment of judges.

SHRI HANSRAJ BHARDWAJ: Let me correct, Mr. Law Minister. I never surrendered. I differed with them and did not appoint several judges if I did not like. I used to satisfy them with relevant facts. In one appointment, I may correct you, the Chief Justice of India did not recommend the next Chief Justice of India. I consulted the other judges. It was Justice Pathak's appointment. Initially Justice Bhagwati did not recommend it. I went to the other judges and appointed him. But we have to assert, because we are not sitting silent.

SHRI RAMAKANT D. KHALAP: I am not speaking about anybody surrendering to any one. (*Interruptions*)

SHRI HANSRAJ BHARDWAJ: It was in the Press.

DR. BIPLAB DASGUPTA: Maybe you should not have confirmed that Whatever has happened between you and the Chief Justice for the appointment of the successor Chief Justice was between you and the Chief Justice.

श्री त्रिलोकी नाथ चतुर्वेदी: भारद्वाज साहब, आप भी नाम मत लीजिए।

SHRI RAMAKANT D. KHALAP: I never said that the learned predecessor surrendered to anybody. It is not a question of surrendering. We hold our judiciary in very high esteem. I personally hold the judiciary in the highest esteem. I said this in this House and in the other House and I have also said this publicly. I have also said, in the omity of ations, if we look at our judiciary, it is the best judiciary that we have notwithstanding some complaints that anybody would make. Those complaints are bound to be there, because we are human beings. We are all men and we come from the people and we reflect the people's

aspirations. Some of us will be good, as you said, and some of us will be bad. So, what applies to the judiciary applies to us

also. Let us not condemn ourselves totally. Some of us will be bad and some of us will try to bargain or subvert the process. *(Interruptions)*

So, when I refer to the people's power of appointment, What I meant to say was that ultimately all of us are representatives of the public. We are accountable to the public. If we make any wrong choice, finally the question will be asked by the people. When the question of impeachment of a particular judge came last time and when the House did not rise to the occasion on those days, people asked us: Why is it that the Parliament did not rise to the occasion and take the proper action? This is the aspect of the accountability and this is what I say is the people's power. If people did not like what was done, they told the concerned people to sit away from the seat of power. So, this is the consultation process; this is the power about which I spoke knowing very well what limitations we suffer from. So, in the present system that is the import of the last judgment. One of the conclusions that one derives from this judgement is that no appointment of any Judge of the Supreme Court or any High court can be made unless it is in conformity with the opinion of the Chief Justice of India. This is the present position. In exceptional cases for stated strong cogent reasons disclosed by the Government indicating that the recommended person is not suitable for appointment, that 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 other Judges of the Supreme Court who have been consulted in the matter, on the reiteration of the recommendation by the Chief Justice of India, appointment should be made as a healthy convention. Of course, I have not criticised the judgement as such. I am only expressing a view because many others have done it. Instead of the President consulting Judges, now the judiciary says, "ap-

point so and so." The process has been reversed. The President is left with no other choice. The only exception is, if the President or the executive does not agree, that appointment may not be made. So, it is only the negative aspect, not the positive aspect. Therefore, in this context one more question arises.

SHRI TRILOKI NATO CHATUR-VEDI: Cogent reasons are there. Why should we be afraid of the judiciary? when we say that, yes, let us work with integrity, let us work with honesty, let us

work in the interest of the people and if transparency is there, if we are honest enough to put the facts on record, why should be afraid of them? I am inhibited from saying quite a few things, that is why as a matter of propriety I just do not want to say anything, why should we think that Judges would always give a wrong advice and try to override or overawe the executive?

SHRI RAMAKANT D. KHALAP: I am sorry, I have not been properly understood. I think I did not make myself very clear. What I said was, by this judgement appointments shall be made only if it is in conformity with the opinion of the judiciary.

SHRI NARENDRA MOHAN: This judgement does not debar the Government to suggest name to the Chief Justice. When you suggest names to the Chief Justice, after proper consultations, perhaps, you can reach the right decision.

SHRI RAMAKANT D. KHALAP: This is the difference. I think my learned predecessor would be in a better position to answer this question. Would you?

SHRI HANSRAJ BHARDWAJ: Yes. let me explain. The position is like this. Earlier S.P. Gupta's case was giving the Minister a handle that if a recommendation came from the Chief Justice of a High Court, you could ignore the Chief Justice of India saying that at least there

was one recommendation. So, successive Chief Justices, Justice Ranganath Mishra and other Chief

Justices later on sat in a different Bench and said that this area needed to be corrected. Then, we had no objection to that that primacy of the Chief Justice among Judges should remain. But later on that limited reference was converted into a full debate in the Supreme Court by nine Judges. They said that the Chief Justice of India alone was not sufficient to be consulted, you have to add two more Judges from both High Court and the Supreme Court. So, it like an appointment committee of the executive wherein two Ministers and the Prime Minister make appointments. That is very well. But these are judicial appointments. They are not executive appointments. So, when this, judgement came, we went to the Chief Justice of India and the learned Minister would find that we discussed the memorandum of procedure and the judiciary has given a right to the executive to point out that if the executive does not agree with the recommendations, they are entitled to go back to the Chief Justice of India. Now, when the three Judges sit together and they say that they have gone into it, for example, let me elaborate. There is some QD report or IB report and in many cases they are false. So, the Minister himself can see that this was a wrong report. 'So, when the Chief Justice of India makes enquiries, he says, "I have gone into everything." The Chief Justice of India makes an elaborate enquiry. This process is very effective. The Department of Justice is like a judicial department. They don't take anything for granted. They do everything in their summary of procedure. If the judiciary says, "we have gone into his case, you appoint him", then, there is no vested interest with the executive. Therefore, there is no arbitrariness. I pointed out what Justice

Kuldip Singh said.....is a little disturbing I myself felt very upset about

it. he has said something which will bring some kind of a confrontation between the judiciary and the executive because that is with regard to the exercise of the powers of the Council of Ministers in advising the President. Now the judiciary says, "You shall exercise your powers of aid and advice to the President under article 74 on the view tendered by the judiciary. This is a very difficult proposition. When there is a demarcation of powers that the judiciary will do its own job and the Council of Ministers will do its own job, you cannot accept this proposition that we will tender advice to the President because the judiciary wants it. This is an area which, according to me as a professional, may be examined. The hon. Minister may also have it in his mind. It has already been pointed out to

the judiciary. Ambedkar answered it when he was asked what would happen if the President and the Chief Justice disagreed. He said that he did not envisage that because they were very high offices. But, today it can occur. Suppose the three Judges unitedly say "We do not agree with this idea, with this report; we do not agree; you appoint". And it has happened—I won't name the cases—where the President of India had reservations in spite of the Prime Minister agreeing. He has his own role. He said, "I am not going to appoint this man". He or she was not appointed and he had to agree. So, we should not bring a situation where by judicial fiat or order you have Judges appointed. Otherwise, as Ram said, the system works very nicely because the people who were holding positions were above-board. And if we all today decide, we can sit together and set right whatever aberrations are there.

SHRI NARENDRA MOHAN: But the problem arose because they wanted to have a committed judiciary.

SHRI HANSRAJ BHARDWAJ: I will not answer it. (*Interruptions*).



**उपसभाध्यक्ष (श्री मोहम्मद सलीम):** आप दोनों इस तरह से यहां सवाल जवाब नहीं चला सकते।

**SHRI RAMAKANT D. KHALAP:** I was trying to point out that by virtue of the judgment today, the executive.....

**उपसभाध्यक्ष (श्री मोहम्मद सलीम):** यह मुद्दा बहुत अहम है इसीलिए इसके लिए आधे घंटे की चर्चा चल रही है। डेढ़ घंटा हो चुका है। और अभी वैलफेयर मिनिस्टर की डिस्कशन है, उसको कनक्लूड करना है, वरना आने वाले हफ्ते में टाइम नहीं रहेगा।

**SHRI RAMAKANT D. KHALAP:** I was trying to point out that by virtue of this judgment today what has happened is that if the executive does not agree with the recommendations made by the judiciary, there may not be an appointment. But the vice-versa position is not possible. And the memorandum of procedure which has been adopted subsequent to the judgment, when Mr. Bhardwaj was the Minister of Law, is that the process of appointment of a Judge shall be initiated by the judiciary. That recommendation comes to the executive, to the Law Minister; the Law Minister thereafter sends it to the Prime Minister; and from there, it goes to the President. (*Interruptions*). Therefore, the process of consultation which is supposed to be talking to different persons or different constitutional authorities seems to have so narrowed down today that the consultation, if at all, takes place in the judiciary only; it comes to the Law Minister; it goes to the Prime Minister; and from there, it goes to the President.

**श्री त्रिलोकी नाथ चतुर्वेदी:** दूल्हा तो हैं नहीं। आपस में ठीक है, पुरोहित शादी कर देगा। हम उसमें क्यों अपनी टांग अड़ाएं?

**SHRI RAMAKANT D. KHALAP:** Therefore, the whole argument now rests on this particular issue.

**SHRI NARENDRA MOHAN:** Just a clarification. Are you suggesting that at present you are not suggesting the names, the names are coming from the Supreme Court?

**SHRI RAMAKANT D. KHALAP:** I Yes, that is the position.

**SHRI NARENDRA MOHAN:** Are you not allowed even to suggest names to the Supreme Court? I think you can suggest any name to the Supreme Court and this exercise is not being done by the Government of India now.

**SHRI RAMAKANT D. KHALAP:** Sir, the names are initiated, the process of appointment is initiated, by the Court, not by the executive.

**SHRI NARENDRA MOHAN:** This is completely a new thing.

**SHRI RAMAKANT D. KHALAP:** This is the position after 1993. This is the conclusion. I am reading out the conclusion:

"Initiation of the proposal for appointment in the case of 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. In the case of transfer of a judge or a Chief Justice of a High Court, the proposal shall be initiated by the Chief Justice of India. This is the manner in which proposals for appointments of judges in the Supreme Court and in the high courts as well as for transfers of judges etc. must invariably be made."

**SHRI RAM JETHMALANI:** Finally, it means that the formal process of consultation starts there. That does not mean that nobody has a right to suggest any appointment before.

**SHRI HANSRAJ BHARDWAJ:** There is a long correspondence. Nobody can stop the Law Minister from writing to the Chief Justice. We have much a big file of references. When hon. Members make references, we do send it to the Chief Justice. Nobody can stop that.

**SHRI RAM JETHMALANI:** I can write to the Chief Justice: "Here is a good member of the Bar; he is good material; please consider him."

SHRI HANSRAJ BHARDWAJ: And even the Chief Minister can do that. It is always sent.

SHRI NARENDER MOHAN: And, Sir, this is not being done. The Law Minister is not fulfilling his obligation. He must send the names of persons who are fit to be appointed.

SHRI RAMAKANT D. KHALAP: Sir, because of these judgments, the Law Minister, or, let me use the words 'the Executive', the Executive cannot initiate the process of appointment.

SHRI NARENDRA MOHAN: But you are too technical, Sir!

उपसभाध्यक्ष (श्री मोहम्मद सलीम): आप इनके खिलाफ क्यों जा रहे हैं?

SHRI RAMAKANT D. KHALAP: I say, by virtue of this judgment the Executive cannot initiate the process of appointment of a judge. That is just not possible.

SHRI RAM JETHMALANI: This can be sorted out by a conversation with the Chief Justice in five minutes.

SHRI HANSRAJ BHARDWAJ: Sir, this has been going on from the inception of the Constitution; no Law Minister can say that he starts this process. What has happened is this. The Constitution says that in a High Court the Chief Justice of that High Court shall make a recommendation. You read the 1983 Memorandum of Procedure. When Sardar Patel was the Justice Minister, what happened was that it was started by his Secretary, Shri V. Shanker. Pandit Nehru himself objected: "No. no. no. These are judicial appointments and the proposal must emanate from the Judiciary." So, these are tradition bound recommendations. The Law Minister's role is definitely there. Even a Chief Minister can say that in the opposition-States. I had this problem. I had great respect for a very senior Chief Minister, the Chief Minister of West Bengal. Shri Jyoti Basu was a very senior

Chief Minister. I said to him, "If you write a letter to me, I would immediately move." I said,

"Chief, you must look into this letter. If late

Shri NTR wrote from Andhra Pradesh, how could you ignore this?" all this you will find in the file, but the proposal has to come from the Judiciary in High Courts as well as in the Supreme Court. It can't be an Executive proposal.

SHRI RAMAKANT D. KHALAP: Sir, what I can do by way of personal relationship, by way of talking, is different. Sir, what I am saying is what has been laid down by the judgment. It is not that if I say, well, I consider 'X' person to be a fit material for judgeship, I don't think I am barred from doing that. The concept of my putting forward that is not that. But this is the import of this Judgment, that the process is initiated by the Judiciary and, thereafter, the whole process starts.

Now, Sir, on the question of independence, the whole argument made here is

that we should not go back to the pre-1993 position because the independence of the Judiciary is concerned. That is why I was reading out the Minority view. In the Minority view it has been stated. Sir: "The concept of judicial independence is deeply ingrained in our Constitution scheme, and Article 50 illuminates it. The degree of independence is near total after a person is appointed and inducted into the judicial cadre." So, if this concept can, at least, be accepted, can we not accept that once a person is appointed as a judge, his independence is total, that we can't influence him any more? Sir, for the last 50 years, a whole galaxy of Judges was appointed. This country saw eminent jurists, eminent judges, who have been revered even today and they were products of the old system, and as a practice, the Executive has tried to go by the recommendations of the Judiciary. They have never trampled upon them. There may be one or two exceptions.

Somebody referred to committed judges,

SHRI RAMAKANT D. KHALAP: If there was any talk of committed judges, I would say it was an aberration. Those who tried to talk about such a concept, they were thrown away, they were told to go away from power. The people of this country are not going to tolerate such an aberration. They will not tolerate any interference with the judiciary. I think that particular thought must be the route of an overall thinking. We must give the due that the people deserve. Ultimately they will judge us and they have been judging us all the time. Just because the executive appoints them, I don't think the independence of the judiciary in any way would be affected. That is why I was trying to read out the viewpoints of certain eminent persons which were made after this judgment. One of them is Shri H.M. Seervai. I will read out a portion of his comments. While criticising the Judgment he stated:

"the bottom has fallen out and never has a majority judgment of the Supreme Court reached a lower level of judicial incompetence. Judicial incompetence takes a form of ignorance of the legislative history; ignorance of the provisions of our Constitution; ignorance of disregard of well-settled principles of interpretation; ignorance of the meaning of ordinary English words; inability to draw correct conclusions.."

These are not my words. The meaning of the word 'consultation' to which a reference has also been made by Shri Satish Agarwal, has also been criticised. Some authors and some jurists have said that this is rewriting the Dictionary. Some others have said that this is rewriting the Constitution. Some others have said that the whole constitution has been amended by this judicial pronouncement. Still some other have said that the very power amendment of the constitution

which is so elaborate has been taken away by that particular judgment. Therefore, we veer around and try to think what we should do at this particular moment. The past history of judicial appointments shows that, by and large, in almost a majority of the cases, I would go to the extent of saying that in 99 per cent of the cases, the appointments have proved to be good appointments. The appointments have been done in consultation, proper Consultation, with the judiciary. The views of the judiciary have always been given the highest regard that it deserved. There may be a few instances, not even half-a-dozen, where the recommendations or the views of the judiciary were not taken into consideration.

SHRI NARENDRA MOHAN: Sir, I would like to seek one clarification.

THE VICE-CHAIRMAN (SHRI MD. SALIM): No. Mr. Narendra Mohan, this cannot be an unending discussion.

SHRI NARENDRA MOHAN: Sir, it is very important.

THE VICE-CHAIRMAN (SHRI MD. SALIM): You had your chance. You have already put your question.

SHRI NARENDRA MOHAN: Sir he has given....

SHRI VICE-CHAIRMAN (SHRI MR. SAUM): I am not allowing. Let him conclude. Mr. Minister, please conclude,

SHRI RAMAKANT D. KHALAP: Sir, I was referring to the position like where in world. Wherever there is democracy there the appointments have been done by the executive, in places where there is no democracy, of course, this question does not arise. Appointments are straightway being done by the executive, by those who are ruling. No doubt, there have been discussions that this power should vest in an independent body.

SHRI NARENDRA MOHAN: Sir, I would like to raise a point of order.

THE VICE-CHAIRMAN (SHRI MP. SALIM): NO, I am not allowing it.

SHRI NARENDRA MOHAN: Sir, please permit me. He has given a wrong interpretation of the judgment. I am holding this judgment in my hands.

THE VICE-CHAIRMAN (SHRI MD. SALIM): What is your point of order?

SHRI NARENDRA MOHAN: He has said that...

THE VICE-CHAIRMAN: (SHRI MD. SALIM): You cannot speak like this. You have to quote a rule. Under which rule do you want to raise a point of order?

SHRI NARENDRA MOHAN: Sir, the judgement of the Supreme Court has been quoted here wrongly.

THE VICE-CHAIRMAN (SHRI MD. SALIM): There is a certain procedure. You have to quote the rule under which you want to raise a point of order.

SHRI NARENDRA MOHAN: I don't have the Rule Book. The point I am going to raise is...

THE VICE-CHAIRMAN (SHRI MD. SALIM): No- I am not allowing.

SHRI NARENDRA MOHAN: He is quoting the judgment wrongly.

THE VICE-CHAIRMAN (SHRI MD. SALIM): This is a Half-an-Hour Discussion, you have already put your questions. Let the Minister answer those questions.

Therefore, ultimately, coming down to the final aspects of this matter, everybody seems to be of the opinion that the Constitution needs to be amended to provide for appointment of judge\*. It means that the proponents of the appointment of a judicial commission also feel that we must go beyond what has been stated by the Supreme Court in the 1993 judgement. If we all agree that the

appointment should be done, the way they are done today, on the recommendation of the judiciary itself, I would like to ask, why at all we need a judicial commission. Let the procedure continue as it is continuing today. The very fact that people have started thinking in terms of having an independent authority was a proof that it was admitted by all that the time had come for us to bring forward an amendment to the Constitution. Now will a judicial commission serve the purpose? Shri Jethmalani and those who prepared this draft Bill on National Judicial Commission felt that this had to be done. Members have also said, so, because they felt that the image of the executive and politicians was so bad that nobody would trust them. For that purpose, you want to have a judicial commission. But it may be noted that, in a year, about hundred vacancies arise in different courts and to fill up these hundred vacancies in various high courts and the Supreme Court, a continuous process goes on. As rightly pointed out, the judicial department has been doing this job very well. But it is such a continuous process that whoever is appointed in that commission will have to function full time. Shri V.N. Gadgil has moved a Private Member's Bill suggesting a commission consisting of the Law Minister, the Prime Minister, the Leader of Opposition and things like that... *(Interruptions)*...

SHRI HANSRAJ BHARDWAJ: How can the Leader of Opposition appoint? The tendency to govern even when they are in the Opposition, goes against the constitutional mandate. The Leader of Opposition cannot appoint. You have to appoint... *(Interruptions)*...

SHRI RAMAKANT D. KHALAP: In this draft Bill on National Judicial Commission, a collegium is being suggested. A collegium of the Opposition Leaders to suggest one Member, a collegium of High Court judges to suggest one member, a collegium of Bar Council

to suggest one Member... (Interruptions)... A different process is being suggested. Till some days back, I must confess to this House, the Government was toying with two alternatives; one alternative was to go back to the pre-1993 position, the second alternative was to conceive a judicial commission not only to make appointments, but also to be disciplinary authority, almost like a Lokpal for the judiciary. But the time came when we thought, the age old system that was being used for the last 45 to 50 years, produced so many eminent judges, including the present Chief Justice, Shri Verma whose integrity, whose knowledge, nobody can ever doubt, should the system which produced all the eminent Supreme Court judges who were now functioning there be reversed by the executive. Therefore, the Bill was prepared and moved. But while replying to a question, on the last occasion, after listening to the views of so many members of this House and the other House, as well as the views of eminent personalities outside, I decided to come back to you. We wanted to go back to the Leaders of various political parties present in the House and take their views, come to a consensus and then frame a Bill. I am happy that here, at least, a view has converged that the Constitution needs to be amended.

7.00 P.M.

There is no consensus about how it should be amended and what should be the methodology of appointing judges. If a consensus has developed on the second issue also it will be in the interest of the country, in the interest of the judiciary. So, with this last assurance, I would like the hon. leader of various political parties, eminent jurists to come together very soon and frame their final opinion on this issue and advise the executive about the methodology of amending the Constitution. Thank you, very much.

THE VICE-CHAIRMAN (SHRI MD. SALIM): Good, we had a good discussion,

SHRI SATISH AGARWAL: That is fair enough. You could have said it in the beginning. If you had said that in the beginning, I would not have raised the discussion.

THE VICE-CHAIRMAN (SHRI MD. SALIM): Mr. Agarwal, we should continue with the discussion on the working of the Ministry of Welfare. It is also important. We have identified three Ministries; one is already over, we are discussing the second one.

श्री गोविन्दराम मिरी (मध्य प्रदेश): सर, अब तो 7 बज गए हैं।

उपसभाध्यक्ष (श्री मोहम्मद सलीम): आप नहीं चाहते कि कल्याण मंत्रालय पर डिस्कसन हो?

श्री गोविन्दराम मिरी: सर, अब समय कहाँ है। हम इसे 7 बजे शुरू करेंगे, और काफी मॅबर बाकी हैं।

उपसभाध्यक्ष (श्री मोहम्मद सलीम): यह तो सदन के ऊपर है।

DR. BIPLB DASGUPTA: Is it possible to postpone the discussion until Monday?

THE VICE-CHAIRMAN (SHRI MD-SALIM): The House is supreme, you can postpone it for ever. No problem... (Interruptions)..

DR. 3IPLAB DASGUPTA: No, no, until Monday ... (Interruptions)...

SHRI GOVINDRAM MIRI: Sir, not for ever. ... (Interruptions)...

श्री सतीश अग्रवाल: लंच अवर को डिस्पेंस कर के कल 12 बजे से ढाई बजे तक कर दें।

उपसभाध्यक्ष (श्री मोहम्मद सलीम): यह हाउस के ऊपर है। हाउस यह निर्णय करेगा।

श्री गोविन्दराम मिरी: यह एक इम्पोर्टेंट मिनिस्ट्री है और आप इस को मायनोरिटी में ले रहे हैं। यह समय नहीं है, हम यहां बोलना चाहते हैं क्योंकि यह अत्यंत ही इम्पोर्टेंट मिनिस्ट्री है।

**श्री सतीश अग्रवाल:** मेरा सुझाव यह है कि कल दोपहर 12 बजे से ढाई बजे तक लंच अवर को डिस्पेंस कर के चर्चा हो सकती है।

**DR. BIPLAB DASGUPTA:** That is also possible.

**कल्याण मंत्री (श्री बलवन्त सिंह रामूवालिआ):** सर, कल मैं नहीं होऊंगा।

...(व्यवधान)...

**उपसभाध्यक्ष (श्री मोहम्मद सलीम):** आप जीरो अवर भी चाहते हैं, स्पेशल मेशन भी चाहते हैं, मिनिस्ट्री का डिस्कसन भी चाहते हैं और जल्दी घर भी जाना चाहते हैं। तो आप की कोई फार्मूला बताइए कि यह सब कुछ हो जाए?

**श्री गोविन्द राम मिरी:** मंडे को ले लीजिए?

**उपसभाध्यक्ष (श्री मोहम्मद सलीम):** ऐसा कर लीजिए कि डिस्कसन हो जाय और जवाब बाद में हो जाएगा। ....(व्यवधान)....

**श्री बलवन्त सिंह रामूवालिआ:** सर, मंडे को मैं होऊंगा कल नहीं होऊंगा।

**श्री गोविन्द राम मिरी:** मंडे को कर दीजिए। श्री सतीश अग्रवाल: मंडे को नहीं हो सकता है। कारण यह है कि मंडे और ट्यूजडे दो दिन फायनेंस बिल के लिए रखे गए हैं।

**DR. BIPLAB DASGUPTA:** A part of the morning can be taken up by him.

**उपसभाध्यक्ष (श्री मोहम्मद सलीम):** अभी दो एक स्पीकर तो बोल लें।

**श्री बलवन्त सिंह रामूवालिआ:** सर, एक उपाय है मैं कोई कुर्लींग साहबान, कल चर्चा के नोट्स ले लेंगे और मैं मंडे को रिप्लाय कर दूंगा।

**श्री गोविन्द राम मिरी:** ठीक बात है।

**उपसभाध्यक्ष (श्री मोहम्मद सलीम):** कल लंच अवर डिस्पेंस कर के दोपहर बैठना पड़ेगा।

**DR. BIPLAB DASGUPTA:** Sir, from 1.00 P.M. to 2.30 P.M., i.e. one-and-a-half hours can be given for the discussion on welfare tomorrow and then we can get the reply from the Minister on Monday.

**THE VICE-CHAIRMAN (SHRI MD. SALIM):** The House is adjourned till 11.00 A.M. tomorrow, the 9th May, 1997.

The House then adjourned at three minutes past seven of the clock till eleven of the clock on Friday, the 9th May, 1997.