CHAPTER 22

THE SUPREME COURT

Constitution of the Supreme Court.

PARLIAMENT has the power to make laws regulating the constitution, organisation, jurisdiction and powers of the Supreme Court. Subject to such legislation, the Supreme Court consists of the Chief Justice of India and not more than *twenty-five*[1] other Judges [*Art.* 124].

Besides, the Chief Justice of India has the power, with the previous consent of the President, to request a retired Supreme Court Judge to act as a Judge of the Supreme Court for a temporary period. Similarly, a High Court Judge may be appointed *ad hoc* Judge of the Supreme Court for a temporary period if there is a lack of quorum of the permanent Judges [*Arts.* 127-128].

Appointment of Judges.

Every Judge of the Supreme Court shall be appointed by the President of India. The President shall, in this matter, consult other persons besides taking the advice of his Ministers. In the matter of appointment of the Chief Justice of India, he shall consult such Judges of the Supreme Court and of the High Courts as he may deem necessary. A nine-Judge Bench of the Supreme Court has laid down that the seniormost Judge of the Supreme Court considered fit to hold the office should be appointed to the office of Chief Justice of India.[2] And in the case of appointment of other Judges of the Supreme Court, consultation with the Chief Justice of India, in addition to the above, is obligatory [*Art.* 124(1)]. Consultation would generally mean concurrence.[2] The above provision, thus, modifies the mode of appointment of Judges by the Executive—by providing that the Executive should consult members of the Judiciary itself, who are well-qualified to give their opinion in this matter.[3]

In a reference[4] (not as a review or reconsideration of the *Second Judges case*) made by the President under Art. 143 relating to the consultation between the Chief Justice of India and his brother Judges in matters of appointment of the Supreme Court Judges and the relevance of seniority in making such appointments, the nine-Judge Bench opined:

1. The opinion of the CJI, having primacy in the consultative process and reflecting the opinion of the judiciary, has to be formed on the basis of consultation with the *collegium,* comprising of the CJI and the four senior most Judges of the Supreme Court. The Judge, who is to succeed the CJI should also be included, if he is not one of the four senior most Judges. Their views should be obtained in writing.

2. Views of the senior most Judges of the Supreme Court, who hail from the High Courts where the persons to be recommended are functioning as Judges, if not the part of the *collegium*, must be obtained in writing.

3. The recommendation of the *collegium* alongwith the views of its members and that of the senior most Judges of the Supreme Court who hail from the High Courts where the persons to be recommended are functioning as Judges should be conveyed by the Chief Justice of India to the Govt. of India.

4. The substance of the views of the others consulted by the Chief Justice of India or on his behalf, particularly those of non-Judges (Members of the Bar) should be stated in the memorandum and be conveyed to the Govt. of India.

5. Normally, the *collegium* should make its recommendation on the basis of consensus but in case of difference of opinion no one would be appointed, if the CJI dissents.

6. If two or more members of the *collegium* dissent, CJI should not persist with the recommendation.

7. In case of non-appointment of the person recommended, the materials and information conveyed by the Govt. of India, must be placed before the original *collegium* or the reconstituted one, if so, to consider whether the recommendation should be withdrawn or reiterated. It is only if it unanimously reiterated that the appointment must be made.

8. The CJI may, in his discretion, bring to the knowledge of the person recommended the reasons disclosed by the Govt. of India for his non-appointment and ask for his response thereto, which, if made, be considered by the *collegium* before withdrawing or reitirating the recommendation.

9. Merit should be predominant consideration though inter-seniority among the Judges in their High Courts and their combined seniority on all India basis should be given weight.

10. Cogent and good reasons should be recorded for recommending a person of outstanding merit regardless of his lower seniority.

11. For recommending one of several persons of more or less equal degree of merit, the factor of the High Courts not represented on the Supreme Court, may be considered.

12. The Judge passed over can be reconsidered unless for strong reasons, it is recorded that he be never appointed.

13. The recommendations made by the CJI without complying with the norms and requirements, are not binding on the Govt. of India.

Qualifications for appointment as Judge.

A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is (a) a citizen of India; and (b) either,—(i) a distinguished jurist; or (ii) has been a High Court Judge for at least 5 years; or (iii) has been an Advocate of a High Court (or two or more such

Courts in succession) for at least 10 years [*Art.* 124(3)].

Tenure of Judges.

No minimum age is prescribed for appointment as a Judge of the Supreme Court, nor any fixed period of office. Once appointed, a Judge of the Supreme Court may cease to be so, on the happening of any one of the following contingencies (other than death):

(a) On attaining the age of 65 years; (b) On resigning his office by writing addressed to the President; (c) On being removed by the President upon an address to that effect being passed by a special majority of each House of Parliament (*viz.*, a majority of the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting).

The only grounds upon which such removal may take place are (1) 'proved misbehaviour' and (2) 'incapacity' [*Art.* 124(4)].

Impeachment of a Judge.

The combined effect of Art. 124(4) and the Judges (Inquiry) Act, 1968 is that the following procedure is to be observed for removal of a Judge. This is commonly known as impeachment—

(1) A motion addressed to the President signed by at least 100 members of the Lok Sabha or 50 members of the Rajya Sabha is delivered to the Speaker or the Chairman.

(2) The motion is to be investigated by a Committee of three (2 Judges of the Supreme Court and a distinguished jurist).

(3) If the Committee finds the Judge guilty of misbehaviour or that he suffers from incapacity the motion (para 1, *above)* together with the report of the Committee is taken up for consideration in the House where the motion is pending.

(4) If the motion is passed in each House by majority of the total membership of that House and by a majority of not less than two-thirds of that House present and voting the address is presented to the President.

(5) The Judge will be removed after the President gives his order for removal on the said address.

The procedure for impeachment is the same for Judges of the Supreme Court and the High Courts. After the Constitution this procedure was started against SHRI R. RAMASWAMY in 1991-93. The Committee found the Judge guilty. In the Lok Sabha the Congress Party abstained from voting and so the motion could not be passed with requisite majority.

Salaries, etc.

A Judge of the Supreme Court gets a salary of Rs. 30,000 *per mensem*[5] and the use of an official residence free of rent. The salary of the Chief Justice is Rs. 33,000.[5]

Independence of Supreme Court Judges, how secured.

The independence of the Judges of the Supreme Court is sought to be secured by the Constitution in a number of ways:

(a) Though the appointing authority is the President, acting with the advice of his Council of Ministers, the

appointment of Supreme Court Judge has been lifted from the realm of pure politics by requiring the President to consult the Chief Justice of India in the matter.[3]

(b) By laying down that a Judge of the Supreme Court shall not be removed by the President, except on a joint address by both Houses of Parliament (supported by a majority of the total membership and a majority of not less than two-thirds of the members present and voting, in each House), on ground of proved misbehaviour or incapacity of the Judge in question [*Art.* 124(4)].

This provision is similar to the rule prevailing in England since the Act of Settlement, 1701, to the effect that though Judges of the Superior Courts are appointed by the Crown, they do not hold office during his pleasure, but hold their office 'on good behaviour' and the Crown may remove them only upon a joint address from both Houses of Parliament.

(c) By fixing the salaries of the Judges by the Constitution and providing that though the allowances, leave and pension may be determined by law made by Parliament, these shall not be varied to the disadvantage of a Judge during his term of office. In other words, he will not be affected adversely by any changes made by law since his appointment [*Art.* 125(2)].

But it will be competent for the President to override this guarantee, under a Proclamation of 'Financial Emergency' [*Art.* 360(4)(b)].

(d) By providing that the administrative expenses of the Supreme Court, the salaries and allowances, etc., of the Judges as well as of the staff of the Supreme Court shall be 'charged upon the Consolidated Fund of India'; *i.e.*, shall not be subject to vote in Parliament [*Art.* 146(3)].

(e) By forbidding the discussion of the conduct of a Judge of the Supreme Court (or of a High Court) in Parliament, except upon a motion for an address to the President for the removal of the Judge [*Art.* 121].

(f) By laying down that after retirement, a Judge of the Supreme Court shall not plead or act in any Court or before any authority within the territory of India[6] [*Art.* 124(7)].

[It is to be noted that there are analogous provisions in the case of High Court Judges; see Chap. 23, *post.*]

Position of the Supreme Court under the Constitution.

It has been rightly said that the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest Court of any other country.[7] It is at once a federal Court, a Court of appeal and a guardian of the Constitution, and the law declared by it, in the exercise of any its jurisdictions under the Constitution, is binding on all other Courts within the territory of India [*Art.* 141].

Compared with the American Supreme Court.

Our Supreme Court possesses larger powers[8] than the American Supreme Court in several respects—

Firstly, the American Supreme Court's appellate jurisdiction is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties. But *our* Supreme Court is not only a federal court and a guardian of the Constitution, but also the highest court of appeal in the land, relating to civil and criminal cases [*Arts.* 133-134], apart from cases relating to the interpretation of the Constitution.

Secondly, our Supreme Court has an extraordinary power to entertain appeal, without any limitation upon its discretion, from the decision not only of any court but also of any tribunal within the territory of India [*Art.* 136]. No such power belongs to the American Supreme Court.

Thirdly, while the American Supreme Court has denied to itself any power to advise the Government and confined itself only to the determination of actual controversies between parties to a litigation, *our* Supreme Court is vested by the Constitution itself with the power to deliver advisory opinion on any question of fact or law that may be referred to it by the President [*Art.* 143].

(i) As a Federal Court.

Every federal Constitution, whatever the degree of cohesion it aims at, involves a distribution of powers between the Union and the units composing the Union, and both Union and State Governments derive their authority from, and are limited by the same Constitution. In a unitary Constitution, like that of England, the local administrative or legislative bodies are mere subordinate bodies under the central authority. Hence, there is no need of judicially determining disputes between the central and local authorities. But in a federal Constitution, the powers are divided between the national and State Governments, and there must be some authority to determine disputes between the Union and the States or the States *inter se* and to maintain the distribution of powers as made by the Constitution.

Though *our* federation is not in the nature of a treaty or compact between the component units, there is, nevertheless, a division of legislative as well as administrative powers between the Union and the States. Article 131 of *our* Constitution, therefore, vests the Supreme Court with original and exclusive jurisdiction to determine justiciable disputes between the Union and the States or between the States *inter se*.[8]

(ii) As a Court of Appeal.

Like the House of Lords in England, the Supreme Court of India is the final appellate tribunal of the land, and in some respects, the jurisdiction of the Supreme Court is even wider than that of the House of Lords. As regards *criminal* appeals, an appeal lies to the House of Lords only if the Attorney-General certifies that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought. But in cases specified in Cls. (*a*) and (*b*) of Art. 134(1) of *our* Constitution (death sentences), an appeal will lie to the Supreme Court as of right.

As to appeals from High Courts in *civil* cases, however, the position has been altered by an amendment of Art. 133(1) by the Constitution (30th

Amendment) Act, 1972, which has likened the law to that in England. Civil appeals from the decisions of the Court of Appeal lie to the House of Lords only if the Court of Appeal or the House of Lords grants leave to appeal. Under Art. 133(1) of *our* Constitution as it originally stood, an appeal to the Supreme Court lay as of right in cases of higher value (as certified by the High Court). But this value test and the category of appeal as of right has been abolished by the amendment of 1972, under which appeal from the decision of a High Court in a civil matter will lie to the Supreme Court only if the High Court certifies that the case involves 'a substantial question of law of general importance' and that 'the said question needs to be decided by the Supreme Court'.[8]

But the right of the Supreme Court to entertain appeal, *by special leave,* in any cause or matter determined by any Court or tribunal in India, save military tribunals, is unlimited [*Art.* 136].

(iii) As a Guardian of the Constitution.

As against unconstitutional acts of the Executive the jurisdiction of the Courts is nearly the same under all constitutional systems. But not so is the control of the Judiciary over the Legislature.

It is ture that there is no express provision in *our* Constitution empowering the *Courts* to invalidate laws; but the Constitution has imposed definite limitations upon each of the organs of the state, and any transgression of those limitations would make the law *void.* It is for the Courts to decide whether any of the constitutional limitations has been transgressed or not,[9] because the Constitution is the organic law subject to which ordinary laws are made by the Legislature which itself is set up by the Constitution.

Thus, Art. 13 declares that any law which contravenes any of the provisions of the Part on Fundamental Rights, shall be *void.* But, as *our* Supreme Court has observed,[9] even without the specific provision in Art. 13 (which has been inserted only by way of abundant caution), the Court would have the powers to declare any enactment which transgresses a fundamental right as invalid.

Similarly, Art. 254 says that in case of inconsistency between Union and state laws in certain cases, the State law shall be *void.*

The limitations imposed by *our* Constitution upon the powers of Legislatures are—(a) Fundamental rights conferred by Part III. (b) Legislative competence. (c) Specific provisions of the Constitution imposing limitations relating to particular matters.[10]

It is clear from the above that (apart from the jurisdiction to issue the writs to enforce the fundamental rights, which has been explained earlier) the jurisdiction of the Supreme Court is three-fold: (a) Original; (b) Appellate; and (c) Advisory.

A. Original Jurisdiction of Supreme Court.

The Original jurisdiction of the Supreme Court is dealt with in Art. 131 of the Constitution. The functions of the Supreme Court under Art. 131 are purely of a federal character and are confined to disputes between the Government of India and any of the States of the Union, the

Government of India and any State or States on one side and any other State or States on the other side, or between two or more States *inter se*. In short, these are disputes between different units of the federation which will be within the exclusive original jurisdiction of the Supreme Court. The Original jurisdiction of the Supreme Court will be *exclusive*, which means that no other court in India shall have the power to entertain any such suit. On the other hand, the Supreme Court in its original jurisdiction will not be entitled to entertain any suit where *both* the parties are not units of the federation. If any suit is brought either against the State or the Government of India by a private citizen, that will *not lie* within the original jurisdiction of the Supreme Court but will be brought in the ordinary courts under the ordinary law.

Again, one class of disputes, though a federal nature, is excluded from this original jurisdiction of the Supreme Court, namely, a dispute arising out of any treaty, agreement, covenant, engagement; 'sanad' or other similar instrument which, having been entered into or executed before the commencement of this Constitution continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute.[11] But these disputes may be referred by the President to the Supreme Court for its *advisory* opinion.

It may be noted that until 1962, no suit in the original jurisdiction had been decided by the Supreme Court. It seems that the disputes, if any, between the Union and the units or between the units *inter se* had so far been settled by negotiation or agreement rather than by adjudication. The first suit, brought by the State of West Bengal against the Union of India in 1961, to declare the unconstitutionality of the Coal Bearing Areas (Acquisition and Development) Act, 1957, was dismissed by the Supreme Court.[12]

In this context, it should be further noted that there are certain provisions in the Constitution which exclude from the original jurisdiction of the Supreme Court certain disputes, the determination of which is vested in other tribunals:

(i) Disputes specified in the Proviso to Arts. 131 and 363(1).

(ii) Complaints as to interference with inter-State water supplies, referred to the statutory tribunal mentioned in Art. 262, if Parliament so legislates.

Since Parliament has enacted the Inter-State Water Disputes Act (33 of 1956), Art. 262 has now to be read with s. 11 of that Act.

(iii) Matters referred to the Finance Commission [*Art.* 280].

(iv) Adjustment of certain expenses as between the Union and the States under Arts. 257(4), 258(3).

(v) Adjustment of certain expenses as between the Union and the States [*Art.* 290].

B. Writ Jurisdiction.

The jurisdiction of the Supreme Court to entertain an application under Art. 32 for the issue of a constitutional writ for the enforcement of Fundamental Rights, is sometimes treated as an 'original' jurisdiction of the Supreme

Court. It is no doubt original in the sense that the party aggrieved has the right to directly move the Supreme Court by presenting a petition, instead of coming through a High Court by way of appeal. Nevertheless, it should be treated as a separate jurisdiction since the dispute in such cases is not between the units of the Union but an aggrieved individual and the Government or any of its agencies. Hence, the jurisdiction under Art. 32 has no analogy to the jurisdiction under Art. 131.

C. Appellate Jurisdiction of Supreme Court.

The Supreme Court is the highest court of appeal from all courts in the territory of India, the jurisdiction of the Judicial Committee of the Privy Council to hear appeals from India having been abolished on the eve of the Constitution. The *Appellate* jurisdiction of the Supreme Court may be divided under three heads:

(i) Cases involving interpretation of the Constitution,—civil, criminal or otherwise.

(ii) Civil cases, irrespective of any constitutional question.

(iii) Criminal cases, irrespective of any constitutional question.

Apart from appeals to the Supreme Court by special leave of that Court under Art. 136, an appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in two classes of cases—

(A) Where the case involves a substantial question of law as to the *interpretation of the Constitution,* an appeal shall lie to the Supreme Court on the certificate of the High Court that such a question is involved or on the leave of the Supreme Court where the High Court has refused to grant such a certificate but the Supreme Court is satisfied that a substantial question of law as to the interpretation of the Constitution is involved in the case [*Art.* 132].

(B) In cases where no *constitutional* question is involved, appeal shall lie to the Supreme Court if the High Court certifies that the following conditions are satisfied [*Art.* 133(1)]—

(i) that the case involves a substantial question of law;

(ii) that in the opinion of the High Court the said question should be decided by the Supreme Court.

(i) Criminal.

Prior to the Constitution, there was no court of criminal appeal over the High Courts. It was only in a limited sphere that the Privy Council entertained appeals in criminal cases from the High Courts by *special leave* but there was no appeal *as of right.* Article 134 of the Constitution for the first time provides for an appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, as of right, in two specified classes of cases—

(a) where the High Court has on an appeal reversed an order of acquittal of an accused person and sentenced him to death;

(b) where the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused and sentenced him to death.

In these two classes of cases relating to a sentence of death by the High Court, appeal lies to the Supreme Court as of right.

Besides the above two classes of cases, an appeal may lie to the Supreme Court in any criminal case if the High Court certifies that the case is a fit one for appeal to the Supreme Court. The certificate of the High Court would, of course, be granted only where some substantial question of law or some matter of great public importance or the infringement of some essential principles of justice are involved. Appeal may also lie to the Supreme Court (under *Art.* 132) from a criminal proceeding if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

Except in the above cases, no appeal lies from a criminal proceeding of the High Court to the Supreme Court under the Constitution but Parliament has been empowered to make any law conferring on the Supreme Court further powers to hear appeals from criminal matters.

(ii) Appeal by Special Leave.

While the Constitution provides for regular appeals to the Supreme Court from decisions of the High Courts in Arts. 132 to 134, there may still remain some cases where justice might require the interference of the Supreme Court with decisions not only of the High Courts outside the purview of Arts. 132-134 but also of any other court or tribunal within the territory of India. Such residuary power outside the ordinary law relating to appeal is conferred upon the Supreme Court by Art. 136. This Article is worded in the widest terms possible—

> "136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
>
> (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting special leave, against any kind of judgment or order made by any court or tribunal (except a military tribunal) in any proceeding and the exercise of the power is left entirely to the *discretion* of the Supreme Court unfettered by any restrictions and this power cannot be curtailed by any legislation short of amending the Article itself. This wide power is not, however, to be exercised by the Supreme Court so as to entertain an appeal in *any* case where no appeal is otherwise provided by the law or the Constitution. It is a special power which is to be exercised only under *exceptional circumstances* and the Supreme Court has already laid down the principles according to which this extraordinary power shall be used, *e.g.*, where there has been a violation of the principles of natural justice. In *civil cases* the special leave to appeal under this Article would not be granted unless there is some substantial question of law or general public interest involved in the case. Similarly, in *criminal* cases the

Supreme Court will not interfere under Art. 136 unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.[13] Similarly, it will not substitute its own decision for the determination of a *tribunal* but it would interfere to quash the decision of a quasi-judicial tribunal under its extraordinary powers conferred by Art. 136 when the tribunal has either exceeded its jurisdiction or has approached the question referred to in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice.[14]

D. Advisory jurisdiction.

Besides the above regular jurisdiction of the Supreme Court, it shall have an *advisory* jurisdiction, to give its *opinion,* on any question of law or fact of public importance as may be referred to it for consideration by the President.

Article 143 of the Constitution lays down that the Supreme Court may be required to express its opinion in two classes of matters, in an advisory capacity as distinguished from its judicial capacity :

(a) In the first class, any question of law may be referred to the Supreme Court for its opinion if the President considers that the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court. It differs from a regular adjudication before the Supreme Court in this sense that there is no litigation between two parties in such a case and that the opinion given by the Supreme Court on such a reference is not binding upon the Government itself and further that the opinion is not executable as a judgment of the Supreme Court. The opinion is only advisory and the Government may take it into consideration in taking any action in the matter but it is not bound to act in conformity with the opinion so received. The chief utility of such an advisory judicial opinion is to enable the Government to secure an authoritative opinion either as to the validity of a legislative measure before it is enacted or as to some other matter which may not go to the courts in the ordinary course and yet the Government is anxious to have authoritative legal opinion before taking any action.

Up to 2007 there were *fourteen* cases of reference of this class made by the President.[15-28] It may be mentioned that though the opinion of the Supreme Court on such a reference may not be binding on the Government, the propositions of law declared by the Supreme Court even on such a reference are binding on the subordinate courts. In fact, the propositions laid down in the *Delhi Laws* case[15] have been frequently referred to and followed since then by the subordinate courts. The Supreme Court is entitled to decline to answer a question posed to it under Art. 143 if it is superfluous or unnecessary.[22]

(b) The second class of cases belong to the disputes arising out of pre-Constitution treaties and agreements which are excluded by Art. 131, Proviso, from the Original Jurisdiction of the Supreme Court, as we have already seen. In other words, though such disputes cannot come to the Supreme Court as a litigation under its Original jurisdiction, the subject-

matter of such disputes may be referred to by the President for the opinion of the Supreme Court in its advisory capacity.

E. Miscellaneous Jurisdiction.

There are provisions for reference to this Court under Art. 317(1) of the Constitution, s. 257 of the Income-tax Act, 1961, s. 7(2) of the Monopolies and Restrictive Trade Practices Act, 1969, s. 130A of the Customs Act, 1962 and s. 35H of the Central Excise and Salt Act, 1944.

Appeals also lie to Supreme Court under the Representation of the People Act, 1951; Monopolies and Restrictive Trade Practices Act, 1969; Advocates Act, 1961; Contempt of Courts Act, 1971; Customs Act, 1962; Central Excise and Salt Act, 1944; Terrorist Affected Areas (Special Courts) Act, 1984; Terrorist and Disruptive Activities (Prevention) Act, 1985; Trial of Offences relating to Transactions in Securities Act, 1992 and Consumer Protection Act, 1986.

Election Petitions under Part III of the Presidential and Vice-Presidential Elections Act, 1952 are also filed directly in the Supreme Court.

The 42nd,43rd and 44th Amendments.

The jurisdiction of the Supreme Court, as outlined in the foregoing pages, was curtailed by the 42nd Amendment of the Constitution (1976), in several ways. But some of these changes have been recoiled by the Janata Government, by repealing them by the 43rd Amendment Act, 1977, so that the reader need not bother about them. The provisions so repealed are Arts. 32A, 144A.

But there are several other provisions which were introduced by the 42nd Amendment Act, 1976, but the Janata Government failed to dislodge them, owing to the opposition of the Congress Party in the *Rajya Sabha*. These are—

(i) *Art. 323A—323B*. The intent of these two new Articles was to take away the jurisdiction of the Supreme Court under Art. 32 over orders and decisions of Administrative Tribunals. These Articles could, however, be implemented only by legislation which Mrs. Gandhi's *first* Government had no time to undertake.

Article 323A has been implemented by the Administrative Tribunals Act, 1985 [see, further, under Chap. 30, *post*].

But subsequently, the position turned out to be otherwise as the Supreme Court declared the Articles 323-A, Cl. 2(d) and 323-B, Cl. 3(d) and also the "exclusion of jurisdiction" clauses in all the legislations enacted in pursuance of these Articles, unconstitutional to the extent they excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32.[29]

(ii) *Art. 368(4)—(5)*. These two clauses were inserted in Art. 368 with a view to preventing the Supreme Court from invalidating any Constitution Amendment Act on the theory of 'basic features of Constitution' or anything of that nature.

Curioulsy, however, these Clauses have been emasculated by the Supreme Court itself, striking them down on the ground that they are violative of two 'basic features' of the Constitution—(a) the limited nature of

the amending power under Art. 368, and (b) judicial review,—in the *Minerva Mills* case.[30]

REFERENCES

1. The Constitution provided for seven Judges besides the Chief Justice, subject to legislation by Parliament. Parliament has enacted the Supreme Court (Number of Judges) Acts, 1956 and 1986, raising this number to 25.
2. *Supreme Court Advocates* v. *Union of India*, (1993) 4 S.C.C. 441 (9-Judge Bench).
3. VIII C.A.D. 258. But there is no such safeguard in the case of appointment of a Chief Justice, and when A.N. RAY, J., was appointed Chief Justice, after superseding three senior Judges,- HEGDE, GROVER and SHELAT, there was an uproar in which the Supreme Court Bar Association joined, that the Senior Judges had been superseded solely because their judgment in *Keshavananda's* case (AIR 1973 S.C. 1461) had been unfavourable to the Government.

   Again in January 1977 instead of H.R. KHANNA, J., the seniormost Judge M.U. BEG, J. was made the Chief Justice of India. Justice KHANNA resigned just as the three Judges had done a few years back. It was said the supersession was because of his dissenting judgment in *A.D.M.* v. *Shukla*, AIR 1976 S.C. 1207.

   After the judgment referred to in f.n. 2 above viz. *Supreme Court Advocates* v. *Union of India*, it appears that discretion of the executive has been curtailed.
4. *Special Reference No. 1 of 1998,* Re :, (1998) 7 S.C.C. 739. The Bench expressed its optimistic view that the successive CJIs shall henceforth act in accordance with *the Second Judges case* and the opinion in the instant reference.
5. The salaries of Judges of the Supreme Court and the High Courts has been enhanced *vide* Act 18 of 1998, s. 7 (w.e.f. 1.1.1996).
6. But, curiously, there is no bar against a retired Judge from being appointed to any office under the Government [as there is in the case of the Comptroller and Auditor-General: Art. 148(4)]; and the expectation of such employment after retirement indirectly detracts from the independence of the Judges from executive influence. In fact, retired Judges have been appointed to hold offices such as that of Governor, Ambassador and the like, apart from membership of numerous Commissions or Boards.
7. Attorney-General of India (1956) S.C.R. 8; A.K. AIYAR, *The Constitution and Fundamental Rights,* 1955, p. 15.
8. *Vide* Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), pp. 168 *et. seq.*
9. *A.K. Gopalan* v. *State of Madras*, (1950) S.C.R. 88 (*100*); Ref. Under Art. 143, AIR 1965 S.C. 745 (*762*).
10. *Vide* Author's *Constitutional Law of India, ibid.*, p. 270.
11. Article 131, *Proviso*, as amended by the Constitution (7th Amendment) Act, 1956.
12. *State of West Bengal* v. *Union of India*, AIR 1963 S.C. 1241.
13. *Pritam Singh* v. *State*, AIR 1950 S.C. 169.
14. *D.C. Mills* v. *Commr. of I.T.*, AIR 1955 S.C. 65.
15. In re *Delhi Laws Act, 1912* (1951) S.C.R. 747 [regarding the validity of the Delhi Laws Act, 1912].
16. Re *Kerala Education Bill*, AIR 1958 S.C. 956 [regarding the constitutionality of the Kerala Education Bill].
17. Re *Berubari Union*, (1960) 3 S.C.R. 250 [regarding the procedure for implementation of the Indo-Pakistan Agreement relating to the Berubari Union].
18. In re *Sea Customs*, AIR 1963 S.C. 1760 [regarding the constitutionality of the Sea Customs Amendment Bill, with reference to Art. 289 of the Constitution].
19. Special Reference I of 1964 (re. U.P. Legislature), AIR 1965 S.C. 745.
20. In re *Presidential Election, 1974*, AIR 1974 S.C. 1682.
21. In re *Special Courts Bill, 1978*, AIR 1979 S.C. 478 (dated 1-12-1978).
22. In re *Cauvery Waters Disputes Tribunal*, AIR 1992 S.C. 1183.
23. *Special Reference No. 1 of 1993.* [regarding issue of an ordinance to acquire certain disputed land near Ram Janma Bhumi and whether a temple stood at that place]. *Ismail Faruqui* v. *Union of India*, (1994) 6 S.C.C. 360 (Rama Janma Bhumi case).

24. *Special Reference No. 1 of 1998*, (1998) 7 SCC 739. [Regarding consultation with the Chief Justice of India and method of communicating in regard to appointment of S.C. and H.C. Judges].
25. *Reference No. 1 of 1982*. [Regarding validity of Resettlement Act, passed by the State of J&K, decided or 8.11.2001 but unreported yet].
26. *Special Reference No. 1 of 2002, (In re, Gujarat Assembly Election Matter*, (2002) 8 SCC 237. [Gujarat Assembly was prematuredly dissolved. Reference was regarding whether the new Assembly must meet within six months. It involved interpretation of Arts. 174, 324 and 356].
27. *Special Reference No. 1 of 2001*, (2004) 4 SCC 489. [Regarding whether States have legislative competence to legislate on the subject of natural gas and liquefied natural gas under Entry 25 of List II of Sch. VII or whether the Union has exclusive jurisdiction over natural gas in whatever physical form under Entry 53 List I of Sch. VII]. [Opinion delivered on 25-03-2004].
28. The Punjab Termination of Agreement Act, 2004, passed by Punjab State Legislature referred in July 2004 regarding legislative competence (not yet decided).
29. *L. Chandra Kumar* v. *Union of India*, (1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.
30. *Minerva Mills* v. *Union of India*, AIR 1980 S.C. 1789 (paras 22-26, 28, 93-94).