NOTES AND COMMENTS

INDEPENDENCE OF THE JUDICIARY AND THE SUPREME COURT

I. INTRODUCTION

THE FOUNDING FATHERS of the Constitution were keenly aware, from their experience of the role of the judiciary under the British rule, of the limitations inherent in a judiciary which is subordinate to the executive department of the government. The Constitution accordingly, as one of the directive principles, envisioned the eventual separation of the judiciary from the executive branch as an indispensable part of the impartial administration of justice. Even though it is now seventeen years since the Constitution came into force, many states have not yet fully implemented this directive.[1] Thus the full value of the separation of the judiciary from the executive does not appear as yet to have been grasped by the various state governments. Two recent decisions of the Supreme Court *Chandra Mohan* v. *Uttar Pradesh*[2] and *State of Assam* v. *Ranga Mohommed*[3] are highly welcome in this respect, as they serve to focus the attention on the reasons for and implications of the call for separation of the judiciary from the executive.

In the *Chandra Mohan* case, the registrar of the Allahabad High Court had called for applications for the Uttar Pradesh Higher Judicial Service from all advocates of more than seven years standing at the bar and from all "judicial officers." Under the Uttar Pradesh Higher Judicial Service Rules, the Governor constituted a "selection committee" consisting of two judges of the High Court and the Judicial Secretary to the government. The committee then selected six candidates, whose names were placed before the Governor for his approval.

Subsequently, the petitioners, who belonged to the U.P. Civil Service (judicial branch) and were acting as district judges, filed writ petitions in the High Court to restrain the Governor from appointing the candidates selected by the selection committee. The High Court by a majority held that the recruitment from both the sources was good, with the result the petitions were dismissed. The petitioners then appealed to the Supreme Court, where the High Court's ruling was reversed on the grounds that the selection procedure violated article 233 of the Constitution.

In analyzing the appropriateness and implications of the Supreme Court's decision, we shall consider the following three matters, the

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1. See *Ind. Const.* art. 50:
   The State shall take steps to separate the judiciary from the executive in the public services of the State.
2. A.I.R. 1966 S.C. 1987; [1967] 1 S.C.R. 77. (Hereinafter to be simply called as *Chandra Mohan*).
3. A.I.R. 1967 S.C. 903; [1967] 1 S.C.R. 454.

first two being the major issues confronting the Court and the third a problem which has arisen in consequence of the holding:

(i) Whether article 233(1) of the Constitution authorized the Governor of a state in the appointment of district judges to "consult" some agency other than the High Court;

(ii) Whether the Governor has the power to appoint "judicial officers" as district judges even though they are not members of the "judicial service"; and

(iii) Whether it is necessary to amend the Constitution.

Before discussing these points, it would be better to point out and analyze the relevant provisions of the Constitution in this respect. First, the import and ambit of term "consultation" in article 233(1) must be reckoned with.[4] That article states that the appointment of district judges "shall be made by the Governor." The reasons for this could have been that from the inception of the Constitution, in most of the states in India the judiciary has not been separated from the executive. Indeed, at the time when the Constitution was drafted, in most of the states, the magistracy was under the control of the executive. Therefore, it makes good sense, as the article stands, to have the initiative in consulting the High Court and the responsibility for final determination both lie with the Governor. Moreover, the exercise of the power of appointment by the Governor is conditioned upon his actual consultation with the High Court. However, since the High Court is presumably more conversant than the Governor with the suitability of persons for appointment as district judges, there are obviously strong reasons why the burden of consulting the High Court has been cast upon the Governor.

II. "CONSULTATION" AND "RECOMMENDATION": THE RESPONSIBILITY OF THE HIGH COURT

The first basic question before the Court in *Chandra Mohan* was whether the Governor's process of selecting from among the members of the bar by means of a "select committee" constituted a "recommendation" of the High Court within the meaning of article 233(2) of the Constitution.[5] Under the rules, the High Court could either endorse the nominees of the committee or create a deadlock, but no provision has been made for allowing the High Court to make a fresh choice. Under the circumstances the Supreme Court, rightly it is

4. See *Ind. Const.* art. 233(1):
Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

5. *Chandra Mohan* at 1992.

submitted, held that such nominations by a committee with a veto by the High Court is not recommendation by the High Court.[6] Recommendation means that the High Court shall have the ultimate say not only as to who shall not be appointed but as to who shall be chosen as well.[7]

But the Supreme Court has in its judgment, it is submitted, made some confusion between the terms "consultation" and "recommendation."[8] These terms should not be equated.[9] Since it was beyond one's imagination that the separation of the judiciary from the executive could have been achieved overnight, the Constitution-makers were much more constrained in their ability to change the character of the already existing judiciary than they were in enforcing stricter requirements upon those being selected for judicial service. In the case of a new recruit, it is necessary that there be a "recommendation" of the High Court prior to the selection.[10] On the other hand, in the context of promoting or posting of district judges, who are already in the lower judiciary, the only requirement is that the Governor "consult" the High Court.

Under the scheme of rules present in the instant case, the High Court retained no control over the committee and had no part in the ultimate decision. Whether these rules were framed in consultation with the High Court is not clear from the facts of the case. But even assuming *arguendo* that the High Court acquiesced in the framing of the rules of selection it would thereby illegally have abdicated a duty cast upon it under the Constitution to give a recommendation or to be

6. See Seervai, *Constitutional Law of India* 1033 (1967).

7. *Id.* at 1033. Seervai states that the decision of the Supreme Court as regards advocates is clearly right because recommendation by a committee with a veto by the High Court is not recommendation by the High Court. We agree with these views.

8. *Chandra Mohan* at 1990. It was held by the Court that if the rules empower the Governor to appoint a person as district judge in *consultation* with a person or authority other than the High Court the said appointment will not in accordance with the provisions of article 233(1) of the Constitution. Also, under the rules, the High Court can either endorse the *recommendations* of the committee or create a deadlock.

9. See Seervai, *op. cit. supra* note 6, at 1032-33. It is opined by Seervai that consultation with the High Court does not mean that the Governor is obliged to accept the advice he receives. The "judicial officer" as interpreted by the Supreme Court may be fit enough to the facts of this case, but it cannot be universally applied, because the law departments of many states contain law officers who have held judicial office at times as district judges. Therefore, we agree with Seervai's opinion as far as the facts of this case are concerned.

10. Article 233(2) of the Constitution lays down the qualification for appointment as such:

> A person not already in *service* of the Union of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. (Emphasis added).

consulted within the meaning of article 233. Moreover, since overall control of the subordinate judiciary is vested specifically in the High Court,[11] there is strong reason for not allowing any dilution of the role the High Courts should play in the selection of district judges. Thus, the Court correctly ruled, the Governor is not entitled to seek the opinion of any body other than the High Court in making the appointment of district judges.

III. The Meaning of "Service" and The Independence of the Judiciary

With regard to the second basic issue, the Supreme Court held that "service" in the union or of the state under article 233(2) of the Constitution means "judicial service." The main purpose of Mr. Chief Justice Subba Rao in so holding was undoubtedly to secure the independence of the judicial branch by guaranteeing that only those who have had prior experience in the judicial service could be appointed district judges.

The Supreme Court's decision is supportable in the first instance from a historical perspective and secondly by referring to the policy discussions in the Constituent Assembly, particularly those concerning of the separation of judiciary from the executive. Historically, it is true that recruitment from the Indian Civil Service, occurred frequently during the British times. On attaining Indepedence in 1947, the Indian Administrative Service replaced the Indian Civil Service, and thereafter the Governor-General of India decided that the judiciary should no longer be recruited from the I.A.S.[12] The instant judgment puts the stamp of approval on this fact by construing the entire chapter VI of the Constitution as applying only to the "judicial service."

In the Constituent Assembly debates there is a rich source of material on a general philosophical plane touching upon the relationship between the judiciary and the executive. The strict separation of powers has been adopted as the foundation stone of government in many democratic countries. But as Professor K. T. Shah stated in

11. See *Ind. Const.* art. 235:
The control over district courts and courts subordinate thereto, including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such persons any right of appeal which he may have under the law regulating the conditions of his service ....

12. See Ralph Brabanti & Associates, *Asian Bureaucratic Systems Emergent From The British Imperial Tradition* 63 (1966). See also *Chandra Mohan* at 1995.

Constituent Assembly, "it is not merely the separation of the judiciary from the executive, but also its independence, which is of importance in democratic society."[13] It is of the utmost importance that the judiciary, which is the main bulwark of the civil liberties, should be completely independent of the executive. The majority of the members of the Constituent Assembly, including Mr. Nehru,[14] as a matter of policy agreed upon this point.[15] Although immediate strict separation of the judiciary from the executive was not feasible in the context of the Indian situation at the time of Independence, the principle of complete separation has however been established as a goal of future legislation by writing this into article 50 of the directive principles of state policy. It was further provided in article 237 that the state executive could by public notification extend the provisions of chapter VI of part VI of the Constitution to any class or classes of magistrates in the state.[16] Still further, whereas under section 253 of the Government of India Act, 1935, "control" over neither the district judges nor the subordinate judiciary had been vested in the High Court, the Constitution placed complete control over the subordinate judiciary immediately in the High Courts. It seems clear, in short, that the Constituent Assembly envisioned an eventual clear demarcation between the judiciary and the executive.

The experience among the Indian States in the implementation of these principles has however been far from a complete success. In several states, including U.P., committees were established to work out a programme for the reform of the judiciary, but their recommendations with regard to legislative changes have remained unfulfilled.[17] With reference to Uttar Pradesh itself, the Law Commission felt that in many districts there was no substantial separation between the

13. 8 *Constituent Ass. Deb.* 218-19 (1947) (hereinafter cited as *C.A.D.*).

14. See *id.* at 222. While supporting Professor Shah's proposal, Mr. H. V. Kamath stated that when the amendment incorporating article 39A of the Draft Constitution was moved in December, 1948, Mr. Nehru had said that the Government of India was entirely in favour of a separation of the judiciary from the executive.

15. See *C.A.D.* at 225. Further, in support of Prefessor Shah's proposal, Dr. D. S. Deshmukh, another participant, emphasized that the *independence* of the judiciary is secured by a proper selection of the method of the appointment of the judges by providing that there shall be no interference by the executive in the judicial functions of the judiciary.

16. See *Ind. Const.* art. 237 :

> The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the States as they apply in relation to persons appointed to the judicial service of the State .....

According to the Supreme Court, this article was meant to enable the Governor to effect the separation of the judiciary from the executive. See *Chandra Mohan*, at 1994.

17. See The U.P. Judicial Reforms Commission *Report* (1950-51). In Madras on the other hand, the separation was effected, not by law but through an executive order, as early as 1950.

judiciary and the executive.[18] In view of the general indifference of the states in rectifying this pattern and considering the importance of proper administration of justice, the Law Commission recommended that the problem needed to be considered on an all-India basis in order to force the states to comply.[19] The commission even went so far as to suggest that the time was ripe for an amendment of article 235 of the Constitution to vest in the High Court supervisory power over the district judges.[20] To the Law Commission, it was clear from the experience since Independence that from the standpoint of efficient and just administration of justice it was important to bring about complete separation of the judiciary from the executive.

This importance of effective separation stems from several factors. First, it is well recognized that special training is necessary to produce a judiciary of a high calibre. In the words of the Civil Justice Committee (the Rankin Committee):

> Witnesses of eminence who speak with authority have in emphatic terms expressed their opinion before us that delay in the proceedings of civil courts in India is to a considerable extent due to want of any proper system in training the Judges.[21]

Only by placing the responsibility for supervision of the entire judicial branch in the state in the hands of the members of the highest court in each state can there be proper and complete guidance given to the lower judiciary. Secondly, in the selection and appointment of district judges, those who have the best knowledge of proper candidates are the High Court judges themselves. And lastly, there is certainly nothing more conducive to the responsible protection of individual rights than a judge's knowledge that his employment and future are in no way dependent upon the whims of the executive.

In view of these important considerations, the courts have since Independence been very wary of any executive encroachment into the workings of the judicial administration. In *Chandra Mohan* itself, in answer to the plea that the rules framed by the Governor were under power granted him under article 309 to draw up rules of employment for persons in "government service," the Court answered rightly that the requirements of a very specific provision, article 233, covered district judges and would not be overridden by a general provision covering all persons in "government service."[22] The concept of control over the subordinate judiciary as vested in the High Courts has been given a very broad interpretation in *Nripendranath Bagchi* v. *West*

18. See 2 *Fourteenth Law Comm'n of India, Report* 853 (1958).
19. *Id.* at 859.
20. 1 *Fourteenth Law Comm'n of India, Report* 220 (1958).
21. Id. at 161 (1958), citing *Civil Justice Committee Report* 181 (1925).
22. *Chandra Mohan* at 1994.

Bengal.[23] Further, in *Mohammed Gouse* v. *Andhra Pradesh*[24] it was held that this control included the power to take disciplinary action.

Thus, when the related question of the power of the Governor over the appointment of district judges came before the Supreme Court in the instant case, there was strong impetus to curtail the Governor's authority. In the words of the Court,

> Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a district Judge.[25]

Such a reading, it is submitted, is a proper limitation of the Governor's choice to members of the *independent judicial service* and not to any governmental service of his choice.

In even more recent judgments, the Supreme Court has further limited the power of the executive to disturb or reconstitute the body of the judiciary. In *Assam* v. *Ranga Mohammed*,[26] it was held that under article 233 of the Constitution, the Governor is concerned with the appointment, promotion and posting of cadre of district judges, but not with the "transfer" of district judges already appointed or promoted and posted to a cadre.[27] This case was followed in a judgment of the Orissa High Court which rejected the contention that *Ranga Mohammed* does not in any way confer jurisdiction on the High Court to order transfer of such of the members of the "superior judicial service" as were under the government.[28] The Supreme Court, on appeal, confirmed this view but decided against the competence of the High Court to fill some posts in the secretariat of a state government by transfers of judicial officers under its control.[28a] In another decision of the Supreme

23. A.I.R. 1961 Cal. 1. Here it was held that "*control*" in article 235 would include disciplinary control and jurisdiction. *State of W.B.* v. *Nripendranath Bagchi* [1961] 1 S.C.R. 77, upheld the decision of the High Court of Calcutta.

24. A.I.R. 1955 A.P. 65, 68 (Subba Rao, C.J.).

25. *Chandra Mohan* at 1994.

26. A.I.R. 1967 S.C. 903, [1967] 1 S.C.R. 454.

27. In *Ranga Mohammed, supra* note 26, Mr. Justice Hidayatullah rightly observed that the term "posting" cannot be understood in the sense of "*transfer*" because transfer operates at a later stage beyond appointment and promotion.

28. In *Sudhanshu Shekar Misra and Others* v. *P. C. De & Others*, I.L.R. [1967] Cut. 173, it was held by the Orissa High Court that the mere fact the deputation of three judicial officers to the executive department does not enable them to become executive officers and therefore, they are always under the control of the High Court.

28a. See *The State of Orissa* v. *Sudhanshu Shekar Misra* (Civil Appeals Nos. 625 to 630 of 1967, judgment delivered on 7 November 1967, as yet unreported). Hegde, J., speaking for the Court, described the situation as an "outcome of an unfortunate conflict between the High Court and the government of Orissa" and stressed the need for utmost co-operation in such situations between the High Court and the executive. The learned Justice carefully clarified that in *Ranga Mohammed* the power of appointment to certain post by transfers, was confined to a cadre "consisting essentially of officers in the direct control of the High Court."

Court, *Prem Nath* v. *State of Rajasthan*,[29] it was held that the Rajasthan Higher Judicial Service Rules, 1955, promulgated by the Rajpramukh,[30] were clearly inconsistent with article 233 of the Constitution and were therefore invalid in so far as any future appointments were concerned.[31] Through these decisions the judiciary in India has been placed on a much more secure and independent footing, a matter for which the citizen can rightfully be thankful.

IV. Necessity of Amending the Constitution

In the Parliament, the announcement of the Supreme Court's decisions in *Chandra Mohan* and *Ranga Mohammed* was a matter of great consternation. It was felt that invalidating judicial appointments after such a long length of time was a grave matter. Even worse, it was feared by the legislators that all the cases which had been decided by these judges would now be void. The government therefore introduced the Constitution (Twentieth Amendment) Act, 1966, which was passed after substantial debate. We shall consider here whether it was necessary to pass legislation to give effect to the decisions of the impugned judges.

The Supreme Court in its decision merely held that the impugned judges were not judges *de jure* and thus not entitled to continue in their posts. The issue whether their prior decisions would continue to be valid or not is another matter and did not receive any comment by the Court. It is well recognized, however, that in certain circumstances where a legally established position of judge is occupied by some one under the colour of authority he will be termed a judge *de facto* and his judgments prior to a court ruling that his appointment invalid will be sustained.[32] For example in *Sri Hanuman Foundaries Ltd.* v. *Hem Ranjan Deb*[33] it was held that the respondent was the *de facto* presiding

29. A.I.R. 1967 S C. 1599.

30. See article 238 of the Constitution. The term *Rajpramukh* was prevalent in part B states until 1955. At the time of the commmencement of the Constitution there were nine part A states, eight part B and ten part C states. The position of Rajpramukh in part B states was equivalent to Governor in part A states. Part B of the first schedule to the Constitution was repealed by the Constitution (Seventh Amendment) Act, 1956. Further, pursuant to the *States Reorganisation Commission Report*, 1955, the territories of India were divided into two categories, States and Union Territories (the later being administered by the central government), thereby abolishing the distinctions existing between the states before 1955.

31. See *supra* note 29. In this case the actual appointments were validated by virtue of article 233-A introduced by the Constitution (Twentieth Amendment) Act, 1966. Therefore, it was held, the appointments already made cannot be questioned although it was not inconsistent with the spirit of article 233 of the Constitution.

32. See *Pulin Behary Das* v. *King Emperor*, 15 *Calcutta Law Journal* 517 (F.B.) (1912). It was held that the acts of officers *de facto* performed by them within the scope of their assumed official authority in the interest of the public or third parties and not for their own benefits are generally valid and binding as if they were acts of officers *de jure*.

33. See 67, *Calcutta Weekly Notes* 437, (1962).

officer of a labour court, inspite of the fact that he had not held any judicial office in India for not less than seven years and was on this basis ineligible *de jure* for appointment as presiding officer of a labour court. The purpose for this rule is to avoid the continual needless harassment and delay which would occur if every litigant and supplicant were able to challenge *ad fundamento* the authority of every person to hold his judicial position. Furthermore, the *de facto* doctrine serves to protect the interest of the public and the individual where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. The doctrine in fact is necessary to maintain the supermacy of the law and to preserve peace in the community at large.

In the United Kingdom and the United States the *de facto* doctrine has been widely applied as a matter of policy and good sense in an innumerable number of decisions. The official acts of a *de facto* judge, before he is ousted from office, are valid and binding, at least in so far as the public and third persons are concerned and are not open to collateral attack or subject to question on jurisdictional grounds.[34] Lord Ellenbourough defines the term "*de facto* officer" in *Rex* v. *The Corporation of the Bredford Level*[35] as "one who has the reputation of being the officer he assumes to be, yet is not a good officer in point of law."[35a] In the United States, the *de facto* principle has been applied even where a judge holds office after his term has expired.[36] Even an unconstitutional statute can be sufficient to give a colour of right and authority to one seated in a judicial post.[37] It is evident from the above that there is a general presumption of validity in cases where power is exercised under colour of authority. Without this presumption, much disorder and inconvenience could result in the administration of justice.

These same considerations apply when considering the decisions of the impugned judges from Uttar Pradesh. In our opinion, the Supreme Court would not have ruled invalid these prior cases. Even were the Court to find that the *de facto* doctrine did not apply, it would seem to

34. See, generally 48 *Corpus Juris Secundum* (hereinafter cited as *C.J.S.*) §. 52, at 1016 (1947) ; 49 *C.J.S.* §. 17, at 43.

35. 6 East. 356 ; 102 Eng. Rep. 1323 (1805).

35a. *Id.* at 368-369. The decision in this case pertained the validity of acts done by the deputy registrar of the Corporation after the death of the registrar. Applying the principle quoted in the text, Lord Ellenborough was unwilling to hold the deputy registrar to be a de facto officer since his reputation was always that of a deputy and that "such reputation must necessarily have ceased with the knowledge of the death of his principal." *Id* at 369.

36. See *Ridout* v. *State*, 30 S.W. 2d. 255, 261 (1930), 71 A.L.R. 830 (931) ; *Carlton* v. *People*, 10 Mich 259 cited in 71 A L.R. 830 at 838, see also the authorities cited in Annot., 71 A L.R. 848-54 (1931).

37. See R.C.L. 588 at 601, as cited in *Ridout* v. *State*. *supra* note 36.

us that the Court, after calculating the disorder likely to result from voiding these long lines of decisions, would rule that this was another situation in which a constitutional ruling ought to be applied prospectively and not retrospectively. On the other hand, even assuming some doubt in the probable result, where a change in the Constitution is at stake there should be a great deal of studied consideration. In a number of cases the *de facto* doctrine has been employed by the Indian Courts.[38] Until the Supreme Court had had a chance to consider this issue and also to give a decision in its words, it would seem more befitting the dignity of the judicial branch of the government not to pass an amendment which presumes to overrule one of the choices open to the Court.

In the statement of objects and reasons of the amendment bill, however, the sponsors put forward their conclusions as to the exigency of the bill as follows :

> As a result of the Supreme Court judgments, a serious situation has arisen because doubt has been thrown on the validity of the judgment, decrees, orders and sentences passed or made by these district judges and a number of writ petitions and other cases have already been filed challenging their validity. The functioning of the district courts in U.P. has practically come to standstill.[39]

It is difficult to agree with this statement. On the contrary, it is clear from our reading of the law that the judges whose appointments were found to be tainted were acting as *de facto* judges and that therefore their past judgments would have been given full effect.

From the reading of the debates on the bill, it is clear that it was the Uttar Pradesh state government which was the prime force behind the movement to validate the appointments of those judges who had been determined to be constitutionally ineligible to hold office.[40] The amendment as it is incorporated into the Constitution does not lay

38. See *Bhaskara Pillai* v. *Travancore-Cochin*, 5 D.L.R. (Trav.-Cochin) 382 (1950); and the discussion in Markose, *Judicial Control of Administrative Action in India* 356-60 (1956).

39. See Constitution (Twentieth Amendment) Act, 1966. The Gazette of India Extraordinary part II, section I, 665.

40. 52 Lok Sabha Deb. (3rd Ser.) 7248-57 (1966). In response to Mr. Pathak's motion to consider the amendment bill Mr. Nath Pai, the leader of the Praja Socialist Party in Parliament and also an eminent barrister, opposed the amendment of the Constitution on the grounds that only eleven judges, of whom four were direct parties to the cases concerned, would be affected by the Supreme Court judgment. He alleged that the independence of the judiciary was being interfered with in U.P. and quoted the Law Commissions' report in support of his allegation. He further said that the Law Minister's fears were unfounded and that the Constitution should not be amended merely to regularize the irregularities and illegalities committed by the executive. It is only when the need is imperative, overpowering and convincing with regard to social objectives that the Constitution should be amended. In this case none of the above elements existed. If the Constitution is to be amended, one should forget the party loyalty and should bear loyalty to the Constitution. He also opposed the bill on political grounds, saying that it was improper for the Lok Sabha to make an amendment to the Constitution just on the eve of its dissolution.

down any new doctrine by which henceforth the judiciary may test the validity of judicial appointments by the government.[41] Article 233 and the principles of *Chandra Mohan* decision will apply with full force to all appointments in the future. The effect of the amendment in fact has been merely to allow to continue in office a group of appointees who would now, were the executive to attempt to place them in office by the same procedures by which they were chosen before, be declared ineligible. It is submitted that this aim of satisfying a few persons by continuing their employment should not have been the aim of a provision in a constitutional amendment. Further, there is a strong consensus of opinion that the numerous amendments have reflected upon the prestige of the judiciary and its capacity to effect decisions. It has been said by Justice Jackson of the American Supreme Court in *Everson* v. *Board of Education* that "the great purposes of the Constitution do not depend on the approval or convenience of those they restrain."[42] The Constitution must always remain within the reach of those who find such restraints oppressing.

It is apparent from a reading of the ninth schedule to the Constitution that the area of flexibility within which the Supreme Court may bring to bear its equitable influence has been greatly reduced. Moreover, continued overruling of decisions through the amendment process has cast aspersions upon the very role of the courts in the democratic process. It might be proffered that the previous amendments to our Constitution may be justified on the grounds of implementing the goals of social, economic and political justice which are enshrined in the preamble. But no such plea can possibly be raised to justify an amendment to override the instant Supreme Court judgment.

V. CONCLUSION

The Supreme Court's decision in *Chandra Mohan* is correct on the facts of the case. The Court's desire to lay down a progressive interpretation of law is a pragmatic approach. But the Supreme Court has failed to perceive that the Constitution-makers have advisedly provided for two modes of recruitment to the higher judiciary, corresponding to the two different sources, the bar and the lower judiciary, from which recruitments are to be made. As regards the lower judiciary, since they would be under the supervision of the executive, the Governor is the appropriate authority to select candidates from that source for appointment to the post of district judges. The High Court, however, should

41. See *id.* at 7234. The then Union Law Minister, Mr. Pathak, stated that the bill does not affect any change in the substantive provisions of any article of the Constitution. It merely seeks to validate the past appointment of the judges and the judgment and order of transfer.

42. *Everson* v. *Board of Education*, 330 U.S. 1, 28 (1946) (Jackson, J., dissenting).

have a strong voice as to which candidates are most fit to discharge the judicial duties that would befall them as district judges. Accordingly, article 233(1) leaves the initiative for recruitment of district judges from the judicial service in the hands of the executive and confers on the High Court the power of advice. So far as the recruitment from the bar is concerned, the High Court in which the members of the bar practice is the appropriate authority to recommend suitable names. Accordingly, article 233(2) gives to the High Court this prerogative in the appointments to be made from the bar. Thus it would appear that the Constitution-makers have advisedly used the word "consultation" in article 233(1) and "recommendation" in article 233(2) of the Constitution. This distinction, we are afraid, the Supreme Court has failed to appreciate.

If the above interpretation of the word "consultation" is correct then it would follow that the mode of recruitment provided for an article 233(1) would be appropriate only so far as lower judicial service is under the supervision and control of the executive. Once the lower judiciary comes under the supervision and control of the High Court, there would be no reason to leave the initiative for recruitment from the lower judiciary in the hands of the executive. If the judiciary is separated from the executive it is obvious the lower judiciary would come under the control and supervision of the High Court as in the case of recruitment from amongst the members of the bar. But it would appear, that, when article 233 was formulated, the Constitution-makers did not have in mind what would arise after the separation of the judiciary from the executive. In view of the above circumstances, we suggest that article 233 be amended, as to vest the power of appointment in both the cases with the High Court.

On the second issue, the Supreme Court's reading of "service" to mean "judicial service" is clearly in keeping with the spirit of the Constitution and stands as good law not only on the facts of the *Chandra Mohan* case but as a constitutional doctrine as well. It is only to be regretted, in closing, that the legislature amended the Constitution in such a haste without giving the Supreme Court an opportunity to declare the past decisions by the impugned judicial officers to be of continuing validity.

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