THE SUPREME COURT'S JUDGMENT IN THE JUDGES' CASE

N. A. PALKHIVALA

FORUM OF FREE ENTERPRISE
PIRAMAL MANSION, 235 DR. D. N. ROAD,
BOMBAY 400 001.

THE SUPREME COURT'S JUDGMENT IN THE JUDGES' CASE

A critique of the judgment delivered on December 30, 1981

By

Nani A. Palkhivala

An independent judiciary is the very heart of a Republic. The foundation of a democracy, the source of its perennial vitality, the condition for its growth, and the hope for its welfare—all lie in that great institution, an independent judiciary.

Those who share the above sentiments must have been greatly disappointed by the majority judgment of the Supreme Court in what has come to be known as the Judges' Case. One may well wonder whether it was worth hearing arguments at such length, looking into so many confidential State papers and laying down eloquently so many lofty general principles, if in the net result no relief was to be given to the petitioners and the direct consequence of the judgment was to be the strengthening of the hand of the executive which has been of late so heavy on the judiciary.

I shall examine in this article only a few of the significant facets of the judgment, after giving a brief summary of what the Court was called upon to decide and what it decided.

There were three main issues in the petitions before the Supreme Court—(1) whether the Law Minister's circular dated 18th March 1981 seeking the consent of additional judges to be appointed in other States was valid; (2) whether an additional judge could be dropped without giving him an extension, despite mounting arrears of work; and (3) in what

circumstances could a High Court judge be transferred to another High Court.

The four subsidiary issues which arose for consideration were—(1) the *locus standi* of the lawyers to maintain the petitions; (2) the claim of privilege put forth by the Central Government regarding documents pertaining to the non-extension or transfer of judges; (3) the circumstances in which and the period for which additional judges could be appointed under Article 224; and (4) the question whether the views of the Chief Justice of India had primacy if his advice, regarding the appointment of a judge, differed from that of the Chief Justice of a High Court or the Governor of a State.

It was for the first time in the judicial history of India that (a) an additional judge whose term was not extended, approached the Court for relief; (b) the claim of privilege for State papers regarding judicial appointments was negatived and disclosure was ordered; and (c) the Chief Justice of India filed an affidavit in a matter pending in the Supreme Court.

There were two propositions on which there was no controversy: the independence of the judiciary is a cardinal principle of our Constitution, and an additional judge of a High Court is not appointed on probation.

Each of the seven Judges delivered a separate judgment. All were agreed upon the *locus standi* of lawyers to present the petition, and on the historical fact that Article 224 which deals with the appointment of additional judges has been misused since 1956, when it was first introduced into the Constitution.

By a majority verdict, all the petitions were dismissed and no relief was given in any case.

The minority view—voiced by Gupta, Tulzapurkar and Pathak, JJ,—was that the Law Minister's circular seeking the consent of additional judges to

be appointed in any other State was invalid; and that the non-extension of Additional Judge Kumar in the Delhi High Court was also invalid, with the result that the President of India should reconsider the question of his extension. However, these three Judges who were in a minority on the above points, formed the majority with Venkataramiah, J, in holding that Chief Justice K. B. N. Singh's transfer from the Patna to the Madras High Court was valid.

Unfortunately, some of the judgments are far too prolix, —1486 pages, half a million words. A judgment of the Supreme Court and a thesis for a Doctorate in Law are two different exercises. It would be difficult to name any other country the judgments of whose highest court are generally so verbose as those of ours. Brevity might well be cultivated as a virtue in Supreme Court judgments — at least as a concession to the shortness of human life.

Further, it is not easy to see the relevance of some passages in the judgments to the issues before the Court. For instance, Desai, J, regards our judicial system as "cancer-ridden" and goes on to observe that "the justice delivery system of this country is utterly alien to the genius of this country. This is a smuggled system from across the shores imposed upon us by the empire builders for their own political motives and during the foreign rule a class came into existence which has enormously benefited by this justice delivery system to the detriment of teeming millions and, therefore, they have become the protagonists of the system."

None of the main or subsidiary issues called for this comment. In the warmth of his denunciation, the learned Judge has overlooked what is obvious, viz., that a system which was openly "imposed upon us" by the foreign administrators could not possibly be said to be "smuggled".

The Chief Justice of India was made a party to one of the petitions. This was clearly wrong. But if any petitioner made such a mistake, the Court should have ordered the name of the Chief Justice to be struck off from the list of respondents before the hearing commenced.

One error led to another. The Court passed an order regarding the filing of affidavits by the respondents in such terms as to suggest that the Court expected an affidavit to be filed by Chief Justice Chandrachud himself. That in its turn led to the crowning mistake of Bhagwati, J, in treating the Chief Justice of India as a litigant in the case.

Transfer of Chief Justice K. B. N. Singh

The transfer of Chief Justice K. B. N. Singh from the Patna High Court to the Madras High Court was made by the President of India under Article 222 which says, "The President may, after consultation with the Chief Justice of India, transfer a judge from one High Court to any other High Court". The Chief Justice of India filed an affidavit stating on oath that there had been a full and effective consultation between him and the President (the Government of India) in respect of the transfer of Chief Justice Singh. It is significant to note that the Law Minister, though a party to the proceedings, filed no affidavit.

The only question in that petition was whether the order transferring Chief Justice Singh was valid and constitutional. The contest was clearly between the petitioners who challenged the validity of the order and the Government of India ("the President") who had passed the order. By no rational test could the Chief Justice of India be regarded as "a litigant" or as having any interest in the outcome of the litigation. The decision to effect the transfer was entirely

that of the Government—the party consulted can never become the deciding authority.

Bhagwati, J, makes the following observations: "I may observe that this is a remarkably unusual case in which there is substantially a contest between the Chief Justice of a High Court on one hand and the Chief Justice of India on the other . . . Since the Order of transfer was made by the Government on the recommendation of the Chief Justice of India, it is the Chief Justice of India who has accepted the gauntlet to join the contest against Chief Justice K. B. N. Singh. The Chief Justice of India has filed a counter-affidavit in reply to the writ petition of Chief Justice K. B. N. Singh and others, but having filed such counter-affidavit, he has chosen not to appear before us through counsel . . . We are deciding this contest between Chief Justice K. B. N. Singh on the one hand and the Chief Justice of India and the Government on the other . . . We have the highest regard for the Chief Justice of India as we have for Chief Justice K. B. N. Singh, but they are both litigants before us and while deciding the contest between them we must be blind to their status or position and we must adjudicate the controversy between them as we might do in the case of any other litigants before us . . . The scales of justice cannot tilt one way or another merely because a litigant before us happens to be the Chief Justice of a High Court or the highest among the Indian Judiciary."

There can be no doubt that the aforesaid repeated remarks of Bhagwati, J, calling the Chief Justice of India "a litigant" entering into a "contest" with Chief Justice K. B. N. Singh are wholly unwarranted. To expect the Chief Justice of India to be a litigant, to file an affidavit, to appear through counsel, or to prove by written documents what he had discussed with the Government, is such a bizarre suggestion that

it should have been rejected out of hand. Fortunately, there has been in the ultimate result no miscarriage of justice, since the majority took the view that the transfer of Chief Justice K. B. N. Singh was valid on the facts proved before the Court.

Bhagwati, J, voiced the minority view when he held that the transfer of Chief Justice Singh to the Madras High Court was invalid. In my opinion, the majority view upholding the transfer was clearly right, since the transfer had been effected in the public interest and without any oblique motive. No doubt every judge has the jurisdiction to decide rightly or wrongly. But what is regrettable is that the judgment of Bhagwati, J, dealing with the transfer of Chief Justice Singh, is couched in language which occasionally lapses into questionable taste when dealing with the conduct and affidavit of the Chief Justice of India. The averments in the affidavit of the Chief Justice of India, as one would expect from such a deponent, were carefully drafted and well worded. But Bhagwati, J, finds them "vague and indefinite," "delightfully vague", "a little intriguing" and "the Constitutional incantation". Apart from the fact that this criticism of the affidavit of the Chief Justice of India was totally unjustified, one is constrained to observe that respect for the office of the head of the Indian Judiciary warranted a choice of more dignified words in the judgment of a brother judge.

Locus Standi

The unanimous judgment of the Supreme Court regarding *locus standi* of lawyers to agitate the issues was clearly right. In fact no other view was possible. It is well settled that any member of the public has a right to bring before the Court a "public interest" case, provided he has a sufficient interest in the proceedings and is not a wayfarer, interloper, officious intervener or busybody. Obviously, the

cases before the Supreme Court fell in the category of "public interest" cases; and lawyers do have "sufficient interest" in judicial appointments.

The argument that such a liberal extension of the doctrine of *locus standi* would open up the floodgates of litigation was nailed by Prof. K. E. Scott in words which were approved by the Australian Law Reforms Commission: "The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the court room". As Krishna Iyer, J, in *Fertilizer Corporation Kamgar Union's* case had observed, "If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the Court will not be ajar for him. But if he belongs to an organization which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered."

Privilege for State Documents

The Supreme Court's decision to reject the Government's claim of privilege and order *public* disclosure of the documents pertaining to the non-extension of Kumar, J, and the transfer of Chief Justice K. B. N. Singh, must be regarded as controversial. When the Supreme Court ordered the documents to be disclosed, it would have been better if the hearing had taken place in chambers or in camera, to prevent nationwide publicity which has only served to lower the image of the judiciary in the eyes of the common man. In any event, the order of disclosure should not serve as a precedent to be routinely followed hereafter. The Court should be extremely circumspect in ordering disclosure of documents pertaining to judicial appointments. Pathak, J, found that "it was

not an easy decision for the Court to order disclosure", though on balance he concurred in the order while sounding a note of warning. He observed:

> "The rules now developed by this Court relating to the disclosure of documents need to be carefully applied. The balance between the conflicting claims of public interest represented by officialdom and the public interest flowing from the administration of justice often calls for a delicate assessment, into which perforce must enter considerations vital to the operations of Government on the one hand and the demands of adjudication on the other. The responsibility fixed on the Court is a serious one, and there is no need to warn that this power which now vests in the Court can have grave consequences if the content of its potential is not truly appreciated and realized by those who wield it. Whenever a Court breaks new ground, the development and recognition of new rights is often accompanied by the birth of problems surfacing also for the first time. New doctrines must be cautiously applied, and no Court can shirk its duty if it finds that the power has been rightly invoked".

Law Minister's Circular Letter

On 24th May 1949 Pandit Jawaharlal Nehru stated in the Constituent Assembly that our Judges should be "first-rate" men of "the highest integrity" who could "stand up against the executive government and whoever may come in their way". But Jawaharlal Nehru's standards are no longer in vogue. Inconvenient Judges who stand up against the executive are sought to be transferred to other States with the ostensible purpose of furthering "national integration". In reality, the policy of transfer of Judges is calculated to accomplish disintegration of judicial independence rather than national integration.

Dealing with the case of Justice Sankalchand Sheth who was transferred during the Emergency, Chandrachud, J, had observed: "There are numerous other ways of achieving national integration more effectively than by transferring High Court Judges from one High Court to another. . . . Considering the great inconvenience, hardship and possibly a slur which a transfer from one High Court to another involves, the better view would be to leave the Judges untouched and take other measures to achieve that purpose. If at all, on mature and objective appraisal of the situation, it is still felt that there should be a fair sprinkling in the High Court judiciary of persons belonging to other States, that object can be more easily and effectively attained by making appointments of outsiders initially."

On 18th March 1981 the then Law Minister issued a circular letter addressed to the Chief Ministers of different States in which he requested them (a) to obtain from all the Additional Judges of the High Court in the State their consent to be appointed as permanent Judges in any other High Court in the country, and (b) also to obtain similar consent from those persons who have been, or in the future are to be, proposed for appointment as Judges. The letter also carried a request to obtain from the Additional Judges and the proposed appointees names of three High Courts in the order of preference to which they would like to be appointed as Judges or permanent Judges as the case may be. It was added that the written consent and preferences of the Additional Judges and the proposed appointees should be sent to the Law Minister within a fortnight of the receipt of the letter.

The majority of the Supreme Court Judges held that the Law Minister's circular did not deal with transfer, because it contemplated the reappointment

of an Additional Judge to another State after his present tenure ended. No doubt, this is technically true. The Godfather, in the famous novel bearing that name, was speaking likewise the technical truth when, after getting his rival murdered by an assassin, he told his wife, "*I* did not kill him". In form, the Law Minister's circular letter did not deal with transfer. In substance, the Additional Judge was asked to consent to his transfer to another State by forgoing his legitimate expectation to be appointed for a further term or to be made a permanent Judge in the very High Court where he functioned.

The nationwide sharp reaction to the Law Minister's circular was perfectly natural, having regard to the far-from-creditable record of the ruling party:

- In April 1973 the supersession of Justices Shelat, Hegde and Grover and the appointment of Justice Ray as the Chief Justice.

- During the Emergency the transfer of 16 Judges when the record showed that none of them was transferred for the so-called purpose of "national integration"; and the already prepared list of 40 other Judges who were to be transferred later.

- In January 1976 the refusal to extend the term of U. R. Lalit, the Additional Judge of the Bombay High Court, who had granted bail to some students during the Emergency; and in February 1976 the refusal to continue R. N. Aggarwal, the Additional Judge of the Delhi High Court, who had ordered Kuldip Nayar to be released from preventive detention.

- In January 1977 the supersession of Justice H. R. Khanna and the appointment of Justice Beg as the Chief Justice.

- In 1980 five High Courts had only acting Chief Justices who remained unconfirmed (Andhra Pradesh, Assam, Delhi, Jammu & Kashmir, and Rajasthan).
- The shocking new practice of appointment of additional judges for only a few months at a time.
- Leaving additional judges guessing till the last moment whether their term would be extended or not, with the result that some of them had to be re-sworn just a few hours or minutes before their term was due to expire.
- The circular letter was issued at a time when politicians in high positions had been indulging in a campaign of denigrating the higher judiciary, treating every court decision adverse to the Government as a deliberate and motivated attack on the executive. A Chief Minister of a prominent State had talked of the "Dictatorship of the Court", while a Cabinet Minister in the Central Government had bracketed the judiciary with the opposition parties.

The circular, no doubt, aggravated the atmosphere of fear psychosis among the Additional Judges.

Bhagwati, J, expressing the majority view upheld the circular on the ground that "it has no constitutional or legal sanction behind it" and that it is "a document without any legal force". If this reasoning is right, the Court must also uphold a circular letter which communicates to each Judge through the Chief Minister that "the Government of India thinks very highly of those 'value-packed' Judges who never rule against the Government, and will consider favourably their promotion to the Supreme Court". You need an attitude of engaging, childlike innocence not to realize that a circular letter from the Law Minister can undermine judicial independence most

effectively, while ensuring that it has "no constitutional or legal sanction" behind it.

The minority view, voiced by Gupta, Tulzapurkar and Pathak, JJ, that the Law Minister's circular letter was invalid is, I think, clearly the right view. The circular letter was unconstitutional for three reasons.

First, against the backdrop of the historical facts detailed above, it was calculated to have a coercive effect on the minds of the sitting Additional Judges by implying a threat to them that if they did not furnish their consent to be shifted elsewhere they might not be continued nor made permanent.

Secondly, Article 222 of the Constitution provides that "The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court". Transfers on a wholesale basis which leave no scope for considering each particular case and which are based on the executive's one-sided policy are outside the purview of Article 222. Tulzapurkar, J, used the language of studied moderation when he called the circular letter an attempt to circumvent the constitutional safeguards "by resorting to transfers of sitting Additional Judges under the garb of making fresh appointments on the expiry of their initial or extended term".

Thirdly, an official of the Law Ministry filed an affidavit which carried the clear implication that the refusal of an Additional Judge to give his consent to serve in another State would be a relevant but not a conclusive factor against him when the question arises of the extension of his term or his appointment as a permanent Judge. The affidavit said: "it is not, however, the intention of the letter that a permanent or further appointment will be denied to a Judge *only* on the ground that he had not given his consent. . . . By no stretch of construction or from the facts and circumstances existing can it be sought to be inferred

that failure to give consent would *necessarily* involve an Additional Judge ceasing to be a Judge." Thus, invidious discrimination between Additional Judges who give their consent and those who do not was writ large on the face of the circular letter and that made the circular letter violative of Article 14. In this context it is necessary to remember that High Court Judges do not constitute a single all-India cadre.

If the issue of transfer of High Court Judges was not fraught with such tragic consequences for the independence of the judiciary, one would have thought that Fazal Ali, J, was seeking to enliven the proceedings when he held that no Judge should regard himself as punished when he is transferred, because on his transfer he becomes entitled to a compensatory allowance under Article 222(2) of the Constitution: "The granting of compensatory allowance to a Judge in lieu of transfer completely destroys the concept that the transfer involves a stigma or a punishment. . . . We, therefore, fail to see what harm is done to the judges. On the other hand, the Circular provides an additional facility to the judges who may like to go out of the State in accordance with the policy." This observation should rank as one of the most incredible pronouncements ever to emanate from the Supreme Court.

The refusal of the majority of the Supreme Court to strike down the circular must be regarded as the high watermark of abdication of judicial power.

Additional Judges

Article 216 of the Constitution reads, "Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint". This Article implies a constitutional obligation on the President to ensure that the High Court is fully constituted. Incalculable

injury to the cause of public justice would ensue if the High Court is insufficiently manned to cope with the normal workload. When the normal workload of most of the High Courts is increasing at an alarming rate, quite obviously the remedy lies in increasing the strength of permanent Judges. If there is increasing congestion of traffic, you do not blame the traffic but you widen the roads.

Article 224(1) of the Constitution makes it clear that Additional Judges can be appointed only when it is necessary to increase the number of the Judges for the time being "by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein", and the appointment has to be made for a period "not exceeding two years". It is unarguable that Additional Judges can be appointed to cope with permanent increase in the normal workload of the High Court. Yet, ever since the power of appointing Additional Judges was conferred upon the Government in 1956, that Article has been blatantly misused and the constitutional scheme has been distorted. Almost every one has been appointed first as an Additional Judge and then confirmed as a permanent Judge.

On 31st December 1980 the number of cases pending in the various High Courts was 6,78,951 — it was 6,13,799 on 31st December 1978. (Incidentally, the heavy arrears were not due to inadequate disposal. The average rate of disposals per judge per year fixed at one of the Chief Justices' Conferences was 650, while the average rate of disposals of main cases per judge per year during the years 1978 to 1980 was 860.).

On 18th March 1981 — the date of the circular letter — the aggregate sanctioned strength of permanent Judges of High Courts was 308, while the aggregate sanctioned strength of Additional

Judges was 97. This means that the sanctioned strength of Additional Judges was almost one-third of that of permanent Judges. Surely, those Additional Judges ought to have been appointed as permanent Judges if the constitutional duty under Article 216 of manning the High Courts sufficiently had to be discharged.

The dereliction of the constitutional duty was compounded by the fact that appointments were not made even upto the sanctioned strengths of permanent and Additional Judges. On 18th March 1981 there were as many as 85 vacancies in the High Courts, and on 30th September 1981 there were 76.

Nothing could be better calculated to destroy the sanctity of the Constitution than the continuance of a practice which is dead against both the letter and the spirit of the Constitution. By any rational standard, the various High Courts are grossly undermanned.

It is a matter of great public regret that the Supreme Court did not issue a direction restraining the Government from appointing hereafter any Additional Judges, till at least the vacancies in the sanctioned strength of permanent Judges had been filled up. As Gupta, J, said: "The independence of the judiciary depends to a great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it would be difficult for him to perform the duties of his office without fear or favour."

Kumar's Case

The Judges in a minority (Gupta, Tulzapurkar and Pathak, JJ,) were right in holding that the case of

Kumar, J, of the Delhi High Court required to be reconsidered by the President for an extension of his term. The majority rejected his plea on the wholly unwarranted assumption that there was a full and effective consultation with the Chief Justice of India, although the record of the case gave no support to the view that the grave allegations against Kumar, contained in the letter dated 7th May 1981 addressed by the Chief Justice of the Delhi High Court to the Law Minister, were ever disclosed to the Chief Justice of India.

However, I would like to comment on the position under Article 217 which requires that in matters of appointment of High Court Judges the President must have free and effective consultation with the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court. In dealing with Kumar's case where the advice of the Chief Justice of India was contrary to that of the Chief Justice of the Delhi High Court, Bhagwati, J, held that under Article 217 the opinion of all the three functionaries who are to be consulted stands on the same footing and the opinion of the Chief Justice of India has no primacy. Bhagwati, J's ruling is unacceptable because its logical consequence is to put no higher value on the opinion of the Chief Justice of India than on that of the Governor of the State. In my opinion, if the Government were to reject the advice of the Chief Justice of India *merely* on the ground that it has received contrary advice from the Chief Justice of the State or the Governor, it would not only be acting unrealistically and unwisely but it would be guilty of constitutional impropriety. In Pandit Jawaharlal Nehru's time cases arose where the advice of the Chief Justice of India differed from that of the other functionaries, and Nehru abided by the advice of the Chief Justice of India.

The President is not an umpire or arbiter with freedom to choose the advice which suits him. On a proper reading of the constitutional scheme, primacy should be accorded to the advice tendered by the Chief Justice of India when he has fully considered — while disagreeing with — the views of the other two high constitutional functionaries; although his advice may be rejected by the Government for other valid reasons.

Can erring Judges be transferred?

The transfer of Chief Justice K. B. N. Singh from Patna to Madras was clearly justified, as pointed out above, since the transfer had been effected *bona fide* in the public interest. But that case raises a point of great constitutional importance which needs precise formulation.

The Supreme Court ruled in the case of Justice Sankalchand Sheth that a Judge could be transferred without his consent; and the validity of such non-consensual transfers was reaffirmed in the latest case.

In Sheth's case Chandrachud, J, had rightly said: "Experience shows that there are cases, though fortunately they are few and far between, in which the exigencies of administration necessitate the transfer of a Judge from one High Court to another. The factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites."

But the syllogism which has now been accepted by the Supreme Court is that a Judge can be transferred in the public interest but not by way of

punishment; and therefore, if a Judge deviates from high standards of judicial ethics, he cannot be transferred because that would be by way of punishment. The logical conclusion from this process of reasoning is that a guilty Judge cannot be transferred but an innocent Judge can be. If a Judge's relatives are able to earn high fees at the Bar because of his position on the Bench and it is done with the Judge's connivance, the Judge cannot be transferred; but if it is done without his connivance, he can be transferred. Acting on this principle, some of the Judges who upheld the transfer of Chief Justice Singh are at pains to point out that there was no allegation of any impropriety against Chief Justice Singh. While, on the facts, there is no doubt that there was no such allegation against Chief Justice Singh, I am here dealing with the constitutional question whether his transfer would have been invalid if there had been such an allegation supported by evidence.

I regard the view, which forges out of misconduct a shield against transfer, as wrong. The correct constitutional position may be summed up as follows:

(1) The dichotomy is not between transfers in the public interest and transfers by way of punishment. The dichotomy is really between transfers in the public interest and transfers for extraneous considerations. Seeking to punish a Judge is merely a species of the genus "extraneous considerations". If a Judge is transferred in the interest of purity of administration of justice, his transfer would be valid, irrespective of the question whether the Judge was consciously defiling the well-spring of justice or not.

(2) A non-consensual transfer can only be for overriding considerations of public interest and not for any extraneous consideration.

Seeking to transfer a Judge because of his sturdy independence and for judgments against the executive, is not only an extraneous consideration but a vicious, disgraceful and *mala fide* exercise of constitutional power. Such an order of transfer would be set aside by the Court, not because it amounts to punishment of the Judge but because the order would be *mala fide* and for an oblique purpose.

(3) It is the object of the transfer and not the result or effect of the transfer which is the decisive factor. If the Judge suffers great inconvenience and feels punished, that would not vitiate the transfer if the *bona fide* object was public interest, and it would not convert it into a transfer by way of punishment. As Gupta, J, said, "An order of transfer even if made for administrative reasons and in public interest is likely to cause some injury to the Judge transferred, though that could not be a valid ground for holding that the transfer is by way of punishment. It is the reason behind the order of transfer that should determine the nature."

(4) The argument that an erring Judge should not be transferred but impeached in Parliament under Article 218, read with Article 124(4), suffers from three infirmities. First, there is no constitutional warrant for the assumption that a Judge liable to be impeached is a Judge not liable to be transferred, or that the liability to be impeached and the liability to be transferred are mutually exclusive. On the contrary, all notions of justice and commonsense point to the opposite conclusion, viz. that conduct involving judicial impropriety

should be no defence against transfer. Secondly, a Judge's impropriety may not amount to misbehaviour, whereas impeachment under Articles 218 and 124(4) can only be "on the ground of proved misbehaviour or incapacity". Thirdly, to invite politicians to use the weapon of impeachment of Judges is hardly desirable or far-sighted. Let us not forget that as many as 198 signatures of MPs were procured on a scandalous petition to the Speaker of the Lok Sabha to impeach Justice J. C. Shah, only because he had passed a wholly justified order against a corrupt government servant. Fortunately, Mr. Dhillon, who was then the Speaker of the Lok Sabha, managed to convince the majority of the signatories of the irresponsibility of their act and the move for impeachment was dropped.

In conclusion, I would like to say a word regarding the so-called "confrontation" between the executive and the judiciary. Since the Courts are the trustees of the law and charged with the duty of securing obedience to it, they have to stand high above the storms. They must necessarily judge the validity of other men's actions and act as a brake on other men's conduct. Wise men who are so judged and restrained yield with a grace to the judicial process which is the only way devised by the wit of man to maintain the rule of law. Thick-skinned and thick-headed men in power regard such judgment and restraint as constituting a "confrontation" between the judiciary on the one hand and the executive or the legislature on the other. Every time a judge vindicates the rights of the citizen against repressive authority, he is only protecting the integrity of the Constitution.

(By courtesy, *The Indian Express*)

424

Have you joined the Forum?

The Forum of Free Enterprise is a non-political and non-partisan organisation, started in 1956, to educate public opinion in India on free enterprise and its close relationship with the democratic way of life. The Forum seeks to stimulate public thinking on vital economic problems of the day through booklets and leaflets, meetings, essay competitions, and other means as befit a democratic society.

Membership is open to all who agree with the Manifesto of the Forum. Annual membership fee is Rs. 15/- (entrance fee, Rs. 10/-) and Associate Membership fee, Rs. 7/- only (entrance fee, Rs. 5/-). Graduate course students can get our booklets and leaflets by becoming Student Associates on payment of Rs. 3/- only. (No entrance fee).

Write for further particulars (state whether Membership or Student Associateship) to the Secretary, Forum of Free Enterprise, 235, Dr. Dadabhai Naoroji Road, Post Box No. 48-A, Bombay-400 001.

Published by M. R. PAI for the Forum of Free Enterprise, 235, Dr. Dadabhai Naoroji Road, Bombay-400 001, and printed at TATA PRESS Ltd., 414, Veer Savarkar Marg, Prabhadevi, Bombay 400 025.

15/Feb./1982