



EROSION OF HIERARCHICAL DISCIPLINE IN THE SUPREME COURT OF INDIA

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I. INTRODUCTION

In a democratic political set up, no one can deny the importance of the judiciary. An independent judiciary is an indispensable requisite of a free society governed by rule of law. Such independence implies freedom from interference by the executive and legislature with the exercise of the judicial function but does not mean that the judges are entitled to act in an arbitrary manner. For a Parliamentary democracy committed by its Constitution to justice for all, Lord Bryce has aptly remarked, “*there is no better test of the excellence of a government than the efficiency of its judicial system.*”¹

The judge’s functions are, “to decide individual cases independently, and to act as a custodian of the law. Impartiality must be assured to fulfill the first function, particularly when judges are required to make value judgments, such as reasonableness, fairness and justice. In exercising judgment, the judge must apply values ultimately derived from those prevailing in the community. This is not just the application of public opinion. The judicial function as custodian of the law is essential to the maintenance of parliamentary democracy and the rule of law.”² As a political concept the ‘rule of law’ has as at least one main strand, the minimization if not the exclusion of human arbitrariness from the process of law and government.³ This provided a sound justification to doctrine of *stare decisis* in the common law system. “The doctrine of *stare decisis*, in addition to whatever it may enjoin upon the intellect, certainly evokes an atmosphere and a mood to abide by ancient decisions, to follow the old ways, and conform to existing precedents. It suggests a condition of rest, even of stasis, a system of law whose content is more or less settled, the past content by past decisions, and the present and future content because they too are controlled by those past decisions.”⁴ The assumed emergence of new decisions from those of the past would depend only on correct judicial reasoning and not on judicial choice and will. And the notion of *stare decisis* would thus run into the notion of ‘the rule of law’, as in Bracton’s famous subjection of the King not to man but to God and the law. “If we could wholly accept the idea that present and future decisions are determinable and determined on the basis of *stare decisis* then indeed we would finally have attained the dream of being under a government of laws and not of men.”⁵ The principle of *stare decisis* is thus one way by which the courts respect

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¹ Rajkumar Singh, “Judiciary of Independent India : Expectations Ahead”, 5 *International Journal of Advancements in Research & Technology*, 5(Feb,2016) available at: <http://www.ijoart.org/docs/Judiciary-of-Independent-India-Expectations-Ahead.pdf>(last visited on December 10, 2018).

² Guy Green, “The Rationale and Some Aspects of Judicial Independence”, 59 *Aus. L. Jour.* 135 (1985), available at: <http://www.uow.edu.au/law/LIRC/CourtResources/courtandjudiciary.html> (last visited on December 10, 2018).

³ Julius Stone, “The Ratio of the Ratio Decidendi”, 22(6) *Mod. L. Rev.* 598 (Nov, 1959).

⁴ *Ibid.*

⁵ *Id.* at 599.

the legitimate expectations of the community.⁶ Under Article 141 of the Constitution of India, the law declared by the Supreme Court is made binding on all Courts of India. The Courts should treat a decision of the Supreme Court as an authority not only for what it declares or decides by express enunciation but also for what follows from such declarations by clear implication by way of logical deduction. Besides, principles of judicial discipline and propriety demands that the Judges whatever their own views, must follow the decision of the superior Courts to which they are judicially subordinate. This paper tries to examine some of the disconcerting trends arising in the apex court, which go against the judicial propriety.

II. SMALLER BENCHES DECIDING CONSTITUTIONAL QUESTIONS

The practice of constituting smaller bench is so prolific that in spite of clear constitutional mandate that questions involving substantial question of law as to interpretation of Constitution will be heard and decided by a bench of not less than five judges, several smaller benches (three-judge/two-judge benches) have interpreted and substantially changed the provisions of the Constitution.⁷

A division bench of Supreme Court in *State of Andhra Pradesh v. Balram*⁸ reflected on the issues of reservation to socially and educationally backward classes under Article 15(4) and upheld the identification made by Andhra Pradesh Government on the basis of caste. A bench of three judges in famous *Bandhua Mukti Morcha v. Union of India*⁹ case discussed the meaning of “letter addressed by a party on behalf of persons belonging to socially and economically weaker sections complaining violation of their rights under various social welfare legislations” and whether it can be treated as a writ petition under the purview of “appropriate proceedings.”¹⁰ In this process the bench brought a significant change to the law of standing under Article 32. Another two-judge bench¹¹ in notable *Mohini Jain v. State of Karnataka*,¹² discussed several issues which involved a substantial question of law as to interpretation of constitution.¹³ The bench made a significant contribution and expanded the scope of the Article 21 by including the right to education within its ambit.

A three-judge bench of the Supreme Court in *Smt. Selvi v. State of Karnataka*,¹⁴ discussed several questions of law as to interpretation of the Constitution,¹⁵ and held “narco-

⁶ Jack Knight & Lee Epstein, “The Norms of Stare Decisis”, 40(4) *Amer. Jour. of Pol. Science* 1021 (Nov, 1996).

⁷ Yogesh Pratap Singh, *Judicial Dissent and Indian Supreme Court: Enriching Constitutional Discourse* 458 (Thomson Reuters, 2018).

⁸ *State of Andhra Pradesh v. Balram*, AIR 1972 SC 1375. (Vaidyalingam and Mathew, JJ.)

⁹ *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

¹⁰ Article 32(1): The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

¹¹ Justice Kuldeep Singh and Justice R. M. Sahai.

¹² *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666.

¹³ Four important questions were decided by the bench, “first, was there a ‘right to education’ guaranteed to the people of India under the Constitution? If so, did the concept of ‘capitation fee’ infract the same? Second; whether the charging of capitation fee in consideration of admissions to educational institutions was arbitrary, unfair, unjust and as such violated Article 14 of the Constitution? Third; whether the impugned notification permitted the Private Medical Colleges to charge capitation fee in the guise of regulating fees under the Act? And fourth; whether the notification is violative of the provisions of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984?” See, *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666.

¹⁴ *Smt. Selvi v. State of Karnataka* (2010) 7 SCC 263.

¹⁵ The issues involved in the case were: “(i) Whether the involuntary administration of the impugned techniques violates the ‘right against self-incrimination’ enumerated in Article 20(3) of the Constitution? (ii) Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject? (iii) Whether the results derived from the impugned techniques amount to ‘testimonial compulsion’ thereby attracting the bar

analysis test” violative of right against self-incrimination embodied in Article 20(3) of the Constitution. It is striking to mention here that to clarify some of concerns of similar nature an eleven-judge bench had been constituted in the past.¹⁶

A two judge bench¹⁷ of the Supreme Court in *U. P. Power Corporation Ltd. v. Rajesh Kumar*¹⁸ held that “the state must demonstrate backwardness, inadequacy of representation and maintenance of efficiency before providing reservation in promotions”, a question which was discussed by a constitutional bench¹⁹ in *M. Nagraj v. Union of India*²⁰ but what U.P Power Corporation did for the first time was to strike down reservation in promotions for not meeting these criteria.²¹ Perhaps this was in violation of clear constitution mandate i.e. “a substantial question of law which involves interpretation of the constitution will be decided only by constitutional bench.”²² A two-judge bench²³ while interpreting the law making power of the Parliament on members of legislature convicted of offences, invalidated Section 8(4) of the Representation of Peoples Act, 1951.²⁴ Likewise, prescribing National Policy for disposing of all public resources by public auctioning in 2G Spectrum case,²⁵ laying down the law for disposing of clemency petitions by the President in capital punishment cases²⁶ and decriminalizing homosexuality under Indian Penal Code²⁷ were done by division bench in spite of fact that all these involved substantial question of law as to interpretation of the Constitution.

This paper is not arguing that these cases were decided without jurisdiction (*though in the strict sense of terms this is so*) and hence null and void, but this is certainly against the spirit of the Constitution. Taking Constitution for granted even by the Supreme Court will not craft a good precedent. The only point this paper wants to put forth is that a larger bench would promote better objectivity and lucidity while declaring authoritatively what the law is. This in long run will reduce the likelihood of filing appeal. Larger benches would also ensure better accountability amongst the judges because opportunity of dissent which acts as an intra-organ control will be more in comparison to two-judge benches. This in turn will enhance the status of the Supreme Court as constitutional court and improve its respect in the eyes of the people and the courts below in hierarchy.²⁸

of Article 20(3)? (iv) Whether the involuntary administration of the impugned techniques is a reasonable restriction on 'personal liberty' as understood in the context of Article 21 of the Constitution?”

¹⁶*State of Bombay v. Kathi Kalu Ogha*, [1962] 3 SCR 10.

¹⁷Justice Dalveer Bhandari and Justice Deepak Mishra.

¹⁸*U. P. Power Corporation Ltd. v. Rajesh Kumar* (Decided on 27th April, 2012.)

¹⁹Y. K. Sabharwal, K. G. Balakrishnan, S.H.Kapadia, C.K.Thakker, P Balasubramanyan JJ.

²⁰*M. Nagraj v. Union of India*, AIR 2007 SC 71.

²¹Available at: <http://www.thehindu.com/opinion/lead/winning-the-case-for-promotion-quotas/article3863068.ece> (last visited on Dec. 10, 2018).

²²Art. 145(3), Constitution of India, 1950. It requires that minimum number of judges to discuss a substantial question of law as to the interpretation of this constitution shall be five. The use of phrase ‘shall’ makes it evidently clear that the provision is mandatory.

²³*Rajbala v. State of Haryana*, Writ Petition (Civil) No. 671/2015.

²⁴Experts have raised doubts whether this verdict would stand the test of law as a Constitution Bench of the Supreme Court, on January 11, 2005, in the *K. Prabhakaran v. P. Jayarajan case* had stated that: “The persons falling in the two groups [those who are convicted before the poll and those convicted while being MP/MLA or MLC] are well defined and determinable groups and, therefore, form two definite classes. Such classification cannot be said to be unreasonable as it is based on a well laid down differentia and has nexus with a public purpose sought to be achieved.”

²⁵*Centre for Public Interest Litigation v. Union of India* (2012)3 SCC 1.

²⁶*Shatrughan Chauhan v. Union of India* (2014)3 SCC 1.

²⁷*Suresh Kumar Kaushal v. Naz Foundation*, Civil Appeal 10972 2013.

²⁸*Supra* n. 7 at 459.

III. DILUTION OF HIERARCHICAL DISCIPLINE

Another drift in the Supreme Court decision making process is the dilution of hierarchical discipline which requires a bench of two judges to follow the judgment of three judges or larger bench and so on. There is no provision in the Constitution which says that a smaller Bench of the Supreme Court is bound by its larger Bench decisions. But judicial propriety and the need for certainty in the law require that a smaller Bench follow the law declared by larger Benches.

The law relating to judicial propriety is fairly settled. It provides that a bench of the Supreme Court must follow a decision delivered by a bench of a larger or even equal strength. In case of inability to agree, the only option available is to refer the matter to the Chief Justice of India requesting to constitute a bench of much larger strength for resolving of conflict. The principles were summed up in the following terms by the then Chief Justice of India, Justice R.C. Lahoti while delivering the decision in a Constitutional Bench judgment in the case of *Central Board of Dawoodi Bohra Community v. State of Maharashtra*:²⁹

- (1) "The law laid down by a larger Bench of this Court is binding on any subsequent Bench of lesser or co-equal strength.
- (2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted."³⁰

This rule is subject to two exceptions:

- (i) "The aforesaid rule does not bind the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and
- (ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration, then by way of exception (and not as a rule) and for reasons, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing."³¹

A three-Judge Bench of this court in *Official Liquidator v. Dayanand and Others*³² reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in *State of Karnataka and Others v. Umadevi and Others*³³ is binding on all courts including this court, till the same is overruled by a larger

²⁹AIR 2005 SC 752.

³⁰Faizan Mustafa & Yogesh Pratap Singh, "Key Questions in Disagreement Between SC-3 Judges Benches" *Indian Express*, March 6, 2018.

³¹*Union of India v. Raghubir Singh* (1989) 2 SCC 754; *Union of India v. Hansoli Devi* (2002) 7 SCC 273.

³²(2008) 10 SCC 1.

³³(2006) 4 SCC 1.

Bench. It observed, “We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed.”³⁴

The five-judge bench in *Islamic Academy Education v. State of Karnataka*³⁵ did find incongruities and doubts in the eleven-judge bench *Pai case*³⁶ and found that the process of interpretation occasioned rewriting of some portions of the judgment. It was soon realized that even this constitutional bench could not resolve all the issues raised in *TMA Pai case* and therefore the frequency of litigation increased due to non-clarity of these issues and inconsistencies in it. In view of this, a new seven-judge bench was constituted in *P. A. Inamdar v. State of Maharashtra*³⁷ which not only interpreted the *Pai* judgement but also modified it. Similarly, five-judge bench of *Rameshwar Prasad v. Union of India*,³⁸ while accepting the ratio laid down by the nine-judge bench in *S R Bommai*³⁹ choose not to follow it by not reviving the unconstitutionally dissolved legislative assembly.

The recent NJAC judgment,⁴⁰ which struck down National Judicial Appointment Commission Act too highlights this trend. The genesis of collegium system was laid down by a nine-judge bench in *second judges transfer case*⁴¹ and it was further modified by another nine-judge bench.⁴² However, the 93rd Constitutional Amendment Act which eventually tried to replace collegium system was heard and finally struck down by the bench of five judges.⁴³ This was in contrast with previous practice of the Supreme Court. After the eleven-judge bench decision in *Golak Nath v. State of Punjab*,⁴⁴ the Parliament enacted 24th Constitutional Amendment Act. The sole reason of this amendment was to remove the difficulties created by the eleven-judge bench. This amendment was challenged and thirteen-judge bench was constituted in *Kesavananda Bharti v. State of Kerala*.⁴⁵ But in the NJAC case Supreme Court did not find substance in it. A division bench of Supreme Court in *Rajbalav. State of Haryana*⁴⁶ precluded illustrious doctrine of substantive due process,⁴⁷ the debate which

³⁴*Id.* at para 90.

³⁵ *Islamic Academy Education v. State of Karnataka* (2003) 6 SCC 697.

³⁶ *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481.

³⁷ AIR 2005 SC 3226.

³⁸ (2005) 7 SCC 625.

³⁹ *S. R. Bommai v. Union of India* (1994) 3 SCC 1.

⁴⁰ *Supreme Court Advocates-on- Record Association v. Union of India*, W.P. (C) No. 13 of 2015. (Popularly known as the ‘Fourth Judges’ case).

⁴¹ *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268. (Popularly known as the ‘Second Judges’ case).

⁴² *Re: Special Reference No. 1 of 1998* (1998) 7 SCC 739 (Popularly known as the ‘Third Judges’ case).

⁴³ It would be pertinent here to mention that surprisingly this matter was allotted to a three-judge bench.

⁴⁴ AIR 1967 SC 1643.

⁴⁵ (1973) 4 SCC 225.

⁴⁶ Writ Petition (Civil) No. 671/2015.

⁴⁷ “Constitutionality of the Haryana Panchayati Raj (Amendment) Act, 2015 (Act 8 of 2015) was in question. The impugned Act included five categories of persons ineligible to contest elections for certain offices in Panchayats in Haryana: One; persons against whom criminal charges of a certain kind are framed, two; persons

started in *Maneka Gandhi v. Union of India*⁴⁸ and practiced in many landmark cases till recently in the *Ramlila Maidan Incident*⁴⁹ and *Smt. Selvi Devi case*.⁵⁰

IV. DOCTRINE OF *PER INCURIAM* VIS-À-VIS REFERRAL OF MATTER TO LARGER BENCH

Under the Land Acquisition Act of 2013, if land was acquired five years prior to the commencement of new Act and if compensation was not paid, acquisition would lapse. The legislative intent was to give a better deal to farmers under the new and progressive law.⁵¹

A three-judge bench of Chief Justice R.M. Lodha, Justice Madan B. Lokur and Justice Kurian Joseph in the Pune Municipal Corporation case⁵² unanimously held that ‘paid’ would mean compensation offered or rendered and deposited in court. The bench also held that Land Acquisition Act being expropriatory must be strictly followed. On February 8, 2018 in the Indore Development Authority case, Justice Arun Mishra, Justice Adarsh Kumar Goel and Justice Mohan M Shantagoudar by a majority of 2:1 held judgment of three judges in Pune Municipal corporation as *per incuriam*. In fact, majority judges Justice Mishra and Justice Goel gave as many as 11 reasons for holding Lodha’s opinion *per incuriam*. Justice Shantagoudar did not agree to this. The court held that once compensation has been unconditionally offered and refused, it would satisfy the requirement of payment of compensation if it was deposited in the government treasury. Thus, two judges considered referring the matter to larger bench but still decided against it.⁵³

On 21st February, Justice Lokur’s bench was surprised to know that a three-judge bench has declared a decision of an earlier three judge bench judgment of which both Justice Lokur and Justice Joseph too were part as *per incuriam*. Justice Lokur’s bench therefore stayed hearing in High Courts and requested other benches of the apex court to wait till his bench hears the matter after Holi on the issue of referring the issue to the CJI for the constitution of the larger bench. The referring of the case to CJI in between by the benches of Justice Goel and Justice Mishra was therefore not really necessary as in view of detailed judgment of Justice Mishra, Justice Lokur’s bench was itself likely to do the same on the next hearing. Now CJI has constituted a five-judge bench which will try to resolve the conflict between 2014 and 2018 orders of the court.⁵⁴

The doctrine ‘*per incuriam*’ was evolved by English courts in relaxation of the rule of *stare decisis*. The Halsbury’s Laws of England⁵⁵ explains, “a decision is *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it or decision given in ignorance of the terms of a

who fail to pay arrears, if any, owed by them to either a Primary Agricultural Cooperative Society or District Central Cooperative Bank or District Primary Agricultural Rural Development Bank, three; persons who had not paid their electricity dues, four; persons who had not specified their educational qualifications and five; persons who did not have functional toilet in their homes.” The Act was challenged on the grounds that it is arbitrary and wholly unreasonable and therefore violative of Article 14 of the Constitution. Though the court observed that Act cannot be declared unconstitutional only on the ground of arbitrariness but refused to apply doctrine of substantive due process. The court observed that courts in India cannot go into the question of wisdom of legislative choices unless the statute is otherwise violative of some specific provisions of the Constitution.

⁴⁸ AIR 1978 SC 597.

⁴⁹ (2012) 5 SCC 1.

⁵⁰ *Smt. Selvi v. State of Karnataka* (2010) 7 SCC 263.

⁵¹ *Supra* n.30.

⁵² (2014) 3 SCC 183.

⁵³ *Supra* n. 30.

⁵⁴ *Ibid.*

⁵⁵ See, 26 Halsbury Law of England 297-98, para 578 4thedn.

statute.” In *Young v. Bristol Aeroplane Company Limited*⁵⁶ the House of Lords observed that ‘*Incuria*’ literally means ‘carelessness.’ In practice *per incuriam* appears to mean *per ignoratium*. Lord Godard, C.J. held it to mean in *Huddersfield Police Authority v. Watson*,⁵⁷ “when a court has acted in ignorance of a House of Lords decision, or when the decision is given in ignorance of the terms of a statute or rule having statutory force.” He further observed that, where a case or statute had not been brought to the court’s attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam*.⁵⁸

A decision *per incuriam* is not a binding precedent, that is, without the Court’s attention having been drawn to the relevant authorities or statutes. The ‘*per incuriam*’ rule is strictly and correctly applicable to the *ratio decidendi* and not to *obiter dicta*. This is a significant rule of judicial propriety and our Supreme Court has followed it in many decisions.

Justice Sabyasachi Mukharji in famous *A.R. Antulay v. R.S. Nayak*,⁵⁹ observed “*Per incuriam* are decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.” At a later stage of the decision it was observed that “It is a settled rule that if a decision has been given *per incuriam* the court can ignore it.”

In the case of, *State of Assam v. Ripa Sarma*,⁶⁰ it was held that, “a judgment rendered in ignorance of earlier judgments of benches of co-equal strength would render the same *per incuriam*, and thus, such a judgment will not be elevated to the status of precedent.”⁶¹ In the case of, *Jai Singh v. M.C.D.*,⁶² it was held that, “judicial discipline and propriety demands that, there should be consistency in the views as regards the decisions rendered by co-equal benches on the same issue. However, subsequent bench is to follow the decision rendered by the earlier co-ordinate bench, except in compelling circumstances, such as where the order of the earlier bench can be said to be *per incuriam*.” Similarly, in the case of *K.H. Siraj v. High Court of Kerala*,⁶³ it was held that, “when a decision is rendered by the High Court without having regard to the relevant line of decisions rendered by the Supreme Court, then such a decision of the High Court is *per incuriam*.”

The Chief Justice of India (CJI) is the head of judiciary but he is one amongst equals. Constitution does not make CJI ‘master of rolls’. It is the Supreme Court Rules that declare him so. As ‘master of rolls’, he constitutes benches in his administrative capacity.⁶⁴ Even judiciary while acting administratively is ‘State’ under Article 12 and thus cannot violate fundamental rights. Since even CJI is bound by rule of law, he is not supposed to act

⁵⁶(1994) All ER 293.

⁵⁷1947 KB 842: (1947) 2 All ER 193.

⁵⁸*Supra* n.30.

⁵⁹(1988) 2 SCC 602.

⁶⁰(2013) 3 SCC 63.

⁶¹See also, *Siddharam Satlingappa Mhetre v. State of Maharashtra*, AIR 2011 SC 312. While dealing with the issue of ‘*per incuriam*’, a two- Judge Bench, after referring to the dictum in *Bristol Aeroplane Co. Ltd.* case and certain passages from Halsbury’s Laws of England has ruled that “the analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength.”

⁶²(2010) 9 SCC 385.

⁶³(2006) 6 SCC 395.

⁶⁴Article 143(3) read with Supreme Court Rules.

arbitrarily either in the constitution of benches or in preparing the roaster. Idea of constitutionalism demands that every authority should have limited powers only. Vesting of absolute powers in any office is anti-thesis of constitutionalism. There is a difference between supremacy of the Supreme Court and Supremacy of the Constitution. Supreme Court is not supreme, Constitution is.

The Supreme Court has made it clear that only a Bench of the same quorum can question the correctness of the decision by another Bench of co-ordinate strength, in which case the matter may be placed for consideration by a Bench of larger quorum. In other words, a Bench of lesser quorum cannot express disagreement with, or question the correctness of, the view taken by a Bench of larger quorum. A view of the law taken by a Bench of three judges is binding on a Bench of two judges and in case the Bench of two judges feels not inclined to follow the earlier three-Judge Bench decision then it is not proper for it to express such disagreement; it can only request the Chief Justice for the matter being placed for hearing before a three-Judge Bench which may agree or disagree with the view of the law taken earlier by the three-Judge Bench. Additionally, a matter is to be referred to larger bench where in a two-judge bench, both judges wrote separate dissenting notes and hence could not arrived at any conclusion.

However, there should be a judicial order for referring the matter to a larger bench. A thirteen-judge bench was constituted to reconsider the basic structure doctrine laid down in *Kesavananda Bharati*⁶⁵ without there being any judicial order of reference for such reconsideration. When after two days of tense hearing, it was pointed out that CJI had constituted the bench to reconsider basic structure case without any judicial reference, the bench was hurriedly dissolved. A worried Nani Palkhivala had to write to Indira Gandhi opposing such an unnecessary reconsideration.

V. CONCLUSION

The Supreme Court today, it appears is losing its original character of final constitutional court of the country and has cramped itself into a general court of appeal by engaging in dispute resolution. At present Supreme Court is functioning with a Chief Justice's court and 13 to 14 division benches of two-judges. Each one is Supreme Court in itself, resulting into the problems of inconsistency, smaller benches deciding constitutional questions and smaller benches modifying/overruling previous larger bench decisions. In contrast constitutional court in United States, United Kingdom, Australia, Canada and South Africa sit either *en bank* or in large benches.⁶⁶

As the final doctor of legal and constitutional maladies, the Supreme Court has to lay down law for all the courts in India. Thus, it is imperative that Supreme Court ideally should sit as full bench or with five/seven/eleven judges to decide matters of constitutional/national/public importance only; and constitute four regional appellate benches or four national courts of appeal in the Delhi, Kolkata, Mumbai and Chennai which would entertain the appeals from the 24 High Courts and Tribunals.

A policy has to be formulated for allotment of cases to benches. Academic and professional experience relevant to the cases; other experience like political, administrative, technical; any earlier expression of opinion on the matters allotted; area from which the judge comes in a volatile criminal matter, regularly figuring in the media, shareholding of the judge

⁶⁵AIR 1973 SC 1461.

⁶⁶*Supra* n.30.

in vital economic or financial matters may be taken as relevant factors in this regard. Translucent policy to constitute benches shall also remove possibility of bench hunting which may be heard in the corridors of the Supreme Court.